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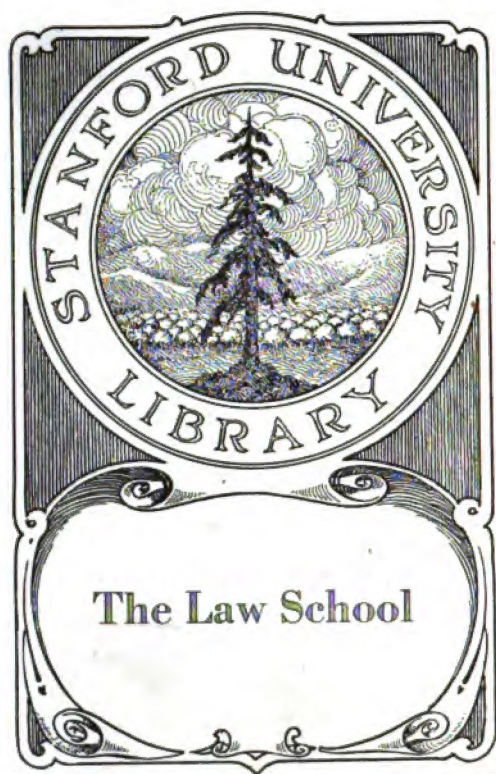
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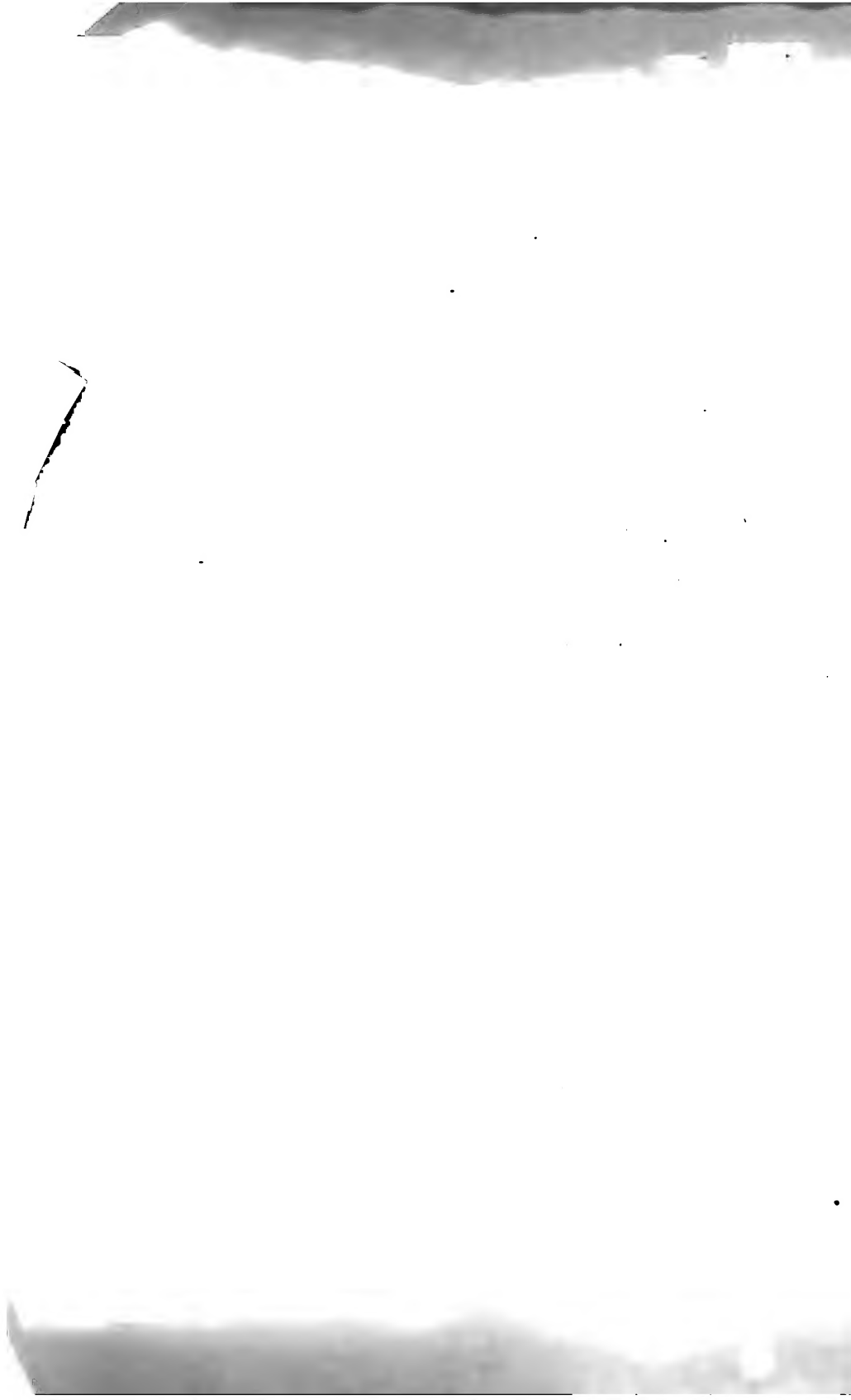
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H. L. GILLASPIE.











REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gilliespie

FORMERLY CONDENSED BY

HON. THOMAS SERGEANT,

Now Reprinted in full.

VOL. XXVII.

CONTAINING CASES IN THE KING'S BENCH, IN TRINITY, MICHAELMAS, AND
HILARY TERMS, THIRD AND FOURTH WILLIAM IV., 1833-4, AND
IN THE COMMON PLEAS, FROM TRINITY TERM, FOURTH
WILLIAM IV., 1834, TO EASTER TERM, FIFTH
WILLIAM IV., 1835, BOTH INCLUSIVE.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,
PUBLISHERS AND IMPORTERS,

NO. 197 CHESTNUT STREET.

1854.

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YRABEL CHOWATC

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH

TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL,

OF LINCOLN'S INN,

AND

JOHN LEYCESTER ADOLPHUS,

OF THE INNER TEMPLE,

ESQES., BARRISTERS AT LAW.

VOL. V.

CONTAINING THE CASES OF TRINITY, MICHAELMAS, AND HILARY TERMS,
IN THE THIRD AND FOURTH YEARS OF WILLIAM IV. 1833-4.

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1854.



J U D G E S
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

Sir THOMAS DENMAN, Knt., C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JAMES PARKE, Knt.
Sir WILLIAM ELIAS TAUNTON, Knt.
Sir JOHN PATTESON, Knt.

ATTORNEY-GENERAL.
Sir WILLIAM HORNE, Knt.

SOLICITOR-GENERAL.
Sir JOHN CAMPBELL, Knt.



A TABLE

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C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

Gillies Trinity Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.¹

MASON v. HILL and Others.

A. erected a mill in 1828, on his own land, the former owner of which had for twenty years before 1818 appropriated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818 B. had erected a mill near the same stream, and the owner and occupier of A.'s land then gave a parol license to B. to make a dam at a particular spot and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where A.'s mill was afterwards erected. In 1818, B., without license, conveyed part of the water which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828 A. appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829 A. demolished the dam erected by B., and gave him notice not to divert the water. B. then erected a new dam lower down the stream, and by means of it diverted from A.'s mills, at some times, all the water before appropriated by A., at others a part of it, and the water, when returned into the stream, was in a heated state: Held, on special verdict,

First, that whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, A. was entitled to the surplus water, for he was first occupant of that, and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water.

Secondly, that A. was in like manner entitled to recover in respect of the water diverted by B. at his new dam; because the license granted to B. by the former occupier, was to take the water at one particular point, and not at the place where this dam was made; and, further, because if the license had been general to take at any place, it would have been revocable, except as to such places where it had been acted on and expense incurred; and it was revoked before the last dam was erected.

Thirdly, that A. was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1818; for the possessor of land through which a natural stream flows, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment.

Whether such possessor of land can maintain an action for the mere violation of such general right, by diversion of the water, &c., without having sustained any special injury, *Quære*.

CASE. The first count of the declaration stated, that before and at the time, &c., the plaintiff was lawfully possessed of a certain mill, manufactory, hereditaments, *close, and premises, with the appurtenances, in the county [*2] of Stafford; and by reason thereof, of right ought to have had and enjoyed the benefit and advantage of the water of a certain stream which had been used

¹ TAUNTON, J., sat in the Bail Court this term.

to run and flow, and during all that time ought to have run and flowed, in great plenty and purity, and still of right ought so to run and flow unto the said mill, &c., of the plaintiff, to supply the same with water for working, using and enjoying the same respectively and for other necessary purposes; yet the defendants contriving, &c., by a certain dam and divers obstructions, placed in and across the said stream above the plaintiff's premises, impounded, penned back, and stopped the water of the said stream, and also wrongfully and injuriously laid down into and near the said stream, above the plaintiff's premises, divers pipes and tiles, and kept and continued the said dam and obstructions so placed in and across the said stream, and the said pipes and tiles so laid down for a long space of time, to wit, hitherto; and thereby during all that time unlawfully and wrongfully diverted and turned divers large quantities of the water of the said stream, which ought to have flowed to the said mill, &c., respectively, away from the said mill, &c., and stopped and prevented the same from flowing along the usual and proper course to the said premises. And also that the defendants wrongfully and injuriously heated and spoiled the water which ran and flowed unto the said mill, &c., so that it became of no use to the plaintiff, [*3] whereby he was prevented from using his mill, &c., in so extensive and beneficial a manner as he otherwise would have done. In the second count the plaintiff stated himself to be possessed of a close and lands, with the appurtenances, and of a mill and manufactory situate therein, near to the said stream, and claimed a right to have the stream run to the said close and premises for supplying the same with water for the necessary purposes thereof. In the third count a similar right was claimed for the convenient enjoyment of certain hereditaments, lands, and premises, with the appurtenances. There was a fourth count for turning foul water upon the plaintiff's premises. Plea, not guilty. At the Stafford Spring assizes, 1831, the jury found a special verdict, stating the following facts:—

A stream of water called the Stubbs Brook, from time whereof, &c., until the diversions thereof as after mentioned, had been used and accustomed to run and flow by the northern end of the town of Newcastle-under-Lyne, in a southerly direction, by the corner of a garden called Kinnersley's Garden, and into and through a certain croft called Hartell's Croft, by a tree there called the Sithwell Tree, and from thence into a piece of land called the Parson's Flat, by a spring there called the Sithwell Spring, and from thence by and through certain other closes into a croft called Ashley's Croft, part of which croft at the times when, &c., belonged and now belongs to the defendants, and other part of the croft at the time when, &c., belonged and now belongs to the plaintiff, and in which part last aforesaid the engine, mill, manufactory, hereditaments, and premises of the plaintiff, in the declaration and *hereinafter mentioned, then were and are now situate, but the stream ran and flowed only through [*4] that part of the said croft which now belongs to the plaintiff, and from thence through a certain other close into the Newcastle Lower Canal. During all the time aforesaid, a considerable quantity of pure water at all times ran and flowed from the Sithwell Spring, and also from other springs, called the Over Canal Springs, into the said stream; which last-mentioned springs flowed into the stream below the Sithwell Spring; and the stream before the diversions thereof as hereinafter mentioned, ran and flowed down and along its natural and ancient course to, through, and along Ashley's Croft.

For upwards of twenty years before 1818, Thomas Ashley, the father, who was then the occupier and owner of the whole of Ashley's Croft, had appropriated and used the water of the said stream and springs for watering his cattle, and also for irrigating that part of the said croft which now belongs to the plaintiff. In 1818, the defendants erected a mill and manufactory in a certain close adjoining Ashley's Croft, near, but not contiguous, to the said stream; and at that time Thomas Ashley, the son, who was then the occupier and owner of the whole of Ashley's Croft, gave to the defendants a parol license to make a

dam at the said tree, called Sithwell Tree, higher up the said stream than the Sithwell Spring and the Over Canal Springs, and to take what water of the stream they pleased from that point to the mill and manufactory of the defendants; which water, after being used at that mill, was to be returned by pipes into the bed or channel of the said stream, higher up than that part of Ashley's Croft which now belongs to the plaintiff. In consequence of such parol [*5] *license, the defendants did, in 1818, erect such dam, and thereby take part of the water of the stream above the Sithwell Spring and the Over Canal Springs, for the use of their mill and manufactory, by the means of pipes, laid down at their own expense to a large amount; and for a considerable time returned part of such water back again by means of other pipes, into the stream, bed, or channel of the stream between the Sithwell Spring and that part of Ashley's Croft which now belongs to the plaintiff. Also in 1818 the defendants collected into a tank part of the water of the Over Canal Springs; and, by means of pipes, carried the same over the brook into a reservoir, which received the water taken under the license from the Sithwell Tree; but such license did not extend to take such last-mentioned water from the Over Canal Springs.

After the said dam was made, part of the water of the stream which from time to time flowed over and through the dam, and also all the water from the Sithwell Spring, and after the making the tank part of the water from the Over Canal Springs not collected in the said tank, ran and flowed at all times in its ancient and natural course towards, into, through, and along the Ashley's Croft, and until the diversion thereof by the defendants, as hereinafter next mentioned.

The parol license so given by Thomas Ashley, the son, to the defendants, to make the dam at the Sithwell Tree, did not extend to empower them to take the water from the Sithwell Spring.

In 1823, the plaintiff erected and made the manufactory and premises in the declaration mentioned, upon that part of Ashley's Croft which belongs to the plaintiff, by the side of the stream, and the plaintiff, by the leave [*6] *and license of the defendants, laid down pipes between his mill and that of the defendants, and took the hot water which came from the engine and mill of the said defendants unto and into his, the plaintiff's manufactory, for the purposes thereof, until February, 1829, when the communication by means of the pipes was cut off by the plaintiff, and at that time, and until the diversion thereof by the defendants as hereinafter next mentioned, the plaintiff appropriated and used part of the water of the stream which flowed over and through the dam so made at the Sithwell Tree, and also the whole of the water which flowed from the Sithwell Spring, and also from such part of the Over Canal Springs as were not taken into the tank, and also all the water which was returned by the pipes of the defendants into the stream, for the purposes of his mill and manufactory.

In October, 1828, the plaintiff erected a steam-engine and mill for the purposes of his manufactory, and at that time, and until the diversion thereof by the defendants as next mentioned, appropriated and used part of the water of the stream which flowed over and through the dam so made at the Sithwell Tree, and also the whole of the water which flowed from the Sithwell Spring, and from such part of the Over Canal Springs as was not taken into the tank, and also the water which was returned by the pipes of the defendants into the stream, for the purposes of his said steam-engine, mill, and manufactory.

There is a ridge of land between the stream and the defendant's mill, manufactory, and premises, which, in the highest part, is thirteen feet, and in the lowest part, nine feet above the level of the mill of the defendants, and which would prevent the water of the stream from flowing in its natural course to the mill, manufactory, *and premises of the defendants. The plaintiff's mill [*7] is eleven feet below the level of the defendant's mill.

In January, 1829, the plaintiff destroyed the dam made by the defendants at the Sithwell Tree, which the defendants re-erected, and which the plaintiff

again destroyed, in order that the water might run along its ancient and natural course; and on the 18th of February then next, the plaintiff gave notice to the defendants not to divert or turn the water of the stream from its ancient and natural channel.

In June, 1829, the defendants erected and made another dam in and across the stream, lower down the stream than the place where the Sitchwell Spring, and such part of the Over Canal Springs as were not taken into the said tank, flow into the stream, by means of which last-mentioned dam, all the water of the stream, and also all the water of the Sitchwell Spring, and such part of the Over Canal Springs as aforesaid, was diverted from its ancient and natural course, and was prevented from flowing along the same to the said mill, engine, manufactory, and premises of the plaintiff.

On certain days, to wit, twenty days, between the making of the last-mentioned dam and the commencement of the within suit, all the water was taken by the defendants by means of the last-mentioned dam from the stream, and the Sitchwell Spring, and such part of the Over Canal Springs as aforesaid, and no water was on those days returned by the defendants into the bed or channel of the stream; but the water from the stream and the Sitchwell Spring, and such part of the Over Canal Springs as aforesaid, was on those days diverted by the defendants into a totally different direction down a certain street called Penk-hull Street.

*Although, on other days, since the last-mentioned dam was made, some water was returned by the defendants into the stream between the last-mentioned dam and the said engine, mill, and manufactory of the plaintiff; yet, from day to day, as much water was not returned by the defendants into the stream as was taken from it by them, and the water which was returned by the defendants on such last-mentioned days came back in a heated state. [*8]

The last-mentioned dam so erected by the defendants in June, 1829, stopped, diverted, and turned more water than the dam so made by them as aforesaid at the Sitchwell Tree in 1818, by the license of Thomas Ashley.

After the dam at the Sitchwell Tree had been knocked down by the plaintiff, the defendants might have put it up again in the same place, and they were not prevented from so doing by the acts of the plaintiff; and upon some occasions before the erection of the plaintiff's engine, the plaintiff misconducted himself by throwing or penning back hot water upon the defendant's mill, from the pipes by which the hot water was carried from the mill of the defendants to the mill of the plaintiff. The special verdict then stated that by means of the premises the plaintiff was prevented from enjoying his mill and manufactory, and premises, and from carrying on his business, &c., in manner and form in the said declaration mentioned.

If it should appear to the Court on the whole matter that the defendants were guilty, the jurors in that case assessed the damages of the plaintiff, by reason of the defendants having hindered and prevented so much of the water of the said stream as was formerly taken by the defendants under the said parol license, by means of the dam at the Sitchwell Tree, from running and flowing *down its ancient and natural course to the mill, engine, manufactory, and premises of the plaintiff, at 1s. And they further assessed [*9] the damages of the plaintiff, by reason of the defendants having hindered and prevented so much of the water of the said stream as after the said dam was made at the Sitchwell Tree flowed over and through the same, and also for having hindered and prevented the whole of the water of the said Sitchwell Spring, and also so much of the water of the said Over Canal Springs, as after the making of the said tank was not collected in the same, from running and flowing down its ancient and natural course to the mill, &c., of the plaintiff, at 1s. And they further assessed the damages of the plaintiff, by reason of the said defendants having diverted and collected in the said tank part of the water of the said Over Canal Springs, and hindered and prevented the same from run-

ning and flowing down its ancient and natural course to the mill, &c., of the plaintiff, at 1s. And they further assessed the damages, by reason of the defendants having returned into the said stream, in a heated state, such part of the water as they did return after having diverted the same, at 1s. If it should appear to the Court that the defendants were not guilty, then, &c. The case was argued in last Easter term¹ by

The Solicitor-General for the plaintiff. It has already been decided after argument in this very case, 3 B. & Ad. 304, that the plaintiff, who is the proprietor of lands contiguous to a stream, might, as soon as he was injured by the diversion of the water from its natural course, maintain *an action against [10] the party so diverting it; and that it was no answer to the action, that the defendants first appropriated the water to their own use, unless they had had twenty years' undisturbed enjoyment of it in the altered course. All the authorities were there cited and commented on. Assuming even that that decision was wrong, and that the right to water is, as the defendants say, acquired by occupancy, yet the plaintiff is entitled to recover, because it is here found that twenty years before the erection of the defendants' mill, the former owner and occupier of the plaintiff's land had appropriated and used the water of the stream and springs for watering his cattle, and for irrigating the land now belonging to the plaintiff. It will be said that the defendants were authorized by the parol license to take part of the water. But that license was revocable, and it was revoked by the plaintiff's destroying the dam in 1829. And even if that were not so, the license being to make a dam, and thereby take water from a particular spot, was an easement, and could be granted only by deed: *Hewlins v. Shippam*, 5 B. & C. 221; *Bryan v. Whistler*, 8 B. & C. 288. In *Winter v. Brockwell*, 7 8 East, 308, and *Liggins v. Inge*, 7 Bingh. 682, license was held irrevocable, but there the thing to be done was on the land of the licensee. That distinction was taken in *Hewlins v. Shippam*. Besides, the license here could not apply to a dam erected in a new place.

Peake, Serjt., contra. The principal question is, whether the right to the use of flowing water can be acquired by the owner of adjoining land unless it has been enjoyed *for twenty years. The former decision in this case proceeds principally on the authority of *Wright v. Howard*, 1 Sim. & Stu. 190, but [11] there the authorities upon the subject were not cited. The dicta of Lord HALE in *Cox v. Matthews*, 1 Vent. 237, and of LE BLANC, J., in *Bealey v. Shaw*, 6 East, 208, recognised by HOLROYD, J., in *Saunders v. Newman*, 1 B. & A. 258; and those of BAYLEY, J., in *Williams v. Morland*, 2 B. & C. 913, and Canham v. Fisk, 2 Tyrwh. 155, 2 Cro. & J. 126, show that the right to flowing water is acquired by appropriation or occupancy. It was said upon the former argument in this case that flowing water, like light and air, is publici juris. If that be so it cannot belong to the owner of the land adjoining its channel, until it is appropriated. Mr. Justice BLACKSTONE in his Commentaries, vol. 2, pp. 14 and 18, states water to be one of those things the property in which is acquired by occupancy. But assuming even that the proprietor of lands contiguous to a stream is primâ facie entitled to the use of all the water which comes to his land, still here the former owner of the plaintiff's land having given a license to the defendants to make a dam near the Sitchwell Tree, and to take what water they pleased from that point, it was not competent for him, or the plaintiff who claimed under him, to revoke that license: *Taylor v. Waters*, 7 Taunt. 374. *Liggins v. Inge*, 7 Bingh. 682, is an express authority to show that a parol license (executed), to take water, is irrevocable. It may be conceded, that according to the authorities cited, a party cannot by parol take an *easement [12] in the land of another, but a party may by parol license acquire a right to the use of water, though not a right to have a passage for water over another's land, as in *Hawkins v. Shippam*, 5 B. & C. 221.

¹ Before DENMAN, C. J., LITLEDAL, J., and PARKE, J.

Then this action was not maintainable by reason of the defendants' having accidentally taken more water than they were entitled to. The defendants were possessed of the right to take water either by license or appropriation. The plaintiff then destroyed the defendants' dam, which they tried to restore, but, the plaintiff not suffering them quietly to enjoy his right, they made another dam, on their own land, below the Sithwell Spring, and thereby took at certain times more water than he was entitled to. But as that arose from the plaintiff's own misconduct, he cannot bring an action on the case for it, for a party who brings case must have justice on his side: *Bird v. Randall*, 3 Burr, 1545. In Comyn's Dig. Action on the Case, (B) 4, it is said that it does not lie where the damage happens by the default or negligence of the plaintiff himself. As to the appropriation by Ashley, he merely acquired a right to the water for the purpose of irrigating his land and watering his cattle, but the plaintiff claims a right to have the water for the use of his mill. *Cur. adv. vult.*

DENMAN, C. J., in this term, delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows:—

The substance of the special verdict is this:—The defendants' mill was erected in 1818; the plaintiff's in *1828, on a piece of land, the former owner [*13] and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land.

At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parol license to the defendants to make a dam, at a particular place above, where the Sithwell Tree stood, and to take what water they pleased from that point to their mill, which water was so taken, and returned by pipes into the stream, above the spot where the plaintiff's mill was afterwards erected.

In 1818 the defendants conducted part of the water of the Over Canal Springs, which had before flowed into the stream, into a reservoir for the use of their mill.

After the plaintiff erected his mill, namely, in 1828, he appropriated to its use all the surplus water, viz., that which flowed over and through the dam; that from the Over Canal Springs, which was not conducted into the reservoir; and all from the Sithwell Spring (which was another feeder of the brook), and also that which was returned by the defendants into the stream.

In January, 1829, the plaintiff demolished the dam at the Sithwell Spring. The defendants erected a new dam lower down, and by means of it diverted from the plaintiff's mill, at some times, all the stream, including all the water so appropriated; at others, a part of it, and returned the remainder in a heated state into the stream.

And the questions upon this special verdict are:—

Whether the plaintiff is entitled to recover, for the diversion of the whole water of the stream, or of any *and what part of it, or for the heating of the part returned? [*14]

That the plaintiff has a right to a verdict for the injury sustained by the abstraction of the whole of the surplus water, and by the abstraction of part, and the heating of the remainder, of that surplus water, does not admit of the least doubt. In any view of the law on this subject,—whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side,—the plaintiff was entitled to this surplus, for he filled both characters; he was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey v. Shaw*, 6 East, 208.

The learned counsel for the defendants argued, that inasmuch as the plaintiff pulled down the dam at the Sithwell Tree, in consequence of which the new dam was erected, he must be considered as the author of the mischief, and has

no right to complain of it. It is, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it, or brought an action; they had no right to construct another at a different place, and by means of it abstract more water than the other did.

The remaining questions are, whether the plaintiff can recover, in respect of the abstracting, or the injury by heating, of that portion of water which was before *diverted by the license of the then owner and occupier of the [*15] plaintiff's field; and, secondly, in respect of that portion of the Over Canal Springs which was conveyed in 1818 to the defendant's reservoir, both of which portions have been at one time entirely, and at another partially abstracted, and in the latter case returned in a heated state into the brook; and we are of opinion that the plaintiff is entitled to recover in respect of both.

As to the first of these portions, the defendants contend that the plaintiff has no right of action, because the former owner and occupier of his land gave an irrevocable license by parol to the defendants to divert so much water by the Sitchwell Tree Dam: and to prove that a parol license to divert water, which had been acted upon by the person to whom it was given, and expense incurred in consequence, is irrevocable, the case of *Liggins v. Inge*, 7 Bing. 682, was cited. But, admitting that the license to abstract the water at that particular point, and by means of that dam, was irrevocable, and therefore that the plaintiff was a wrongdoer in pulling the dam down, it by no means follows that the plaintiff is not to recover for an equal portion of water abstracted at a different place. In the first place, the license is not general, to take away at any point, but at this only; and in the second place, if the license had been general, to take away at any place, it would have been clearly revocable, except as to those places where it had been acted upon, and expense incurred (for it is on that ground only that such a license can be irrevocable); and as it was revoked before the last dam [*16] was erected, *the defendants could not justify the abstraction of any portion of the water by virtue of the license at such dam.

The last question is, whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the Over Canal Springs, and collected in a tank in 1818. This was taken without license, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course: and we are of opinion that they did not.

This point might, perhaps, be disposed of in favor of the plaintiff, even admitting the law to be as contended for by the defendants, that the first occupant acquires a right to flowing water; for, by this special verdict, all the water of the brook is found to have been appropriated by Ashley, the father, and used for twenty years up to the year 1818, for watering his cattle and irrigating the field, now the plaintiff's. A right to use the water, thus acquired by occupancy, in right of the field, must have passed to the plaintiff, and could not be lost by mere non-user from 1819 to 1829; and the total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle upon which rights of this nature depend.

*The proposition for which the plaintiff contends is, that the possessor [*17] of land, through which a natural stream runs, has a right to the advantage of that stream, flowing in its natural course, and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below—that neither can any proprietor above diminish the quantity, or injure the quality of water, which would otherwise

descend, nor can any proprietor below throw back the water without his license or grant:—and that, whether the loss by diversion, of the general benefit of such a stream be or be not, such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

The proposition of the defendants is, that the right to flowing water is publici juris, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, including the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so, may altogether deprive him of the benefit of the water.

In deciding this question, we might content ourselves by referring to, and relying on, the judgment of this Court in this case, on the motion for a new trial, 3 B. & Ad. 304; but as the point is of importance, and the form in which it is *now again presented to us, leads to a belief that it will be carried to a court of error; we think it right to give the reasons for our judgment more at large. [*18]

The position, that the first occupant of running water for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer: and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill: *The Earl of Rutland v. Bowler, Palmer*, 290. But it is a very different question, whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied; and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall, within its limits, might at any time be taken away; and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another.

We think, that this proposition has originated in a mistaken view of the principles, laid down in the decided *cases of *Bealey v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 B. & A. 258; *Williams v. Moreland*, 2 B. & C. 913. It appears to us also, that the doctrine of Blackstone and the dicta of learned judges, both in some of those cases, and in that of *Cox v. Matthews*, 1 Vent. 137, have been misconceived. [*19]

In the case of *Bealey v. Shaw*, the point decided was, that the owner of land through which a natural stream ran (which was diminished in quantity, by having been in part appropriated to the use of works above, for twenty years and more, without objection), might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to that mill, by a further subsequent diversion of the water. This decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land through which the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above, for a subsequent act, by which that benefit is diminished; and it does not in any degree support the position, that the first occupant of a stream of water has a right to it against the proprietor of land below. Lord ELLENBOROUGH distinctly lays down the rule of law to be, that, “independent of any particular enjoyment used to be had by another, every man has a right to have

the advantage of a flow of water in his own land, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of [*20] the party so taking or using it *have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right." Mr. Justice LAWRENCE confirms the opinion of Mr. Baron GRAHAM on the trial, that "persons possessing lands on the banks of rivers had a right to the flow of water in its natural stream, unless there existed before, a right in others to enjoy or divert any part of it to their own use." Mr. Justice LE BLANC, in his judgment, says as follows:—"The true rule is, that after the erection of works, and the appropriation, by the owner of land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains, the first-mentioned owner, however he might, before such second appropriation, have taken to himself so much more, cannot do so afterwards;" and this expression, in which, in truth, that learned judge cannot be considered as giving any opinion upon the effect of a prior appropriation, is the only part of the case, which has any tendency to support the doctrine contended for by the defendants.

The case of *Saunders v. Newman*, 1 B. & A. 258, is no authority upon this question, and is cited only to show, that Mr. Justice HOLROYD quotes the opinion of LE BLANC, J., above mentioned; and he confirms it, so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had a right of action for any subsequent alteration, to the prejudice of his mill; about which there is no question.

The last and principal authority cited is that of *Williams v. Morland*, 2 B. & C. 910.

The case itself decides no more than this: that the *plaintiff having [*21] in this declaration complained, that the defendants had, by a floodgate across the stream above, prevented the water from running in its regular course through the plaintiff's land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff's banks, could not recover, the jury having found that no such damage was sustained. The judgments of all the judges proceed upon this ground, though there are some observations made by my brother BAYLEY, which would seem at first sight to favor the proposition contended for by the defendants.

These observations are, that "flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right, ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose," 2 B. & C. 913.

The dictum of Lord Chief Justice TINDAL in *Liggins v. Inge*, 7 Bing. 692, is to this effect:—"Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined, things, the property of which belongs to no person, but the use to [*22] all. And by the law of England, the person who first *appropriates any part of this water flowing through his land to his own use, has the right to the use of so much as he then appropriates, against any other;" and for that he cites *Bealey v. Shaw and Others*, 6 East, 208, which case, however, is no authority for this position, as far as relates to the owner of the land below; and probably, therefore, the Lord Chief Justice intended the expression "any other" to apply only to those who diverted or obstructed the stream. To these dicta

may be added the passage from Blackstone's Commentaries, vol. ii. 14 :— "There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had ; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences : such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance ; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."

And, 2 Blackstone's Commentaries, p. 18. "Water is a movable, wandering thing, and must of necessity continue common by the law of nature ; so that I can *only have a temporary, transient, usufructuary property therein ; wherefore if a body of water run out of my pond into another man's, I [*23] have no right to reclaim it."

None of these dicta, when properly understood with reference to the cases in which they are cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate, a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

The Roman law is (2 Inst. Tit. 1, s. 1), as follows :—"Et quidem naturali jure, communia sunt omnium hæc : aer, aqua profluens, et mare, et per hoc littora maris." It is worthy of remark, that Fleta, enumerating the *res communes*, omits "*aqua profluens*," Lib. 3, ch. 1. Vinnius, in his commentary on the institutions, explains the meaning of the text :—"Communia sunt quæ à natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt : Huc pertinent, præcipue aer et mare, quæ cum propter immensitatem, tum propter usum, quem in commune omnibus debent jure gentium divisa non sunt, sed relicta in suo jure, et esse primævo adeoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbribus collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremò propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem natura comparatæ sunt, tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione *usus ille promiscuus non læditur." And [*24] he proceeds to describe the use of water, "*aqua profluens ad lavandum et potandum unicuique jure naturali concessa.*" The law, as to rivers, is, "*flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque.*" And Vinnius, in his commentary on this passage, says, "*unicuique licet in flumine publico navigare et piscari.*" And he proceeds to distinguish between a river and its water : the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained ; the latter being continually changing, and incapable, whilst it is there, of becoming the subject of property, like the air and sea.

In the Digest Book 43, tit. 13, in public rivers, whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers ; and in section 4 it is said, that private rivers in no way differ from any other private place.

From these authorities, it seems that the Roman law considered running water, not as a *bonum vacans*, in which any one might acquire a property ; but as public or common, in this sense only, that all might drink it, or apply it, to

the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only.

[*25] We think that no other interpretation ought to be *put upon the passage in Blackstone, and that the dicta of the learned Judge above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.

It remains to observe upon one case which was cited for the defendants (*Cox v. Matthews*, 1 Ventr. 237), in which Lord HALE said, "if a man has a watercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say, *antiquum molendinum*; and upon the evidence, it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause; for otherwise he cannot justify it, though the mill be newly erected." What is said by Lord HALE is perfectly consistent with the proposition insisted upon by the plaintiff; and the defendants in the supposed case, would have no right to divert unless they had gained it by prescription (which is the meaning of Lord HALE), or, according to the modern doctrine, until the presumption of a grant had arisen.

And this view of the case accords with the law, as laid down by Serjeant ADAIR, Chief Justice of Chester, in *Prescot v. Phillips*, cited, 6 East, 213;

[*26] and by Lord ELLENBOROUGH in **Bealey v. Shaw*, 6 East, 208; and by the Master of the Rolls in his luminous judgment in *Howard v. Wright*, 1 Sim. & Stu. 190.

We are, therefore, clearly of opinion, that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the Over Canal Springs, as well as the other injuries complained of; and for which damages have been assessed by the jury.

As to the right to recover for the injury sustained, by the water being returned in a heated state, there can be no question.

Whether he could have maintained an action before he had constructed his mill, or applied the water of the stream to some profitable purpose, we need not decide. It may be proper, however, to refer to two cases not cited in the argument. In *Palmer v. Keblethwaite*, 1 Show. 64, the declaration merely stated that the water, used and ought to run to the plaintiff's mill, and Lord HOLT said, "Suppose a watercourse run to my ground, and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? Must you not lay some use for it? But you will speak to it again." In the report of the same case in *Skinner*, 65, Pollexfen, in argument, said he took it to be a clear case that, the stream being the plaintiff's, the defendant could not divert it, and so held the Court, that an action had lain for diverting the stream, though no mill had been erected. The final result of that case does not appear in the books, and the roll has been searched for in vain.

In *Glynne v. Nichols*, 2 Show. 507, a similar question was raised, which [*27] appears from the report of the same case in *Comberbach*, 43, to have been decided for the plaintiff.

It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown.

But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court.

Judgment for the plaintiff.

SWEETAPPLE v. JESSE. May 23.

Declaration stated, that defendant intending to cause it to be believed that plaintiff had been guilty of wilfully setting his house and premises on fire, said of the plaintiff, that he had set fire to his own premises, meaning that he had been guilty of wilfully setting fire to the premises, which, while in his occupation, had been destroyed by fire: After verdict for the plaintiff, the judgment was arrested, on the ground that wilfully setting his own premises on fire was not, except under special circumstances, a crime punishable by law; and the Court would presume only such circumstances as it was essentially necessary for the plaintiff to have proved in support of his declaration.

DECLARATION in slander stated, that the plaintiff, until, &c., was reputed, &c., and had never been suspected to have been guilty of wilfully setting fire to his house and premises; and that, before the time of speaking the words by the defendant as thereafter mentioned, certain premises in the plaintiff's possession, situate at Charlton in the county of Hants, had been destroyed by fire, yet the defendant, well knowing, &c., and intending to bring the plaintiff into public scandal, and disgrace, and so cause it to be believed that he had been, and was, guilty of wilfully setting his house and premises on fire, as thereafter stated to have been charged upon and imputed to him by the defendant, and to subject him to the pains and penalties by the laws of this kingdom made, and provided for, and inflicted upon persons guilty thereof, theretofore, in a certain discourse *which the defendant had of and concerning the plaintiff, and of and concerning the said premises which had been, whilst in the possession and occupation of the plaintiff, destroyed by fire as aforesaid, spoke and published in the presence and hearing of W. E. and others, the false, scandalous, malicious, and defamatory words following:—"Have you (meaning the said W. E.) heard the report about the fire at Charlton?" (thereby meaning the fire by which the said premises, so in the occupation and possession of the plaintiff, were destroyed as aforesaid), and upon the defendant being at the time of the speaking and publishing of the words as aforesaid, there asked, "What report?" he, the defendant, answered thereto, and said, in the presence and hearing of the said W. E. and of others, of and concerning the plaintiff, and of and concerning the said premises which had been, whilst in the possession and occupation of the plaintiff, destroyed by fire as aforesaid, the false, &c., words following, that is to say:—"Why that young Sweetapple (thereby meaning the plaintiff) has set his own premises on fire," thereby meaning that the plaintiff had been guilty of wilfully setting fire to the said premises, so in the possession and occupation of the plaintiff as aforesaid. The declaration concluded in the usual way. Plea, general issue. The plaintiff obtained a verdict at the Hampshire Summer assizes, 1832, and in the following Michaelmas term, a rule nisi was obtained by *Dampier* for arresting the judgment, on the ground that the words in the declaration, taken in the sense there charged, were not actionable, inasmuch as the wilfully setting a man's own house on fire is not necessarily a crime punishable by law; but in order to make it a crime, the setting on *fire must be an act done with the intention, or calculated to have the [*28] effect of injuring others. [*29]

Merewether, Serjt., and *Follett* now showed cause. After verdict it must be presumed, that the words spoken were used by the defendant in the sense charged by the innuendos in the declaration, viz., that they were intended to impute to the plaintiff, that he had been guilty of wilfully setting fire to his own premises; and then *Peake v. Oldham*, 1 Cowp. 278, shows, that after verdict the declaration is sufficient. Lord MANSFIELD there said, "that the word guilty implied a malicious intent, and could be applied only to something which was universally allowed to be a crime." [PARKE, J. The words may have been used in the sense charged in the innuendo without imputing to the plaintiff any crime, for he may have set fire to his own house wilfully without any intention to injure or defraud others. PATTESON, J. The act of setting on fire his own

house may have been wilful, though not unlawful or criminal. It would not be sufficient in an indictment for such an act, to allege merely that the defendant had wilfully set fire to his house.] The defendant, after verdict, must be taken to have imputed to the plaintiff that he was guilty of having wilfully set his house on fire, and the Court, therefore, will presume all circumstances which were necessary to constitute the wilful burning a crime in point of law; viz., either that the house was insured, and that the intent was to defraud the insurers, in which case, it would be a statutable felony, by 7 & 8 G. 4, c. 30, s. 2; or, that it was situate in a town, in which case, the setting it on fire would

[*30] *have been a misdemeanor at common law, Hawkins's P. C., Book 1, c. 39, s. 15. It is sufficient, after verdict, if the charge made by the defendant is consistent with the guilt of the party. In a note to 1 Wms. Saunders, 228 a, it is said, that where in debt for rent, by a bargainee of a reversion, the declaration omitted to allege the attornment of the tenant, which, before the statute 4 & 5 Anne, c. 16, s. 9, was a necessary ceremony to complete the title of the bargainee, and upon nil debet pleaded, there was a verdict for the plaintiff, such omission was cured by the verdict by the common law, Hitchens v. Stevens, 2 Show. 233; Sir T. Raym. 487. [PATESON, J. The judgment in that case proceeded on the ground, that if the plaintiff had not given the attornment in evidence, he must have been nonsuited, and the rule there laid down is, that wheresoever it may be presumed that anything must of necessity be given in evidence, the want of mentioning it in the record will not vitiate it after verdict; but Jackson v. Pesked, 1 M. & S. 234, and the authorities there cited, show that the plaintiff is only bound to prove what the allegations in his declaration necessarily require to be proved.]

DENMAN, C. J. After a verdict for the plaintiff, the Court are bound to presume all matters which it was necessary for him to prove in support of his declaration. Here the plaintiff was bound to prove that the words were spoken with the intent to impute to him that he had wilfully set fire to his house; but that is not necessarily a crime, and therefore the words, though spoken with that intent, are not actionable.

[*31] *LITTLEDALE, J. After verdict for the plaintiff, the Court must presume such matters as it was necessary for him to prove, in order to support the allegations in his declaration. Now, here the plaintiff was bound to prove that the words spoken were intended to impute to him that he had wilfully set fire to his premises; but it is possible that he may have done such an act with an innocent purpose. Such an act is only a crime punishable by law under certain circumstances; and, it not being averred that the words were intended to impute that the plaintiff had done the act under such circumstances, the words spoken do not necessarily import that he had committed any offence, and are not actionable: consequently the judgment must be arrested.

PARKE, J. I am of the same opinion. If the house of the plaintiff was contiguous to others, it might have been a misdemeanor at common law for him to set it on fire; but if the words in the declaration were spoken with an intent to impute that offence, it ought to have been averred that the house was contiguous to others. So, if his house was insured, and the words were spoken, with intent to impute to him, that he had set it on fire with intent to defraud the insurers, it ought to have been averred on the record, that the house was so insured, and that the words were spoken with that intent. Nothing of that sort is stated. There is nothing to show that any offence was charged. After verdict, the rule is, as stated by my Brother LITTLEDALE, that those things must be taken to have been proved, which were necessary to support the aver-

[*32] ments in the declaration. If the declaration had alleged an intention *to impute by the words, that the plaintiff had been guilty of wilfully setting fire to his premises, under circumstances which would have made it a crime, then, after verdict, it must have been presumed that the words were proved to have been used in that sense.

PATESON, J., concurred.

Rule absolute.

WILLIAMS v. JARRETT. May 23.

In the stamp act, 55 G. 3, c. 184, Schedule, part 1 (title Bill of Exchange), which imposes a certain duty on bills "exceeding two months after date;" the date means the time expressed on the face of the bill, not the time when it actually issued. And although by sect. 12, if a bill purporting to be payable at two months from a certain time, be issued before the commencement of that period, without payment of a proportionate duty, the maker is liable to a penalty; yet a bill so post-dated, and bearing the inferior stamp, corresponding with the purport of the bill, is admissible in evidence, being, on the face of it, conformable to the schedule.

ASSUMPSIT by endorsee against drawer of a bill of exchange for 90*l.*, payable two months after date to John Harris or order. Plea, the general issue. At the trial before PATTESON, J., at the Bristol Summer assizes, 1832, it appeared that in July, 1831, Harris, having a demand on the defendant for wheat sold to him, wrote the bill in question on a three-and-sixpenny stamp, and sent it to the defendant for signature. It was dated August 1, 1831. The defendant signed and returned it to the messenger. This occurred at least a week before the 1st of August. On that day, Harris sent the bill, endorsed by him, to the plaintiff, who gave him the money for it. It was objected, on behalf of the defendant, that the bill had been issued before the 1st of August, and post-dated, and therefore being payable two months after date, it should have had a four-and-sixpenny stamp, according to 55 G. 3, c. 184, *Schedule, part 1, title [33] "Bill of Exchange," and section 12.¹ The learned Judge nonsuited the plaintiff upon this objection, and in the next term a rule nisi was obtained for a new trial on the authority of *Upstone v. Marchant*, 2 B. & C. 10.

Merewether, Serjt., and *Crowder* now showed cause. It is true that in *Upstone v. Marchant*, 2 B. & C. 10, this Court held that the word "date" in the schedule denoted the period of payment on the face of the bill. But the twelfth section of the act was not adverted to there. The date on the face of a bill is only prima facie evidence: substantially the date is the time when it is issued. The twelfth section of 55 G. 3, c. 184, clearly gives this effect to the word "date" in the schedule, for by that clause if a bill be made payable at a certain time after date, and be dated subsequently to the day on which it is issued, so as not in fact to be payable within two months, then unless the same shall be stamped so as to denote the duty on bills payable more than two months after date, the party making or issuing such bill shall forfeit 100*l.* The provision of the schedule would be *defeated if the time mentioned on the face of [34] the bill were looked to as the real time of issuing. [PARKE, J. There would still be the penalty of sect. 12 to prevent fraud. That clause was necessarily inserted to effectuate the provision in the schedule; as, in the case of a conveyance, in the same schedule, the duty is proportioned to the amount of consideration-money expressed in the conveyance, and it is directed that the consideration shall be truly expressed; and by another act, 48 G. 3, c. 149, s. 22, &c., penalties are imposed in case that be not done.*] In *Pasmore v. North*, 13 East, 521, where a bill was drawn on the 4th of May, and endorsed on the 5th, but bore date the 11th, Lord ELLENBOROUGH asked whether it would be said

¹ The schedule imposes a duty of 4*s.* 6*d.* on inland bills, from 50*l.* to 100*l.* in amount, "exceeding two months after date, or sixty days after sight." By sect. 12 it is enacted, "that if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory note for the payment of money, at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two months, if made payable after date, or in sixty days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange and promissory note, for the payment of money at any time exceeding two months after date, or sixty days after sight, he, she, or they shall, for every such bill, draft, order, or note, forfeit the sum of 100*l.*"

² But the deed is not therefore void, *Robinson v. Macdonnell*, 5 M. & S. 234. See for other cases *Coventry on Stamps*, c. 5, p. 53, &c.

"that the bill was in abeyance in the intermediate time between the issuing of it and the date?" In *Upstone v. Marchant*, 2 B. & C. 10, and in *Peacock v. Murrell*, 2 Stark. N. P. 558, which will be cited to the same effect, it does not appear that the bills were actually issued before the day of the date. [PATTERSON, J. In the first case the bill when accepted was delivered to the drawer.] A bill made payable at a certain time after date would require a stamp, though no date were actually put upon it; this shows that "date" of a bill does not depend merely upon the figures that may be written on its face. In pleading, it is necessary to say when the bill bore date. The schedule of 55 G. 3, c. 184, must be construed with a reference to the twelfth section; the latter may be an additional safeguard, to secure the same object, but is not to be considered an independent provision.

**Follett*, *contra*, was stopped by the Court.

[*35] DENMAN, C. J. I am of the opinion, that the rule must be absolute. If a bill bears no date, we must ascertain, by evidence, the day when it issued; but where there is a date, that must be considered as the time to which the schedule refers.

LITLEDAL, J., concurred.

PARKE, J. I am of the same opinion. There are two decisions on this point, which have been cited; and I recollect a third to the same effect, not reported.¹

PATTERSON, J. I should not have directed a nonsuit, if my attention had been drawn to *Upstone v. Marchant*, 2 B. & C. 10. Rule absolute.

¹ *Follett* mentioned *Johnson v. Garrett*, 2 Chitt. Rep. 122.

SIMPSON v. RENTON. May 24.

By the 32 G. 2, c. 28, s. 1, it is enacted, that no sheriff's officer shall carry any person arrested by him to gaol within twenty-four hours from the time of such arrest, unless such person shall refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment; and by sect. 12, a penalty is imposed on any officer offending against the act:

Held, in an action brought for the penalty, for taking a party to gaol within twenty-four hours, contrary to the statute, that the officer who made the arrest, ought to have required the party arrested to nominate some convenient dwelling-house to be taken to; for the latter could not be said to have refused till the proposal had been made: and a mere omission by him to nominate a place, did not justify carrying him immediately to gaol.

DECLARATION in debt for a penalty of 50*l.*, for taking the plaintiff to gaol within twenty-four hours from the time of arrest, he not having refused to be

[*36] *carried to some convenient dwelling-house of his own nomination, contrary to the statute 32 G. 2, c. 28, s. 1. At the trial before PARKE, J., at the York Summer assizes, 1832, the following appeared to be the facts of the case.

The defendant, who was the keeper of the gaol for the liberty of Knareborough, and the officer for executing writs within that district, arrested the plaintiff at Harrowgate; and, after keeping him three hours at an inn there, removed him to Knareborough gaol, which is two miles from Harrowgate. The plaintiff, during the time he remained at the inn, behaved with great violence to the officer, and attempted to escape. There was no proof that the plaintiff named any dwelling-house to which he wished to be carried, or that the defendant had ever desired him to do so, or informed him that he might. It was contended for the defendant, that if the party arrested wished to avail himself of the privilege of going to a private house, it was incumbent on him to request the officer to take him to one of his own nomination, and that an omission to make such request was a refusal to nominate within the meaning of

the act of parliament. The learned Judge was of opinion, that there could be no refusal until the party was called upon to nominate a dwelling-house, and, there being no proof in this case to such effect, that the plaintiff was entitled to a verdict. A rule nisi having been obtained for a new trial, on the above point,

Knowles now showed cause. The stat. 32 G. 2, c. 28, was passed for the relief of debtors, and ought to be construed so as best to effectuate that intent. By s. 1, the sheriff, bailiff, &c., is prohibited from taking a party *to goal within twenty-four hours from the time of his arrest, unless he shall refuse [*37] to be carried to some convenient dwelling-house of his own nomination. There must therefore, be either a refusal by the party arrested to nominate any convenient dwelling-house (or, having nominated one), a refusal to be carried there. Here there was no refusal by the plaintiff to nominate a house, for he was never asked to do so. In *Dewhirst v. Pearson*, 3 Tyrwh. 242, 1 Cro. & M. 365, BAYLEY and GURNEY, Barons, expressed an opinion that this was the true construction of the act; and here the maxim does not apply, that ignorance of the law shall not excuse, for the third section of the act presumes the ignorance of the party arrested, and expressly provides for it by enacting that a copy of the clauses of the act shall be delivered to every gaoler and sheriff's officer, and that it shall be part of the condition of the bond into which such persons enter, to deliver a copy to every person arrested.

F. Pollock and Dundas, contra. The Court of Exchequer, in *Dewhirst v. Pearson*, 3 Tyrwh. 242, 1 Cro. & M. 365, were not unanimous on this point; for VAUGHAN, B. said it was a grave question, and thought there ought to be a new trial, to give the defendant an opportunity of putting it on the record. The act being penal, ought to be construed strictly. Section 3 does not require a copy of the clauses to be delivered to a party arrested until he is in a house, and requires meat and drink. Besides here, the party having conducted himself with violence in the inn, and attempted to escape, the defendant was entitled to take him at once to prison. The reason given by *Lord KENYON, in *Evans v. Atkins*, 4 T. R. 556, for the provision that a party shall not be carried to goal within twenty-four hours after his arrest, unless he shall refuse to be carried to some convenient house of his own nomination, is, that he may have an opportunity of procuring bail, or agreeing with those persons at whose suit he is arrested; but a party who, like the plaintiff, conducts himself violently, or attempts to escape, has no intention of procuring bail or agreeing with his creditors; he is, therefore, not a person contemplated by the act. In an Anonymous case, 6 Mod. 96, before the statute in question, HOLT, C. J., said, that, "after arrest, the bailiff ought to carry the party to the next gaol if he do not desire to be carried to a place for to send for his friends."

DENMAN, C. J. I think it quite clear, from the words of section 1, that the legislature intended that the bailiff should offer the party arrested an opportunity of nominating a dwelling-house to which he might go. That is the construction I should put on the section, independently of any authority, but my opinion is confirmed by the case of *Dewhirst v. Pearson*, 3 Tyrwh. 242, in the Court of Exchequer.

LITTLEDALE, J. By the words of section 1, a sheriff's officer is prohibited from carrying any person arrested by him to goal within twenty-four hours from the time of his arrest, "unless such person shall refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment." To justify the officer, therefore, in carrying the party to goal within *that time, there ought to have been a previous refusal by him, either to nominate a house, or after having nominated one, to be carried to it. A [*39] mere omission or neglect to do an act, is not a refusal. That word implies something more. If the plaintiff had been asked to nominate a convenient dwelling-house, and had not done so, that would have been a sufficient refusal.

PARKE, J. I thought at the trial, that the refusal of the party arrested to

be carried to some convenient dwelling-house of his own nomination was a condition precedent to the right of the officer to take him to gaol within twenty-four hours from the time of the arrest, and that it ought to have been proved, either that the plaintiff, on being asked to nominate a convenient dwelling-house had refused to do so; or, that having nominated one, he had refused to be carried there. I thought then, as I think now, that there could not be a refusal to do an act until the party had been called upon to do it; and my opinion on that point is confirmed by those of BAYLEY and GURNEY, Barons, in *Dewhirst v. Pearson*, 3 Tyrwh. 242.

PATTESON, J. My opinion proceeds entirely upon the words of the first section of the act. I cannot conceive how a person can be said to have refused to do an act, until it has been proposed to him to do it. The plaintiff, therefore, cannot be said to have refused to be carried to a house of his own nomination, because he was never desired to name any house. Rule discharged.

[*40] *JAMES v. THOMAS and Another. May 25.

On a bond with a penalty, conditioned for the payment of money at a given day, and interest in the mean time, with a stipulation that on any default in paying the interest the whole sum should be demandable; the obligee, on the interest falling into arrear, brought an action to recover the whole principal and interest: Held, that the case was not within 8 & 9 W. 3, c. 11, s. 8, and, therefore, that the plaintiff was entitled, after verdict, to have judgment and execution for the whole principal sum, and not merely for the arrears of interest.

THE plaintiff brought an action of debt on a bond in the penal sum of 560*l.*, conditioned for the payment of 280*l.*, in three years from the date of the bond, with 5 per cent. interest, payable half yearly; "and also that the said plaintiff should be at liberty to call in and demand payment of the said principal money and all interest thereon, in default of the payment of the said interest half-yearly." The declaration stated, that one year's interest being due and unpaid, the plaintiff demanded the principal and all interest thereon, but the defendants did not pay; whereby the bond became forfeited. The particular of demand stated the action to be brought to recover the principal sum of 280*l.*, and interest as above, from the date of the bond to the day of payment therein mentioned.

E. V. Williams now moved for a rule to show cause why, upon payment of the year's interest above mentiond, all further proceedings should not be stayed; and he cited *Masfen v. Touchet*, 2 W. Bla. 706, where the obligee of a bond conditioned to pay 600*l.*, and interest, in three years from the date of the bond, by instalments of 15*l.*, half-yearly, and 615*l.* at the end of the term, brought an action, on default made in paying the interest, and recovered for the whole penalty; and the Court ordered judgment to be entered for the whole [*41] with stay of execution *on payment of the interest due. [PARKE, J. The condition there was different. Here it is, that on any default of payment the whole sum shall be due.] It is the same virtually on any bond with a penalty. [PATTESON, J. The judgment on an ordinary bond would be for the penalty; but then the defendant would be relieved by 8 & 9 W. 3, c. 11, s. 8, on paying the arrears found due upon trial or inquiry. PARKE, J. In the case cited the same end was attained, only by a shorter course.] It is not clear, in this case, that the plaintiff ought not to assign breaches, according to the statute, to entitle himself under the condition; and then he would gain no more than he may by what is now proposed. [PARKE, J. Yes; by the special agreement embodied in the condition, he would recover 280*l.* and interest. LITLEDAL, J. This is like the case of a warrant of attorney, where the Court never holds a party entitled to relief under the statute.]

Per Curiam. There must be no rule.

Rule refused.

The cause was tried at the ensuing Summer assizes for Glamorganshire

before BOSANQUET, J., and a verdict was found for the plaintiff for 1s., but leave given to the defendant to move that a verdict should be entered for such sum as the Court should think fit. In Michaelmas term (Nov. 6th),

E. V. Williams moved that a verdict should be entered upon the record for 20l., the actual arrear of interest, and no more, as in actions upon bonds with a *penalty, within 8 & 9 W. 3, c. 11, s. 8, and the plaintiff be at liberty [42] to levy for that amount only, the judgment standing as a security in case of future breaches. He contended that the case was, substantially, within the statute, the provision that, in default of paying the interest, the whole sum should become due, being in the nature of a secondary penalty. It is as if an annuity had been granted, with a fixed sum to become due on default in any of the payments. That sum would be merely a penalty to secure the payments. [PARKE, J. You would represent this as a bond with two penalties. The effect of the provision here is, that on any default the 280l. becomes payable as the debt; it is not a mere penal sum to secure the interest.] The intention of the statute of William was to prevent the necessity of going into a court of equity. That reason applies to the present case. A court of equity would relieve the defendant. [PARKE, J. I question whether it would.]

The Court refused a rule.

¹ DENMAN, C. J., PARKER, TAUNTON, and PATTERSON, Js.

*DOE dem. ROBERT SMITH, WILLIAM CLEEVE, and JONATHAN SOUTHAM, and of WILLIAM MARSH, JOSIAS [43] HENRY TRACEY and MONTGOMERIE STEWART v. ANN GALLOWAY. *May 25th.*

Under a lease of all that part of the park called B., situate and being in the county of O., and now in the occupation of S., lying within certain specified abutments, with all houses, &c., belonging thereto, and which now are in the occupation of S., a house on a part which is within the abutments, but not in the occupation of S., will pass.

EJECTMENT. At the trial before GURNEY, B., at the Oxford Summer assizes 1832, it appeared that the premises claimed consisted of a cottage with the appurtenances, in the possession of the defendant, in Blenheim Park. Marsh, Stracey, and Stewart had extended a moiety of Blenheim Park, under a writ of elegit. The moiety was regularly set out upon the inquisition, and delivered to Marsh, Stracey, and Stewart, who leased it to one Richard Smallbones. Smallbones held also the remainder of the Park under another title, and he held the moiety leased to him by Marsh, Stracey, and Stewart up to the 22d of June, 1824. By deed dated that day, Marsh, Stracey, and Stewart demised to Smith, Cleeve, and Southam, all that part of the park, called or known by the name of Blenheim or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of one Richard Smallbones, in a direct line across the said park from the gate called Old Woodstock Lodge (following the words of the inquisition), lying on the northwest side of the said line (setting out the other abutments in the words of the inquisition), together with the farm-houses, and other houses, &c., belonging or appertaining to the said premises, and which now are in the occupation of the said R. S., except and always reserved *unto the said W. Marsh, J. H. Stracey, and M. Stewart, their executors, [44] administrators, and assigns, all mines and quarries of stone, timber, and other trees whatsoever (with a like exception and reservation of hedges, of a right of hunting, shooting, fishing, and fowling, and of the liberty of keeping a herd of deer in the park, and depasturing three head of cattle there). Since the execution of this deed, Marsh, Stracey, and Stewart had become bankrupts, and all their property had been regularly assigned before the action was brought; the plaintiff, therefore, relied upon the lease to Smith, Cleeve, and Southam. The premises claimed were within the line and abutments set out in the inquisition and lease: but the defendant had occupied them, by the permission of the original owner, up to the time of the inquisition, without paying any rent, no

demise having been made to her. Smallbones had also suffered her to occupy them in the same way during the whole time of his tenancy; and she had continued in a similar occupation up to the time of the action brought. It was now insisted for her, that the premises, not having been in the occupation of Smallbones, did not pass by the lease. The learned Judge directed the jury to find a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. The defendant obtained a rule to that effect in Michaelmas term, 1832.

Talfourd, Serjt., and Walesby, now showed cause. There can be no doubt that the intention of the parties to the lease of the 22d of June, 1824, was that all which the lessors held by the elegit should pass; and the words of the demise are sufficient to carry that into effect. The premises are locally [*45] within the line set out in the latter part of the description, and the words added respecting the occupation are mere surplusage. Besides this, the defendant resided on the premises by the permission of Smallbones; they may, therefore, be considered to have been in his occupation. If it be contended that the part granted is limited, by grammatical construction, to the part occupied by Smallbones, the answer is that, by such a construction, all that was occupied by Smallbones would be within the grant. Now that would comprehend parts of the park without the described line. Besides, the lease goes on to make certain exceptions; and, if the present premises were not within the intention of the lessors, they also would have been marked off from the property within the prescribed line by a specific exception. In *Wrottesley v. Adams*, Plowd. 187; the words of a lease, as set out on the record, were "granted and to farm let to the same R. W., the tenements aforesaid, with the appurtenances, by the name of the reversion of all their [the grantors'] farm in B., and by the name of one other tenement there, with all the lands, leasows, pastures, and meadows to the same belonging, and with all and singular their appurtenances then in the tenure and occupation of the aforesaid R. W." On demurrer, an exception was taken that the "tenements aforesaid" (being the premises mentioned in the declaration) were not averred to have been in the tenure and occupation of R. W., 5th exception, p. 191. But the Court held that the averment was not necessary, and said that "another certainty put to a thing which was certain enough before *was of no manner of effect; and therefore there is a [*46] diversity where a certainty is added to a thing which is incertain, and where to a thing certain." Therefore it was considered not to be material, whether the farm of B. was in the tenure of R. W. or not. The Court also held, that the words, "one other tenement" were not material to make the lease good; and consequently, that, so far as the farm of B. was concerned, no averment was necessary. S. C. 195. So, where a demise was made of "all that their [the grantors'] glebe lands lying in C., viz. seventy-eight acres of land, and also the demesnes of the said seventy-eight acres, with all profits, commodities, tithes personal and predial, &c., belonging to the said subchanter and vicars, as parsons and proprietaries of the parish church of C., &c., and all other tithes whatsoever, and also the tithes of the said seventy-eight acres, all which were lately in the farm and occupation of M. P.;" and it was found on special verdict, that none of the tithes of the land mentioned had been in the possession of M. P., but that other tithes and lands were in the tenure of M. P.; it was held, that the tithes of the lands mentioned passed by the demise. *Swift, Subchanter, and one of the Vicars Choral of Litchfield v. Eyres and Others*, Cro. Car. 546; S. C. W. Jones, 435. The maxim, that where there is sufficient certainty in a description a false reference added shall not destroy its effect, was lately recognised in *Doe d. Ashforth v. Bower*, 3 B. & Ad. 459. [PARKE, J. The general rule is laid down in *Doddington's Case*, 2 Rep. 32, b; [*47] and in the note added at the end of the *judgment there. There are also cases on the same point in *Rolle's and Viner's Abridgments*, Grant.¹

¹ 2 Rol. Abr. 54; 14 Vin. Abr. 87. See also 2 Rol. Abr. 423, and 425, Rent, B. 6

Jervis and *Cooper* in support of the rule. It must be conceded that if the words "and now in the occupation," &c., had followed the particular description, the case would have fallen within the rules laid down in the cases cited. But here the words relied upon by the defendant, precede the particular description; therefore, according to *Wrottesley v. Adams*, Plowd. 187, and *Swift v. Eyres*, Cro. Car. 546, and *Dodding's* case, 2 Rep. 32, the particular description must be rejected, if there be any inconsistency. And this was held in the case of *Stukeley v. Butler*, Hob. 168 (edit. 1724). There a bargain and sale was made of all woods, underwoods, &c., standing, growing, &c., in the whole of the bargainor's manor of C., viz., in all his wood called E., and in all his wood called B., and in other woods expressly named: and it was adjudged that woods in C., not being in any of the woods afterwards expressly named, should pass by the conveyance. [DENMAN, C. J. As you construe the sentence, the question would be, whether you are compelled to resort to all the description for the purpose of understanding the meaning. Suppose the premises had been described by reference to a colored plan, and the words had been "all the part colored green and now in the occupation of A. B.," all the green must have passed, though some of *it had not been in the occupation of A. B. LIT-
TLEDALE, J. Is it not the same thing, whether the place be expressly
named, or its limits particularly set out?] In *Doe d. Parkin v. Parkin*, 5 Taunt. 321, it was held that a devise of all hereditaments in T. and then in the devisor's own occupation, would not pass hereditaments in T. not occupied by the devisor. In *Blague v. Gold*, Cro. Car. 447, 473, see also *Hunt v. Singleton*, Cro. Eliz. 473, it was held that the devise of "the corner house in A. in the tenure of B. and H.," passed a corner house in A. which was in the tenure of B.¹ (though not a house in the tenure of H. not being a corner house); and the reason given was, that the devise was of a thing certain at the first. Where a lease was made of a room, a cellar, a vault, and a yard, all expressly set out and described to have been late in A.'s occupation, it was held that a cellar, not expressly named, which was under the yard, but which had not been in the occupation of A., would not pass. *Doe v. Burt*, 1 T. R. 701. The word "and," here, is superfluous in the description; the meaning must be the same as if the description of the parcels had been, "All that part, &c., which is now in the occupation of Smallbones, in a direct line," &c. *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453, is in favor of the defendant; for there the Court held that such premises only passed by the devise, as were within the whole of the description, excluding such as corresponded to a part only of the description. In *Swift v. Eyres*, Cro. Car. 546, *there was an exception of the small tithes, which showed the intention of the parties to pass all the great tithes; here all that
is excepted may be considered as merely in the nature of an easement or a privilege.

DENMAN, C. J. Two parts only of the description of the premises can be relied upon in support of the restrictive construction of this lease. The first part is the expression which occurs early in the description; "all that part of the park called or known by the name of Blenheim or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of Richard Smallbones." But, as to this expression, it is impossible not to see that the words "and now in the occupation" are, as it were, in the genitive case, agreeing with "park," not with "part." The other part of the description, which seems to favor the restrictive construction, occurs towards the close of the description; "together with the farm houses and other houses, &c., appertaining to the said premises, and which now are in the occupation of the said Richard Smallbones."

D. 7. "If a man grants and confirms to another in fee 10s. rent, to take out of certain land, which rent he has of the grant of his father; though he never had anything of the grant of his father, yet this shall create a rent."

¹This house was found by the jury to be in the tenure of B. and N., and the Court held, that if it were a joint tenure, all the house should pass, but that if one part were in the tenure of B., and another part in the tenure of N., the former part only should pass.

Had this occurred in a will, it might possibly have been interpreted as a qualifying restriction : but we cannot hold that general words added, as here, for the protection of a grantee, qualify the words by which the boundary of a district is set forth.

LITTLEDALE, J. I am entirely of the same opinion. If the words "now in the occupation of one R. S.," had followed the words "county of Oxford" directly, there might have been some ground for contending that the lease was intended to pass only all the part of Blenheim Park then in the occupation of [50] Smallbones. Even then, it *would have admitted of considerable doubt whether such a construction were admissible. But the interposition of the word "and" precludes it altogether. It is contended that the words "now in the occupation," &c., are an essential part of the full description. If that were so, the description would mean much more than is suggested; for Smallbones occupied in Blenheim Park much besides that which the lessors had the power of passing. That which follows "the county of Oxford," is merely what is called false demonstration; and false demonstration cannot restrict. Taking the words as they are, it appears to me that all which is described in the words following the description of the occupation, will pass. Many cases have certainly gone upon the circumstance that the particular description came first; in which it has been held that the effect of such a description is not altered by words of suggestion, or false demonstration, following it. Such are *Doe d. Beach v. The Earl of Jersey*, 1 B. & A. 550, and of *Doe d. Ashforth v. Bower*, 3 B. & Adol. 453. And, in the present case, it is contended that as the first part of the description is sufficiently certain, its effect cannot be destroyed by what follows. But in *Chamberlain v. Turner*, Cro. Car. 129, the later words were held to enlarge a devise beyond the effect of the earlier ones. There the words were "the house or tenement wherein William Nicholls dwelleth, called the White Swan," and William Nicholls occupied only the entry or alley, and three upper rooms. But it was considered that the words "White Swan," showed that all the house was meant. And the same argument would apply here, even if we were to take [51] the words "now in occupation" *as referring to the word "part." *Chamberlaine v. Turner* closely resembles the present case.

PARKE, J. I am of the same opinion. The question is, what passed by this demise. Now the rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if premises be described in general terms, and a particular description be added, the latter controls the former. Here is a grant of all that part, &c., in general terms; had it been a grant of all that part now in the occupation of Richard Smallbones, and lying on the northwest side of the line, the occupation would have been a material part of the description, and nothing would have passed which was not both in the occupation of Smallbones, and on the northwest side of the line. But if the terms "now in the occupation" apply, not to "part," but to "park," they may be rejected, for they can be no more than an additional description of the park; so that the meaning would be, "all that part of the park which is called Blenheim Park, and is now in the occupation of Smallbones;" and then follows the description of the part which is to be demised. Therefore, under the clause following, all the farm-houses, &c., belonging to the part demised, pass also; so that we may reject the false demonstration which comes after this clause. It seems to me that this is the true construction of the early part of the grant, in consequence of the word "and;" and the minute description which follows, cannot be brought into doubt by the words which come after it.

Rule discharged.

*The KING v. JOHN HENRY MANNERS SUTTON, Esquire. [*52]
May 25.

On indictment for non-repair of a highway, which defendant was stated to be liable to repair *ratione tenuræ*, and verdict found for the defendant, a new trial was moved for on the ground of misdirection, and the improper rejection of evidence. The Court refused a new trial, but suspended the judgment, in order that a new indictment might be preferred.

Quære, whether a new trial is granted after acquittal in any criminal case, except a penal action?

THE defendant was indicted for the non-repair of Kelham Bridge, in the county of Nottingham, which, it was alleged, he was bound to repair *ratione tenuræ*. Plea, not guilty. At the trial before PARKE, J., at the summer assizes for Lincolnshire, 1832, a verdict was given for the defendant. In the ensuing term Sir James Scarlett obtained a rule to show cause why the verdict should not be set aside, and a new trial had, on the grounds, first, of misdirection, and, secondly, that the learned Judge had refused to admit as evidence certain rules of Court of the reign of Charles II., which were relied upon on the part of the prosecution, as showing that, on an indictment preferred in that reign, the liability of an ancestor of the defendant to repair the bridge, by reason of his tenure of the same lands, had come in question, and he had been found liable. The objection made to the reception of these documents was, that they could only be admissible as secondary evidence of a judgment against the ancestor, and no ground was laid for the admission of such secondary evidence, inasmuch as the want of the original records was not accounted for, and it did not sufficiently appear that the ancestor was a party to the proceedings in question.

The Solicitor-General, Adams, Serjt., and Amos, now showed cause. The court cannot grant a new trial *after acquittal, in a case of misdemeanor. [*53] There is no distinction, in this respect, between one kind of offence and another, nor is there any authority for the practice. [PARKE, J. May it not be granted for misdirection?'] By consent only, as in *Rex v. Russell*, 6 B. & C. 569. It is against the general rule, that a party shall not be twice in jeopardy on the same charge. The case of a penal action is different from that of misdemeanor at common law, because in the first the punishment is limited, in the other, discretionary. A *quo warranto* information is excepted out of the rule, *Rex v. Francis*, 2 T. R. 484; but that is a merely civil proceeding. The practice where a defendant has been acquitted on indictment is laid down in 2 Tidd, 911. The Court has, indeed, under very special circumstances, suspended the entry of judgment, to give opportunity for another trial, *Rex v. Wadsworth*, 1 B. & A. 63; but this is not, in its circumstances, a case for such interference; and there was here neither consent of parties, nor any point reserved at the trial. In *Rex v. Reynell*, 6 East, 315, and *Rex v. Mann*, 4 M. & S. 337, the court (relying upon the general rule) refused to grant a new trial after verdict for the defendant, notwithstanding the instances which had occurred of such rule being granted, after acquittal, in a penal action, and in a *quo warranto*. So in *Rex v. Burbon*, 5 M. & S. 392, a new trial was refused, when the defendants had been acquitted on indictment for non-repair of a highway, Lord ELLENBOROUGH observing that the right was not bound. [PARKE, J. The same case is *mentioned in a note to *Rex v. Cohen and Jacob*, 1 Stark. N. P. C. 516, [*54] where the court is stated to have said that the rule might be relaxed in some cases, in which rights would otherwise be compromised.] Here it is not so: the verdict of not guilty might have been given on the ground that no want of repair was proved. In *Rex v. Cotton*, 3 Campb. 444, a prosecution for non-repair of a highway, evidence was offered for the prosecution, which DAMPIER, J., rejected, and the consequence was a verdict for the defendant. That learned

¹ See (as to a penal action) the observations of Lord KENYON in *Calcraft v. Gibbs*, 5 T. R. 20.

Judge, in deciding upon the inadmissibility of the evidence, said, "I wish that my opinion upon it could be reviewed; but in the manner in which it arises, that is impossible." Lord KENYON said, in *Rex v. Mawbey*, 6 T. R. 638:—"In misdemeanors there is no authority to show that we cannot grant a new trial, in order that the guilt or innocence of those who have been convicted, may be again examined into," see *Parke v. Godin*, 2 Stra. 813; Bull. N. P. 326, b. There two of the defendants had been acquitted; but the observation clearly must be applied only to those who were convicted. In *Rex v. Cohen and Jacob*, 1 Stark. N. P. C. 516, an attempt was made to distinguish between motions for a new trial, on the ground of misdirection, and on the merits; but Lord ELLENBOROUGH did not admit the distinction. And there is no instance, except in the particular cases which have been pointed out, where, after acquittal on a criminal charge, the court has granted a new trial. (They then went into an argument upon the evidence, which it is unnecessary to notice here, as the court pronounced no opinion on that part of the case.)

**Sir James Scarlett*, contra. The only instances in which it has been [55] laid down that the Court would not grant a new trial after acquittal in a case of this description, have been where the verdict was upon the merits, and where the parties acquitted were charged by common right with the repairs, so that the verdict of not guilty would not bind any right. Lord ELLENBOROUGH's ruling in *Rex v. Mann*, 4 M. & S. 337, was, that a new trial is not granted on indictments for misdemeanor, "where a verdict has passed for the defendant upon the merits." That was an indictment for a nuisance; and it does not appear that any right was concluded by the verdict. In *Rex v. Wandsworth*, 1 B. & A. 63, which has been alluded to, the ground of motion was, that the verdict was against evidence; and there the Court adhered to the general rule, in refusing to set the verdict aside, but considering the peculiar circumstances, and that a judgment for the defendants would have been conclusive as to the right upon another trial, the Court suspended the entry of judgment till a fresh indictment could be tried. Until the decision in *Wilson v. Rastall*, 4 T. R. 753, an opinion prevailed that the Court could not grant a new trial after verdict for the defendant in a penal action: but the Court there granted the rule, and Lord KENYON said, "there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the Judge." Technical distinctions may be drawn between a penal action and an indictment, but an action for penalties under the bribery act is in its nature as much a criminal prosecution as an indictment for non-repair of a highway. That case *alone, [56] therefore, would be a precedent for granting the present application. The form of the record makes no substantial difference. Before the statute 4 & 5 W. & M. c. 18, any person might file an information in this Court in the name of the Master of the Crown Office, and hence the statutes which give a remedy by penal action commonly enable the party to proceed by either plaint, action, or information. Having, then, his choice to adopt either course, if he brought an action, and an issue were found against him, he might, in case of misdirection, move for a new trial, and have the case reconsidered. It cannot be contended that if he had chosen to try the same question by information, the form of the record would have precluded him from having the case reviewed, if a verdict had been found against him in consequence of a misdirection. The mere circumstance, therefore, of the action being brought in a civil or a criminal form, ought not to weigh with the Court. An indictment for non-repair of a highway is in the nature of a civil remedy, its true object not being punishment, but the ascertaining and enforcing of a right. The greatest inconvenience would result from holding that a new trial could not be granted in such a case, where the question was of a special liability to repair. A parish, being indicted, might plead that J. S. was liable, *ratione tenuræ*, and the jury, under an erroneous direction, might find for them upon that plea. J. S. might then be indicted as liable *ratione tenuræ*; and the Judge who tried that case might give such a

direction to the jury, upon the same evidence, that the party would be acquitted. If no new trial can be had after acquittal on any indictment, neither verdict could be disturbed. A verdict of not guilty on an *indictment, charging an individual with a prescriptive obligation, discharges him from that [*57] obligation, and tends to fix it on the public or on some other party. It would be hard that a civil right should be thus shifted, and the aggrieved party deprived of the assistance which this Court renders in other civil cases, by a mere technical adherence to the rules of the criminal law. (He then proceeded to contend, that there had been a misdirection in this case; and also that the documentary evidence had been improperly rejected.)

DENMAN, C. J. Upon consideration of all the points that have been raised, we are not disposed at present to make the precedent of granting a new trial; but we think the precedent in *Rex v. Wandsworth*, 1 B. & A. 63, may be very properly followed here by suspending the judgment. Then a new indictment may be preferred; and the points that have arisen may be discussed upon that.

LITLEDAL, PARKE, and PATTESON, Js., concurred.

Rule absolute to suspend the judgment.¹

¹ See, as to granting new trials in criminal cases after acquittal, *Rex v. Bennett*, 1 Stra. 101, and some cases there cited.

*GOSS v. Lord NUGENT. May 29.

[*58]

By agreement in writing A. contracted to sell B. several lots of land, and to make a good title to them; and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then verbally agreed between the parties, that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted.

In an action brought by the vendor to recover the remainder of the purchase-money, the declaration stated that the defendant agreed to deduce a good title to all the lots except one, and that the vendee discharged and exonerated him from making out a good title to that lot, and waived his right to require the same:

Held, that oral testimony was not admissible to show the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing; and by the statute of frauds, in every action brought to charge a person on a contract for the sale of lands, the agreement must be in writing.

DECLARATION stated, that, on the 13th of August, 1830, the plaintiff was about to expose for sale, by public auction, fourteen lots of freehold land, upon the following, among other, conditions:—"That the purchasers should pay down immediately, into the hands of the auctioneer, a deposit of 15*l.* per cent. on the purchase-money, and should sign an agreement for the payment of the remainder on the 29th of September, then next; that the vendor, at his own expense, should deliver to each purchaser, or his solicitor, an abstract of the title of the property sold, and should deduce a good title thereto; and upon the purchaser's payment of the remainder of the purchase-money, and complying with those conditions, the vendor should, at the purchaser's expense, convey his lot to, or as directed by him." Averment, that, before the land was exposed to sale, by a certain agreement between the plaintiff and the defendant, the plaintiff, in consideration of 80*l.* paid by the defendant at the time of the signing the agreement, and of the further sum of 370*l.*, to be paid by him on the 29th of September then next, agreed to sell, and the defendant agreed to purchase, the same land, under the conditions of sale as near as might be, or *such of them as were then, under the said agreement, capable of taking [*59] effect. The declaration then stated mutual promises to perform the agreement and conditions of sale, and averred that the plaintiff delivered an abstract of the title to the property so sold, and deduced a good title thereto, and had always been ready to convey, &c. Breach, non-payment of 370*l.* The

second count differed from the first in stating, "that the plaintiff delivered an abstract of the title to the land, and made out a good title to all the land excepting thirty-five feet thereof, and that after making the agreement, the defendant discharged and exonerated the plaintiff from making out or deducing any other title to the last-mentioned part of the land, and waived his right to require the same under the conditions of sale and agreement." Plea, general issue.

At the trial before GASELEE, J., at the Buckingham Spring assizes, 1832, it appeared that the plaintiff having advertised the property in question for sale by public auction, the defendant agreed to purchase it by private contract, agreeably to the printed conditions of sale. The memorandum of agreement, which was annexed to the conditions of sale, was as follows:—"Thomas Goss, in consideration of 80% paid to him by George Lord Nugent at the time of signing this agreement, and of 370% to be paid to him on the 29th day of September next, doth agree to sell to G. Lord Nugent, and G. Lord Nugent agrees to purchase of T. Goss all the ground and premises described in the particulars of sale hereunto annexed, as near as may be, or such of them as are now under the present agreement capable of taking effect." The fifth condition of sale

[*60] was as follows:—"That the vendor, at his own expense, *shall deliver to each purchaser or his solicitor, an abstract of the title to the property sold, and deduce a good title thereto, and upon the purchaser's payment of the remainder of the purchase-money and complying with these conditions, the vendor shall, at each purchaser's expense, convey his or her lot or lots to or as directed by him." The agreement was drawn up at the request of the defendant, by Hatten, the plaintiff's attorney. The defendant was afterwards informed by Hatten, that as to one lot of thirty-five feet, there was a defect in the title. The defendant said he would accept the title notwithstanding that defect; and possession of the whole was delivered to him. The vendor was called upon by the defendant's solicitor, to furnish an abstract of title, and he delivered one on the 10th of September. In November the defendant's solicitor objected to the title as to the thirty-five feet. Hatten said the objection had been waived. The defendant then refused to complete the purchase. It was objected that oral evidence of the defendant's waiver of his right to have a good title made out of the thirty-five feet, was not admissible, because the action being brought to charge him on a contract for the sale of land, the statute of frauds (29 Car. 2, c. 3, s. 4), required the whole agreement to be in writing. The learned Judge received the evidence, and finally directed the jury to find for the plaintiff if they thought there had been a waiver by the defendant of the right in question. The jury having found for the plaintiff, leave was given to the defendant to move to enter a nonsuit upon the point as to the admissibility of the oral testimony. A rule nisi having been obtained for that purpose,

[*61] **Kelly* in last Easter term showed cause.¹ It may be conceded, that oral evidence of anything which occurred at the time when the written contract was entered into cannot be received to vary it, *Meres v. Ansell*, 3 Wils. 275, and in *Hayne v. Hare*, 1 H. Bl. 659; but here, the agreement in writing not being under seal, is a mere parol agreement, and being executory, it might, without any violation of the common law rule (that every contract ought to be dissolved by matter of as high a nature), be discharged and abandoned, before breach, by a subsequent unwritten agreement. The only question, therefore, is, whether, by the statute of frauds, evidence of such unwritten agreement is excluded. That statute contains no provision for the dissolution of agreements. It will be said, this agreement being one concerning an interest in land is within the fourth section, which enacts, that no action shall be brought to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement upon which the action shall be brought, or some memo-

¹ Before DENMAN, C. J., LITLEDALE, and PARKE, Js.

random or note thereof, shall be in writing. Here, the plaintiff in the second count declares upon the written agreement, and alleges that the defendant waived his right to insist on a good title to part of the land. [PARKE, J. Assuming that a written contract concerning land may be wholly waived by a new agreement not in writing; here there has not been a waiver of the entire agreement, but of a part of it only, and the effect of that waiver is to substitute for the original contract a new one, which is to be proved partly by matter in writing, and partly by oral testimony.] The original agreement consists of two parts: the first is for the sale of land; the second is for making a good title *to that land. The agreement, so far as it is a contract for the [*62] sale of land, cannot be altered by matter not in writing; but so far as it relates to making a good title to the land, it may be so varied. Here, the verbal alteration does not in any degree vary what is to be done by either party. The same land is to be conveyed, the same extent of interest, at the same time, and the same price is to be paid. The oral evidence, therefore, is offered, not to vary the original agreement, but to show that it was discharged in part. There are cases, even within the scope of the statute of frauds, where parol evidence is admissible to show a dispensation with the performance of part of the original contract; such as an agreed substitution of other days than those stated in the contract for the delivery of goods sold, *Cuff v. Penn*, 1 M. & S. 21; *Warren v. Stagg*, cited in *Littler v. Holland*, 3 T. R. 591. There is no difference in principle between a waiver of title, and a waiver of the time for completing the contract.

Storks and *Serjt. Follett*, contra. A written contract concerning an interest in land cannot be abandoned or discharged by matter not in writing; and even if it may, it cannot be altered by parol. In *Buckhouse v. Crossby*, 2 Eq. Ca. Abr. 32, pl. 44, to a bill filed by a purchaser for a specific performance, the vendor of lands objected that the contract had been discharged by parol. Lord HARDWICKE said, "an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract," and he would not decide that it might be discharged by parol; in *Bell v. Howard*, 9 Mod. 305, he said, "that it was certain *that an interest in land could not be parted with, or waived by [*63] naked parol without writing." In *Parteriche v. Powlet*, 2 Atkyns, 383, the same noble and learned Judge said, that "to add anything to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the statute of frauds and perjuries, but to the rule of common law before that statute was in being." Assuming, however, that an agreement for the purchase of land may be wholly waived and discharged by parol, it cannot be varied. In *Price v. Dyer*, 17 Ves. jun. 356, where the plaintiff prayed a specific performance of an agreement for a lease under which the plaintiff had taken possession, and afterwards the parties had mutually abandoned the terms of the written agreement, and made another agreement by parol, as to the duration of the term, the rent and other particulars, Sir W. GRANT, Master of the Rolls, said, "that the waiver, spoken of in the cases, was an entire abandonment and dissolution of the contract, restoring the parties to their former situation. No such thing was, for a moment, in contemplation of these parties. All that they, at any time, meant, was to add to or to modify the terms of the original agreement." So, in this case, the parties never intended entirely to abandon the written contract, but merely to modify one of the terms of it as to part of the property. The effect of the oral evidence is not to show that the written contract was put an end to, or that the parties were restored to their original situation, but to substitute a different contract, which must be proved partly by writing and partly by oral evidence. The contract in writing was to make a good title to all the lots; the substituted contract is to make a good title to all but one. The result of the authorities as to a *parol [*64] variation, is stated by Mr. Sugden in his *Law of Vendors*, 8th Edit. 142, to be, that evidence of it is totally inadmissible at law. [PARKE, J. In *Cuff v.*

Penn, 1 M. & S. 21, and some other cases relating to contracts for the sale of goods of the value of 10*l*. (which the statute of frauds requires to be in writing), it has been held that the time (in which, by the agreement in writing, the goods were to be delivered), might be extended by a verbal agreement; but I never could understand the principle on which those cases proceeded, for the new contract, to deliver within the extended time, must then be proved partly by written, and partly by oral, evidence.] *Curr. adv. vult.*

DENMAN, C. J., now delivered the judgment of the Court. By an agreement in writing, the plaintiff contracted to sell the defendant several lots of land for the sum of 450*l*., and to make a good title to them; and 80*l*. was paid to him as a deposit. It was afterwards discovered, that, as to one of the lots, a good title could not be made; and it was then subsequently agreed by the defendant, that he would waive the necessity of a good title being made as to that lot; and the plaintiff afterwards delivered possession of the whole of the lots to the defendant, which he accepted, but now refuses to pay the remainder of the purchase-money, and he relies on the objection to the title.

By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during [*65] the time that it was in a state of *preparation, so as to add or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.

And if the present contract was not subject to the control of any act of parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained.

But the statute of frauds has made certain regulations as to contracts for the sale of lands; and by the 29 Car. 2, c. 3, s. 4, it is enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

It is to be observed, that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as [*66] there is no clause in the act *which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion upon that point, as this is not a waiver and abandonment of the whole written agreement, but only a part of it; and the question is, what is the effect of that?

It may be said by the plaintiff, that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed, there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid, and that it is only an abandonment of a collateral point.

But we think the object of the statute of frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only.

But, in the present case, the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, is not a contract entirely in writing; and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may, in some instances, better not be conveyed at all; but our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon *the general effect and meaning of the statute of frauds, and that the contract now brought forward by the plaintiff [*67] is not wholly a contract in writing.

We do not say that verbal evidence may not be given of customs and usages applicable to the subject-matter of the written contract where the contract is silent; that has been done in a great variety of instances.

Whether the plaintiff may not have relief in a Court of equity, we give no opinion; it would be for the Court to decide upon the case which should be brought before them. There have, however, been some cases at law on contracts within the statute of frauds, where verbal evidence has been allowed: *Warren v. Stagg*, cited in *Little v. Holland*, 3 T. R. 591; *Thrush v. Rooke*, 1 Esp. N. P. C., and *Cuff v. Penn*, 1 M. & S. 21. These were cases where the time for the performance of the contract had been enlarged by a verbal agreement, and they were decided on the ground that the original contract continued, and that it was only a substitution of different days of performance. It is not necessary to say whether these cases were rightly decided; if they were so, still the present is a different case, for here, without doubt, the terms of the original contract were varied.

Rule absolute.

*ENGLEHEART v. EYRE and Another.

[*68]

In declaring on a judgment signed in vacation, on certificate by the Judge at nisi prius for immediate execution (under 1 W. 4, c. 7, s. 2), the day of signing judgment should be stated according to the fact, and not laid as of the preceding term.

But it is enough to set out the judgment as it appears on the record; the certificate need not be stated.

The *postea*, however, in such a case, should be so framed, that the judgment may appear to be warranted by the previous finding of a jury.

But when on *nul tiel* record pleaded to debt on recognisance of bail, the *postea* shown to the Court proved erroneous in this respect, leave was granted to amend it; the defendants also having leave to plead *de novo*.

Semble, that the Court would have allowed the error in the declaration to be amended, without permitting the defendants to plead again.

THIS was an action on a recognisance of bail. The defendants pleaded, first, as to the recognisance, *nul tiel* record; and secondly, as to the judgment against the principal, the same plea. Issue being joined on both, and a day given for production of the records, the same were accordingly produced in Court on the last day of Easter term, after which the Court, upon motion, made an order, that unless cause were shown to the contrary on the second day of this term, judgment should be entered for the defendants. This rule was granted on the following ground:—The action against the principal was tried on the 5th of February, and the Judge certified for execution on a day in the same vacation, pursuant to 1 W. 4, c. 7, s. 2: judgment was therefore signed in that cause on the 15th of March: but the declaration in the present action against the bail stated the judgment to have been recovered in Hilary term, according to the former practice, by which a judgment signed in vacation was treated as relating to the previous term: and the Court thought, on reference to the statute, that the day of signing judgment, under the present circumstances, ought to be stated according to the fact.—A summons was taken out for the purpose of amending the declaration, and the parties attended before TAUNTON, J., who gave leave to

[*69] amend on payment *of costs, and the declaration was altered accordingly. On the second day of this term,

Thesiger, in pursuance of the direction of the Court in the last term, appeared (May 23d) to show cause against judgment being entered for the defendants; and the declaration, as amended, and also the records of the recognisance and judgment, were again produced.

Mansel, contra, applied to the Court that the order of TAUNTON, J., might be rescinded, and the defendants have judgment. The amendment ought not to have been allowed. The bail are entitled to benefit by the error in the proceeding against them, and should be at liberty to render their principal, *Stevenson v. Grant*, 2 New Rep. 103. If not, the defendants should at least be at liberty to plead de novo. [PARKE, J. This is a technical objection, and since the decision referred to, the Court have often held it to be discretionary in them to allow an amendment. The present case is a favorable one for granting such permission, since the difficulty arises under a new act of parliament. The defendants are now praying judgment. What are the objections to the record as amended?] The declaration should have stated the special circumstances, to show that the judgment was conformable to 1 W. 4, c. 7, s. 2. The certificate for immediate execution should have been stated.

LITTLEDALE, J. That is not necessary. It is the authority to the officer for entering up judgment, but it need not be set out in declaring.

[*70] *PARKE, J. It is quite clear, on referring to sects. 2 and 3 of the statute, that no such statement is necessary. Before this act passed, the allegation of a judgment signed out of term would have been erroneous on the face of it; but now the Court will take notice that a judgment may be signed in vacation under the statute.

PATTESON, J. It is enough to set out the judgment as it is.

LITTLEDALE, J. On referring to the record, it appears that the postea is of the 15th of April, and the return of the distringas juratores is of that day; whereas the judgment is signed on the 15th of March. The postea ought to be so framed, that the judgment should be warranted by the finding of a jury. At present it is not so.

The Court, upon this objection, gave *Thesiger* leave to amend the postea on payment of costs; and they also gave leave to the defendants to plead de novo.

Rule accordingly.¹

¹ The postea was amended, and the defendants having pleaded several matters without leave of the Court, the plaintiffs signed judgment. The amended postea, after stating the venire, vicecomes non misit breve, &c., in the usual way, went on as follows:—"Afterwards the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them before our lord the King, at Westminster, until Monday, the 15th day of April next coming, unless the Right Honorable Sir THOMAS DENMAN, Knight, his Majesty's Chief Justice, assigned to hold pleas in the Court of our said lord the King, before the King himself, shall first come on Friday, the 1st day of February next coming, at Westminster Hall, in the county of Middlesex, according to the form of the statute in such case, &c., for default of the jurors, because none of them did appear. At which last-mentioned day, and before the said 15th day of April, to wit, on the said 1st day of February, in the third year, &c., at the day and place last

[*71] aforesaid, comes the Honorable *Sir JOHN PATTESON, Knight, one of the justices of our said lord the King, assigned to hold pleas in the said court of our said lord the King before the King himself, in the absence of and in the place and stead of the said Sir THOMAS DENMAN, Knight, the Chief Justice aforesaid; and at the same last-mentioned day and place, before the said Sir JOHN PATTESON, Knight, the said Justice, THOMAS DENMAN, Esquire, being associated unto the said Justice, according to the form of the statute in such case made and provided, come as well the above named plaintiff N. B. E., as the above named defendant N. D., by their respective attorneys also above mentioned, and the jurors of the jury, whereof mention is above made, being summoned, also come, who to speak the truth of the matters aforesaid being chosen, tried, and sworn, as to the first issue within joined between the parties aforesaid say" (Verdict for the plaintiff on both issues. Damages 22l. 7s. 10d., and 40s. costs.) "And thereupon, the said Sir JOHN PATTESON, Knight, the Judge before whom in the absence of and in the place and stead of the said Sir THOMAS DENMAN, Knight, the said

Chief Justice, the said issues were tried in form aforesaid, and before the end of the sittings of Nisi Prius at which the said cause was tried, to wit, on the 6th day of February, in the year of our Lord 1833, at Westminster aforesaid, certified under his hand, upon the back of the record of and in the said action, according to the form of the statute in such case, &c., that he was of opinion that execution ought to issue on Tuesday, the 6th day of March then next, for the sum found by the said verdict: and, thereupon, afterwards, and after the granting the said certificate, to wit, on the 15th day of March, in the third year of the reign of our said lord the King, before our lord the King at Westminster, comes the said N. B. E., the plaintiff by his attorney aforesaid, and prays judgment: and that the damages, costs, and charges by the jurors aforesaid in form aforesaid assessed, and also his costs and charges by him about his suit in this behalf expended of increase, may be adjudged to him, &c. Therefore it is considered by the Court of our said lord the King, before the King himself, according to the form of the statute in such case made and provided, that the said N. B. E., the plaintiff, do recover against the said N. D., the defendant, his said damages," &c.

*COOMBS and Another, Assignees of SAMUEL COOMBS, a Bankrupt, v. BEAUMONT. May 27. [*72]

A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 G. 4, c. 16, s. 72, nor had the bankrupt the actual or apparent ownership.

TROVER for steam-engines, other engines, trams, tram-wagons, carts, wagons, weighing-machines, &c. Plea, not guilty. At the trial before GURNEY, B., at the Monmouth Summer assizes, 1832, the following appeared to be the facts of the case:—The bankrupt, on the 31st of May, 1825, became tenant under a lease granted to him and his partners by Philip Jones, of a farm called Gelly Deg Farm, and coal mines under it. There was a proviso that an inventory and valuation should be made of the workmen's tools, movable engines, and machines, and all the timber and other materials, being the property of P. Jones, then being in and upon the collieries; that the lessees should have the full use and enjoyment of all and singular the said stock, and movable engines and materials during the continuance of the demise; and that, at the expiration or sooner determination of the term, the said stock, workmen's tools, and movable engines and materials, together with all improvements, additions, and reparations which should be made of, in, or to the same by the lessees, their executors, administrators, or assigns, at any time during the said term, should be delivered up to P. Jones, his executors, administrators or assigns, for his and their own use and benefit. Proviso for re-entry, if the rent should be in arrear thirty days, or in case the lessees should become bankrupt or insolvent, or any judgment should be entered up and execution issue thereon against them. Philip Jones afterwards died, and his interest vested in Mrs. Mary Jones. [*73]

It being deemed advantageous for the lessees to obtain a lease of the coal under an adjoining estate called the Bryn, the property of one John Jones, a verbal agreement was entered into for a lease of that coal, under which agreement the lessees were permitted to take possession; and it was provided by the agreement, that any erections or machinery to be put up by them should belong to the landlord at the end or determination of the term, and that in all respects the lease should conform to that previously granted. It was also provided that Mr. Jones should contribute to the erection of the engine and the sinking of a new pit. On the 7th of August, 1829, a memorandum of agreement was executed by the lessees and the defendant as the agent of John Jones, whereby it was agreed that the steam-engine, machinery, pumps, pipes, castings, chains, tram plates, and other materials in and about the pits the lessees were then sinking upon part of the Great Penllwyn Farm, near the Bryn, and all additions which should be thereafter made to the same, were then, and should at all future times, be held as the property of John Jones, subject to the use of them, on the part

of the lessees, for raising coal from the said part of Penllwyn Farm, upon all the terms, conditions, and covenants contained in the lease of Gelly Deg Colliery, which they (the lessees) held under his mother Mrs. Mary Jones. All the lessees except Coombs, having failed, the work was carried on by him alone: he committed an act of bankruptcy on the 7th of February, 1831, and a commission issued against him. The defendant was the agent both of John [*74] *Jones and Mrs. Mary Jones, and had taken possession of the stock, machinery, &c., on their behalf. It was proved to be a well-known usage to let old coal mines ready furnished, but virgin collieries always without furniture.

It was contended for the plaintiffs, that they were entitled to recover the value of the whole stock, as having been in the reputed order and disposition of the bankrupt at the time of his bankruptcy. On the other hand, it was argued for the defendant, that the Bryn Colliery and the Gelly Deg Colliery were one, and that the case fell within *Storer v. Hunter*, 3 B. & C. 368. The learned Judge told the jury that the usage proved of demising machinery with old collieries, the landlord retaining the right to it on the determination of the tenant's lease, rebutted the presumption of reputed ownership which would otherwise arise from the tenant's possession of the articles and machinery at the Gelly Deg Colliery; but this usage did not apply to the Bryn Colliery, which was only opened in 1828, and therefore as to the machinery and other articles there at the time of Coombs's bankruptcy, there was nothing to rebut the presumption of reputed ownership arising from the possession by the bankrupt; and the jury found first, that at the time of the bankruptcy, the bankrupt was the reputed owner of the machinery bought, and brought to the Bryn, including the steam-engine; secondly, that he was not the reputed owner of what was brought from the Gelly Deg to the Bryn, nor of what remained at the Gelly Deg. A verdict was then entered for the plaintiff, the amount to be fixed by an [*75] *arbitrator, but the learned Judge reserved leave to the defendant to move to reduce the verdict by the amount of the value of the steam-engine.

A rule nisi was obtained in last Michaelmas term for entering a nonsuit, on the ground that all the machinery at the Bryn belonged to the landlord; or to reduce the damages by the amount of the value of the steam-engine.

The Solicitor-General and *Maule* now showed cause. The learned Judge was clearly right as to the movables. (To this the Court assented.) Then, as to the steam-engine, that would pass to the assignees as part of the property of the bankrupt, because it was a fixture put up for trading or manufacturing purposes, and removable by the tenant at the end of his term, *Lawton v. Lawton*, 3 Atk. 13. At all events it was a tenant's fixture, and then it was in the order and disposition of the bankrupt within 6 G. 4, c. 16, s. 72. In *Ex parte Austin*, 1 Deacon & Chitty's Rep. 207, Sir George Rose said, that where fixtures are capable of removal by an outgoing tenant, without injury to the freehold, they are in the order and disposition of such tenant within the bankrupt law.

Ludlow, Serjt., *Richards*, and *Whately*, in support of the rule. According to *Horn v. Baker*, 9 East, 215 (recognised and acted on in the last case of *Clark v. Crownshaw*, 3 B. & Ad. 884), the steam-engine at the Bryn did not pass to the assignees. There it was held that certain stills fixed to the freehold, which [*76] had been leased, together with a *distill house, to the bankrupt, did not pass to his assignees under the description of goods and chattels within the 21 Jac. 1, c. 19, s. 11. In that case the Court took a distinction between those articles and certain other utensils which were not fixed, but merely stood upon frames or horses, which they held would pass to the assignees under the words of the statute. In *Storer v. Hunter*, 3 B. & C. 368, it was held that the possession by a tenant of certain fixed machinery, which he had taken on lease together with some collieries, and of new machinery which he erected to replace

some of the old, was not to be considered a reputed ownership within the meaning of the statutes of bankruptcy, either during the term, or, after he had forfeited it, between a judgment in ejectment by his landlord and the execution of the writ of habere facias possessionem. [PARKE, J. The Court there relied on a usage which was proved of demising the machinery with the collieries, the landlord retaining a right to it on the determination of the tenant's lease, for that usage rebutted the presumption of a reputed ownership arising from the possession of the articles. In this case the evidence is, that there is no such usage as to a virgin colliery like the Bryn.]

DENMAN, C. J. As to the steam-engine, I think this case must be governed by *Horn v. Baker*, 9 East, 215, and that the engine does not pass to the assignees.

LITLEDALE, J. I see no reason to deviate from the rule laid down in *Horn v. Baker*. The steam-engine is part of the freehold, and does not come under the *description of goods and chattels. Independently of that, property affixed to the freehold is not within the intent of the statute, because [*77] the possession of such property does not create a visible ownership in the bankrupt, so as to procure him credit.

PARKE, J. The steam-engine if affixed to the freehold clearly does not pass to the assignees, because it does not come within the description of goods and chattels in the 6 G. 4, c. 16, s. 72. This was determined in the case of *Horn v. Baker*, 9 East, 215. See *Trappes v. Harter*, 3 Tyrwhitt, 603; and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between landlord and tenant, and such as would not. But then it is said, that this steam-engine vested in the assignees as part of the property of the bankrupt. I think it was not his property; for it was agreed on the 7th of August, 1829, between the lessor and the lessee, that the steam-engine, machinery, &c., then were, and should at all future time be held as the property of the lessor, subject to the lessee's right to use them. The steam-engine, therefore, was the absolute property of Jones, the landlord, and the bankrupt had the mere right to use it during the term.

PATTESON, J., concurred.

Rule discharged as to entering a nonsuit; absolute for reducing the damages.

*CARR, Administratrix of JOSEPH WALKER, v. ROBERT ROBERTS. May 29.

[*78]

Declaration stated, that by indenture between defendant and J. W., reciting that defendant for certain considerations had agreed to pay off certain mortgages and debts of J. W., defendant covenanted to and with J. W. to save, protect, defend, keep harmless, and indemnify J. W., his heirs, executors, administrators, &c., from the payment of the said debts, and from all actions, &c., in respect of them. Breach, that 500*l.* of an annuity, for payment of which J. W. had bound himself, his heirs, executors, and administrators, became in arrear, and remained so after J. W.'s death; and that defendant did not pay the same, nor protect or indemnify J. W., his executors and administrators, &c., by reason whereof the annuity bond became forfeited, and the grantee recovered against the plaintiff, administratrix of J. W., and had judgment for 20*l.* the amount of assets admitted to be in hand, and for the residue, judgment of assets quando:

Held, that, looking to the whole of the deed declared upon, there appeared a covenant by the defendant, not only to indemnify, but to pay the debt.

Semble, per PARKE, J., and held by PATTESON, J., that if the express covenant to protect and indemnify had stood alone, a sufficient breach of that covenant appeared. (LITLEDALE, J., dubitante.)

Held, that the plaintiff might recover the whole arrears, for which she was liable, as administratrix, to the grantee of the annuity, though she had only paid a part.

COVENANT. The declaration stated, that Joseph Walker, the intestate, in his lifetime, in consideration of 600*l.*, became bound to one Anne Smith in the penalty of 1200*l.*, for the payment by him the said J. W., his heirs, executors,

and administrators, of an annuity of 100*l.* to the said Anne for the term of her natural life. That afterwards, by indenture of bargain and sale, made between the intestate of the first part, the defendant of the second part, and William Roberts and John Roberts of the third part, reciting that the said Joseph Walker was seized of, and entitled to, certain freehold and other premises, described in a schedule to that indenture, but that the same were subject to divers mortgages, incumbrances, and payments; and that the said J. W. was indebted to divers persons in certain sums in another schedule also enumerated; and that J. W. had proposed to convey the said premises to the defendant, and that he should, in consideration thereof, pay the said mortgages and sums of money, and also an annuity of 200*l.* to J. W. for his life, which proposal the defendant had agreed to *comply with:—It was witnessed, that, in pursu-

[*79] *ance of the agreement, &c., J. W. granted, bargained, sold, and confirmed to the defendant the said freehold premises (subject to the said incumbrances as far as they were affected by them), to the defendant in fee; and also bargained, sold, assigned, transferred, and set over the leasehold premises to him, his executors, &c., for all the terms and interest which J. W. had therein, subject as before. And the defendant covenanted "that he, the said defendant, his heirs, executors, or administrators, should and would from time to time, and at all times thereafter, well and sufficiently save, protect, defend, keep harmless and indemnified the said Joseph Walker, his heirs, executors, administrators and assigns, and his and their goods and chattels, estates, and effects whatsoever and wheresoever, from and against the payment of the same several sums of money mentioned in the schedule to the said indenture, or any of them, and from and against all actions suits, claims, or demands, for or upon account of the same or any of them." The declaration then averred, that the annuity of 100*l.* to Anne Smith was mentioned in the second schedule to the indenture, and was, and from thenceforth continued to be, a sum of money, against which the defendant by the said indenture so covenanted to save, protect, defend, keep harmless, and indemnify the said J. W., his executors, &c.: that the defendant by virtue of the said bargain and sale, and of the statute for transferring uses into possession, became seized and possessed of the above-mentioned premises respectively: that afterwards, to wit, in December, 1829, in the lifetime of Anne, 500*l.* of the annuity became, and was, and still is, in arrear: that, in Novem-*

[*80] *ber, 1829, the intestate *died and the plaintiff took out administration, of all which premises the defendant had notice: yet the defendant did not, nor would pay, or cause to be paid, the said arrears of the said annuity, to wit, the sum of 500*l.*, or any part thereof, to the said Anne, or well and sufficiently save, protect, defend, keep harmless, and indemnified the said Joseph Walker, his executors or administrators, and his and their goods, estates, and effects from and against the payment of the said sum of money so mentioned in the said schedule, and of, from, and against all actions, suits, claims, and demands for or upon account of the same, but wholly neglected and refused so to do, and by reason and on account thereof the said bond became forfeited, and an action accrued thereon to the said Anne against the plaintiff as administratrix, and that the said Anne thereupon sued the present plaintiff as administratrix, and obtained judgment for 1200*l.*, and 7*l.* damages; the sum of 20*l.*, part thereof to be levied of the goods acknowledged by the present plaintiff to be then in her hands to be administered, and the rest of assets quando acciderint: and that the present plaintiff, as administratrix, was obliged to pay the said 20*l.*, and incurred costs to the amount of 50*l.* in defending the action. The defendant pleaded, 1st, That he did pay the arrears, and did indemnify, &c. 2dly, That if the plaintiff was damnified, it was of her own wrong. 3dly, Ne unques administratrix. The plaintiff on a former trial obtained a verdict for 34*l.* but on motion for an increase of damages, or for a new trial, the latter was granted, 2 B. & Ad. 905. At the second trial, before DENMAN, C. J., at the Middlesex sittings after Michaelmas term, 1832, *the plaintiff had a verdict for*

[*81] 534*l.*; but *Coltman*, for the defendant, obtained leave to move that this

verdict might be reduced to 34*l.*, on the ground that the covenant declared upon was only to indemnify, and it did not appear that the plaintiff had been actually damnified to a greater amount than 34*l.* A rule nisi having been granted,

The Solicitor-General and *White* now showed cause. The plaintiff is entitled to recover the whole arrears of the annuity. It is contended on the other side, that the intestate's estate being insolvent (which is assumed as the consequence of the assignment made by him), the administratrix cannot be compelled to pay those arrears, and consequently, has no interest upon which the present action can be grounded, except as to the sum of 34*l.* That is assuming that her only claim is to indemnify for loss actually sustained. But the defendant's covenant was, in effect, to pay, as well as to indemnify. The Court will collect this from the whole of the contract between the parties, as set out in the instrument declared upon. So in *Sampson v. Easterby*, 9 B. & C. 505, an indenture of demise recited that the lessee had entered by virtue of a former agreement, had pulled down a smelting-mill on the premises, and had engaged to build a new one; and in a subsequent part of the deed, the lessee covenanted to keep in repair the said mill engaged to be erected by the defendant; but there was no direct covenant to *build* the mill. The Court, however, held, that the recital of an agreement to build, followed by the express covenant to *maintain the mill to be erected, made a sufficient covenant in law to erect the building; and they relied upon *Saltoun v. [82] Houstoun*, 1 Bingh. 433, where the same mode of construction was adopted. [PARKE, J. Any words of the deed by which you can establish an agreement and connect it with the parties, will make a covenant.] Besides, the administratrix is damnified, within the meaning of the covenant to indemnify by the judgment of assets quando.¹

Coltman, contra. It cannot be collected here that anything more was intended between the parties than an indemnity to the testator against any mischief that might happen to him in respect of the annuity and other debts. The plaintiff herself has so treated it; for the declaration, after setting out the prior parts of the deed, states that the defendant *did thereby* covenant "to indemnify;" not to pay his debts. In *Saltoun v. Houstoun*, 1 Bingh. 433, the declaration stated the defendants' covenant according to the effect which the plaintiffs contended it ought to have; and the deed, when set out on oyer, was held to bear out that statement. Here, if the deed had been set out in its own words, it might have been contended that the effect was that which the plaintiff now seeks to give it; but she has not done so, and has stated the effect differently in her pleading. Could it be contended that this action would have been maintainable before the plaintiff was sued? [PARKE, J. It might have been so contended, if the time for payment of the annuity had expired, and the defendant had not paid it. *The covenant is not to indemnify merely, but to "save, protect, defend, and keep harmless." It is not every cove- [83] nant to a testator or intestate, not even every personal covenant, that can be sued upon by an executor or administrator. There must be a damage to the personal estate. Non constat here that the personal estate would be charged. In the deed granting this annuity, the intestate charges not only his administrators but his heirs; and the defendant's covenant is to indemnify the heirs as well as the administrators. It would be hard, therefore, if the defendant were liable to the administratrix before she had actually paid the arrears; for if she recovers from him, she may keep the money, or apply it to other purposes, and in the mean time the annuitant may have recovered from the heir, who may then likewise proceed against the defendant for an indemnity.

LITTLEDALE, J.² I am of opinion that the plaintiff is entitled to recover the

¹ LITTLEDALE, J., observed, that the judgment as stated in the declaration appeared imperfect, as there ought to have been an assessment of damages under the statute.

² DENMAN, C. J., had gone to attend the Privy Council.

whole sum claimed. (His Lordship then read the parts of the declaration setting out the annuity deed, and the recital in the indenture between the plaintiff and defendant, of an agreement by the latter to pay the mortgages and sums scheduled.) So far it appears that the defendant had agreed to pay the debts mentioned in the schedule, of which that in question is one. He then goes on to covenant, that he will at all times "well and sufficiently save, protect, defend, keep harmless, and indemnify," Joseph Walker, his heirs, executors, and administrators, against the payment of the sums of money mentioned in the [84] *schedule, and all actions, suits, claims, or demands on account of them.

As far as the words of this clause go, if there were nothing more, it might be a doubt whether the plaintiff was entitled to recover more than the 20*l.* and the costs incurred by the plaintiff; but the former part of the instrument clearly shows that there is an agreement, in effect, that the defendant shall take this debt, among others, upon himself. That is, therefore, the defendant's covenant. Then an action is brought against the plaintiff for arrears of the annuity to the amount of 500*l.*, and judgment is given against her. That arises from the defendant not discharging the arrears, as it was his duty to do; and he is bound to put her in a situation to pay that which, by his default, she has become liable to pay. To a certain extent, namely, 20*l.* and her costs, she has been actually damaged. The defendant suffers no prejudice in being called upon to pay the whole amount: it is his duty to pay it; and it makes no difference as to that, whether she applies it in discharge of the debt or not.

PARKE, J. The Court, in effect, decided this point when they ordered a new trial on payment of costs; it would else have been nugatory to grant such a rule. There are, in fact, two covenants in this deed;—to pay the debts, and to indemnify the testator and his representatives. I doubt if, upon the second alone, this action was not maintainable, for by that the defendant was bound to protect and save harmless the covenantees. But, at all events, there is a breach of the first covenant, and it is well assigned; and as covenants which relate to the personal estate go (with some few exceptions) to the personal representatives, [85] *it is clear that the administratrix in this case was entitled to sue for, and recover, the whole sum demanded. The intestate might, if a judgment for the arrears had been recovered against him; so, therefore, may the administratrix. This case is, in principle, like *Lethbridge v. Mytton*, 2 B. & Ad. 772, see *Huntley v. Sanderson*, 1 Cro. & M. 467.

PATTESON, J. The express covenant in this case is not only to indemnify, but to protect; and a sufficient breach of that engagement is alleged, when the plaintiff states that the defendant did not protect the covenantees, and by reason thereof an action was brought, and judgment recovered, against the administratrix, to the extent of all the assets she had. I do not mean, however, that I entertain any doubt as to there being also a breach of a covenant by the defendant to pay the debt. As to the amount of damages, I think the plaintiff is entitled to the whole sum claimed. The argument to the contrary is only this, that if she recovered it, she might not make a proper use of it.

Rule discharged.

[86] *DOE dem. *KNIGHT v. NEPEAN*, Bart.

A person who has not been heard of for seven years, is presumed to be dead, but there is no legal presumption as to the time of his death. The fact of his having been alive or dead at any particular period during the seven years, must be proved by the party relying on it.

EJECTMENT for copyhold premises. At the trial before TAUNTON, J., at the Dorsetshire Summer assizes, 1832, it appeared that the lessor of the plaintiff claimed the premises by title accruing on the death of Matthew Knight. Matthew went to America in 1807, and was never heard of after that year. The lessor of the plaintiff was then of age. The ejectment was brought in 1832,

and the question at the trial was, whether or not this action was barred by statute of limitations, 21 Jac. 1, c. 16, s. 1.¹ It was admitted that Matthew must be presumed to have died, more than seven years having elapsed since he was heard of. If that presumption was considered as referable to the time when the last intelligence was received of him, the ejectment was brought too late; but if it arose only when seven years had elapsed from the receipt of such intelligence, the action was in time. The learned Judge was of the latter opinion, and directed a verdict for the plaintiff, giving leave to move to enter a nonsuit. In Easter term last,

Coleridge, Serjt., and *Erle* showed cause.² It is admitted that the lessor of the plaintiff must prove his title to have originated within twenty years. In this *case the party on whose death the title accrued, was shown to have been alive in 1807, and must therefore be presumed to have lived till [*87] within twenty years of the bringing of this ejectment; that is, till 1814. One of those conclusions which the law invariably draws from certain premises, and which are called legal presumptions, is the continuance of life in a person once known to be living, till the contrary appear: 2 Stark. on Ev. 261, 2d ed.,³ citing *Wilson v. Hodges*, 2 East, 312, where Lord ELLENBOROUGH refers to *Throgmorton v. Walton*, 2 Roll. Rep. 461, for the same point. The presumption as to this fact has no definite limit except that which has been laid down by analogy to the express provisions of certain acts of parliament (namely, the statute against bigamy, 1 Jac. 1, c. 11, s. 2,⁴ and the statute 19 Car. 2, c. 6),⁵ and which makes the presumption cease after seven years. But for the analogy *drawn from these acts of parliament, the present ejectment could not be supported at all; or at least it would be for the jury to say whether [*88] or not Matthew Knight was dead. Referring, then, to these statutes, the effect of the rule to be deduced from them clearly is, that the presumption of life is to be cut down to seven years, but continues to the last moment of that period; and the death cannot (in default of evidence) be carried back to an earlier date. Otherwise it must be contended that the party who was supposed to be living at every point of time till the seven years were complete, must, after that period elapsed, be presumed to have been dead ever since the seven years commenced. In the case of bigamy, indeed, a different reckoning prevails; for if the husband or wife has not been heard of for seven years, a second marriage during that period is presumed to have taken place after the party's death; but that is a supposition in favor of innocence; to conclude otherwise would be presuming a crime, which the law will not do, see *Rex v. Twynning*, 2 B. & A. 386. In *Doe dem. George v. Jesson*, 6 East, 85, Lord ELLENBOROUGH said (speaking of a party who had gone abroad and never since been heard of): "As to the period

¹ Which enacts, "that no person or persons shall at any time hereafter make any entry into any lands, &c., but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same."

² Before DENMAN, C. J., LITTLEDALE, J., PARKER, J.

³ And see p. 681, note n. *Ibid.*

⁴ Which provides, that nothing in that act "shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other, by the space of seven years together, in any parts within his Majesty's dominions, the one of them not knowing the other to be living within that time."

⁵ Entitled, "An Act for Redress of Inconveniencies by Want of Proof of the Deceases of Persons beyond the Seas or absenting themselves, upon whose Lives Estates do depend." Sec. 2 enacts, "that if such persons for whose lives such estates have been or shall be granted as (in the preamble is) aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient or evident proof be made of the lives of such person or persons respectively, in any action commenced for recovery of such tenements by the lessors or reversioners, in every such case the person or persons upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements by the lessors or reversioners, their heirs or assigns, the judges before whom such action shall be brought, shall direct the jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead."

when the brother might be supposed to have died according to the statute" (referring to 19 Car. 2, c. 6, and to 1 Jac. 1, c. 11), "the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that he was [*89] dead at the *end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him." There the time of the death was left to the jury; but no objection seems to have been taken on that account. The doctrine of Lord ELLENBOROUGH in that case was relied upon by the Court in *Doe dem. Lloyd v. Deakin*, 4 B. & A. 433. Where that learned Judge says that the presumption of life "ends at the expiration of seven years," he must be taken to mean that it continues till then. The test of the present case is, whether an ejectment could have been brought on the demise of the lessor of the plaintiff, more than twenty years ago. That would have been within the seven years: the plaintiff therefore would have been nonsuited. Can it then be said that this action is barred by the statute, as being brought twenty years after the title first accrued? Suppose a term of seven years had been granted, to commence on the death of Matthew Knight. According to the argument that must be used on the other side, the term would commence and expire at the same instant.

Follett, contra. It is not to be presumed that the death took place either at the beginning or the end of the seven years. The fallacy on the other side lies in confounding presumption of the fact of the death with presumption as to the time of the death. When a party has not been heard of for seven years, the fact to be presumed from such negative proof is, that he is *dead*; but those who found a right upon his having died or been alive at a particular time within [*90] the seven *years, must establish that affirmatively by evidence. Unless Matthew Knight was alive within twenty years, the lessor of the plaintiff had no right to demise. Has he then proved that fact? The only conclusion that arises from the evidence is, that at a certain period in 1814 Matthew Knight was dead. If the presumption of law were always that the party lived till the end of the seven years it would, in a great majority of cases, be contrary to the fact. Suppose a legacy were left to C. if he survived B. and B. went abroad, and was not heard of for seven years: must it, under any circumstances whatever, be presumed that C., unless he lived beyond the seven years, did not survive B.? or from what time will the legacy be considered as having become due to C.? and may not this be determined by the general state of facts in the case? In *Norris v. Norris*,¹ where 100% had been left to Richard Norris, who went beyond sea, saying he should not return in seven years, and who, at the end of five years, had not been heard of, his brother, at the expiration of the five years, took out administration, and exhibited a bill in Chancery against the executor for the 100%, suggesting that Richard was dead; and he obtained a decree for the legacy, giving security for the repayment, if Richard should return. There the Court clearly was of opinion, that a party, if not heard of for seven years, might be presumed to have died within that time. Suppose a legacy left to A., then to B., if he survive A.—if not, then over to some other: B. goes abroad, and is not again heard of; A. lives more than six years after. Is it to be presumed that B. lived some months longer? Or [*91] suppose a *testator devised to a party, who went abroad, and was not again heard of. If the testator lived nearly seven years after the last tidings were received of the devisee, it must, according to the argument on the other side be a presumption that the devisee outlived the testator; and such a presumption as this would determine the line in which an estate should pass. In *Rowe v. Hasland*, 1 W. Bl. 405, Lord MANFIELD, after observing that, in cases of pedigree, it is sufficient to show that a person has not been heard of for

¹ Reports temp. Finch, 419. See *Dixon v. Dixon*, 3 Bro. C. C. 510, and Mr. Belt's notes.

many years, to put the opposite party upon proof that he still exists, goes on to observe, that "what is done on such a trial is no injury to the man or his issue, if he should afterwards appear and claim the estate." If the fact of death be erroneously presumed, the error may be repaired; but not so a wrong presumption as to the time, which may send an estate into a different line of descent.

Many cases have arisen in the equity, common law, and ecclesiastical courts, where it would have been important to settle the time of a death—as, for instance, where persons have been lost in the same ship; but our courts have never recognised any presumption upon this subject. By the French Civil Code,¹ the presumptions in the case of persons perishing together are precisely laid down, with reference to the ages, and other circumstances; but our law has no such rules. The inference, if any arise, must be drawn from the particular facts, as in *Broughton v. Randall*, Cro. Eliz. 503, cited 2 Bac. Abr. 721; *Taylor v. Diplock*, 2 Phillimore's Rep. 261; *Mason v. Mason*, 1 Mer. 308; In the goods *of Selwyn, 3 Hagg. Ecc. Rep. 748, are instances of the manner in which such cases have been treated by the Courts. They [*92] have never decided upon mere presumption, but have considered that the fact of survivorship was to be proved by that party whose claim accrued by it. A similar question of this kind arose in the case of a woman and her housekeeper, who were murdered at the same time at Portsmouth, the mistress having left the housekeeper the whole of her property. [PARKE, J. The difficulty of proof there would operate against the person who claimed under the servant, according to the doctrine in *Taylor v. Diplock*, 2 Phillimore, 261.] The like rule must prevail here. A similar case (where persons were lost at sea) was before this Court in 1831;² but the rule was enlarged, that the parties might come to a compromise. In no instance have the Courts presumed the time of death. In *Watson v. King*, 1 Stark. N. P. C. 121, an action of trover, one Maxwell, who had given a power of attorney to J. S. to sell the property in question for him, sailed from Jamaica in March, 1814. The ship parted from her convoy, in bad weather, on the 9th, and neither her nor Maxwell were again heard of. There was also a heavy gale on the 20th. On the 8th of June in the same year J. S. sold to the defendant under the power; and at the trial in 1815, the question was, whether, before that time, the power had not been revoked by Maxwell's death? Lord ELLENBOROUGH (referring to the rule usually adopted in cases of insurance, that a vessel proved to have sailed and not *to have been heard of for two or three years, may be considered as lost) [*93] thought it might be assumed here that the vessel was lost, and that Maxwell had perished, but left it to the jury whether or not he was dead on the 8th of June. They found for the plaintiff, and the Court refused a rule nisi for a new trial. [DENMAN, C. J. The onus of proving that Maxwell died before the 8th lay upon the party who relied on that fact; and it was considered to be proved.] There, as in this case, it might have been contended, that, the presumption of the loss arising at the end of the two or three years, it could not be assumed that the vessel had been lost before that period expired. But the presumption really was this: that she would have been heard of within that time, if she had not been lost; not that she was lost at the end of that time. And it is the same as to a person's death. The defendant here does not rely upon any presumption that Matthew Knight is not dead, or that he died at one time or another. He merely stands in the situation of a party admitting that Matthew Knight was dead when the action was commenced. The plaintiff (in order to defeat an adverse possession of twenty-six years) has to show that his title accrued, by Matthew's death, within twenty.

Cur. adv. vult.

¹ Liv. III. tit. 1, c. 1. The articles alluded to are cited in a note to *Mason v. Mason*, 1 Mer. 310.

² See also the case of the representatives of General Stanwix (in Chancery, 1772). Some account of it is given in Mr. Fearn's *Posthumous Works*; and see other notices of it cited, 2 Stark. on Evid. 26, note m.

DENMAN, C. J., in this term delivered the judgment of the Court. The case of Doe v. Nepean, which was argued before us during the last term, was this: the lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. The lessor was of age in 1805. In 1807, Matthew Knight sailed to America, and was never afterwards heard of, and there was [94] no other evidence of his death. *The ejectment was brought in 1832. On the trial before my Brother TAUNTON, that learned Judge thought that the presumption of the death of Matthew Knight arose in 1814, and the ejectment had been brought in time; but he reserved the point for the consideration of the Court, and gave liberty to move to enter a nonsuit. We are of opinion that the rule should be made absolute.

There is no doubt that the lessor of the plaintiff must recover by the strength of his own title; and in order to do so, must prove that he had a right to enter on the lands sought to be recovered, within twenty years before the ejectment brought; and consequently as the presumption is, that a person once alive continues so until the contrary is shown, the lessor of the plaintiff was bound to prove, first, the death of Matthew Knight; and, secondly, that it took place within twenty years before the ejectment brought.

The absence of Matthew Knight abroad for seven years, without having been heard of, is evidence from which a jury might reasonably presume, and in this case have properly presumed, his death. This period has been adopted as the ground for such presumption in analogy to the statutes of 1 Jac. 1, c. 11, relating to bigamy, and 19 Car. 2, c. 6, as to the continuance of lives on which leases were held; and the lessor of the plaintiff clearly proved the first of the points necessary to maintain his case.

But such absence abroad for seven years, though it naturally leads the mind to believe that the party is dead, and therefore is sufficient evidence to warrant a presumption of fact that the party was dead at the end of seven years, certainly raises no inference as to the exact time of the death; and still less that

[95] such death *took place at the end of seven years. Absence for that period has no tendency to induce the belief that life has ceased at that precise time; and no case has been cited, nor do we know of any, in which it has been laid down as a rule of law, that such a presumption ought to be made, or in which, in point of fact, any such effect has been given to evidence of absence abroad: and, on the other hand, one case was referred to in which Lord ELLENBOROUGH held, that though the loss of a vessel in which a person sailed might be presumed after having sailed on a foreign voyage for two or three years without having been heard of, and so it might be taken that the person who sailed on board was then dead, the time of death was to be decided upon by the jury according to the special circumstances. The case was that of *Watson v. King*, 1 Starkie N. P. C. 121.

We are, therefore, of opinion that the lessor of the plaintiff, who gave no other evidence of Matthew Knight's death than his absence, failed in establishing a second requisite, that his death took place within twenty years before the ejectment brought.

The difficulty of proving the precise time of death in this and similar cases, at first sight appears to work a hardship on the lessor of the plaintiff, who cannot bring his ejectment until after the seven years have expired, for until then the death is not proved, and yet he must bring it within twenty years from the time that his title accrued by the death of the *cestui que vie*; and, therefore, he has not practically a period of twenty years wherein to bring his ejectment. But this is really of little moment; the claimant will always be safe in commencing

[96] his action within twenty years after the *departure abroad; and a similar hardship will often occur where a party entitled is ignorant of his rights during a part of the time when the statute of limitation is running. On the other hand, if we were, for the sake of preventing such an inconvenience, arbitrarily to lay down a rule that seven years' absence abroad (the party not having

been heard of), was *prima facie* evidence of his death at the end of the seven years, such a rule would in the very great majority of cases, nay in almost every case, cause the fact to be found against the truth; and, as the rule would be applicable to all cases in which the time of death became material, would in many, be productive of much inconvenience and injustice.

We therefore think that the rule should be made absolute. Rule absolute.

GIBSON *v.* WINTER and Another. *May 22.*

A trustee suing as a plaintiff in a court of law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the cestui que trust, who uses his name; And, therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action.

COVENANT on a policy of assurance under seal, executed by the defendants, two of the directors of the Indemnity Mutual Marine Assurance Company, wherein, after reciting that the plaintiff had represented to the defendants that he was interested in, or duly authorized as owner, agent, or otherwise, to make the assurance, and had covenanted to pay the premium, it was witnessed, that in consideration of the premises, and of *80*l.*, the defendants covenanted with [97] the plaintiff that the capital stock and funds of the company should be liable to pay and make good all such losses as might happen to the subject-matter of that policy in respect of the sum of 4000*l.* thereby assured, which assurance was thereby declared to be upon goods laden on board the ship called *The Courier*, lost or not lost, at and from Rio de Janeiro to a market in Europe. The usual clauses of the policy describing the risks, &c., were then set out. The interest in the goods was averred to be in one Le Quesne, and a loss by the perils of the sea. Breach, nonpayment of the sum of 4000*l.* by the defendants. Plea, (among others) that the defendants within a reasonable time after the loss, and before the commencement of this suit, to wit, on, &c., at, &c., paid to the plaintiff, out of the capital stock and funds of the company, the said sum of 4000*l.* in the said policy of assurance mentioned, according to the tenor and effect, true intent and meaning of the said policy: and upon this issue was joined. At the trial before Lord TENTERDEN, C. J., at the London sittings, after Hilary term, 1833, the following appeared to be the facts of the case:—The policy was effected on goods the property of Mr. Le Quesne of Jersey, who employed the plaintiff and his partner, one Poindestrie, insurance brokers in London, for that purpose. A loss having occurred, a partial adjustment to the amount of 3000*l.* took place in 1829, between the plaintiff and defendants, the defendants then knowing that Le Quesne was the party interested in the goods insured. The defendants on that occasion gave credit to the plaintiff for 1524*l.* 9*s.* due from him to them for premiums of insurance on ships and property of other persons, in part payment of this *3000*l.*, and paid the balance, 1475*l.* 11*s.*, in cash to the plaintiff. On the 17th of July, the plaintiff informed Le Quesne, [98] by letter, that he had obtained a settlement of 3000*l.* on account, which sum would appear to the credit of his, Le Quesne's account, at two months from that date. Le Quesne, in his answer, said, "The same is placed in due conformity." In the first week of October, 1829, the plaintiff became bankrupt, without having paid over to Le Quesne either the amount received by him or that allowed in account by the defendants, and this action was in fact brought by Le Quesne in the name of the plaintiff, to recover from the defendants 1524*l.* 9*s.*, on the ground that the plaintiff was authorized to receive the amount of the loss in

money only, and that a payment in any other way was not binding on his principal. Lord TENTERDEN was of opinion that that general rule ought to prevail, unless Le Quesne had, in this case, recognised and adopted the mode of payment; and observed that if the mode of payment had been made known to Le Quesne, and he had not, within a reasonable time, objected to it, he must be taken to have adopted it; that the question was, whether he did know it. Gibson, his Lordship observed, in his letter of the 17th of July, informed Le Quesne only that he had obtained an adjustment to the amount of 3000*l.*, not that he had received actual payment of that sum, and that that sum would, at the end of two months, be placed to his, Le Quesne's credit: Le Quesne, in his answer, after advertising to the adjustment, said, "the same is placed in due conformity." And he told the jury to find for the defendants if they thought Le Quesne meant to give credit for 3000*l.* to Gibson, and to accept him as his debtor instead of the defendants. The jury found for the defendants.

[*99] *A rule nisi was obtained for a new trial, on the ground that Le Quesne's assent was not proved, and that although in general where an agent is employed to receive money of a debtor, and the debtor pays him money, the debtor is discharged; yet if the debtor does not pay in money; but settles the account by writing off so much money as may be due from the agent to him, the latter is not discharged, *Todd v. Reid*, 4 B. & A. 210; *Russell v. Bangley*, *Ibid.* 395; *Bartlett v. Pentland*, 10 B. & C. 760; *Scott v. Irving*, 1 B. & Ad. 605.

The Solicitor-General, Sir *J. Scarlett*, and *Tomlinson* in the last term showed cause.¹ Though it be true that a broker has no authority to settle on any other terms than those of payment in money, yet if he receives payment in another mode, as by set-off in a general account with the underwriter, and the assured afterwards recognises and adopts that mode of payment, he cannot afterwards repudiate it. Here, the jury have found that there was such adoption, and there was ample evidence to warrant that finding. The plaintiff acted as Le Quesne's agent in effecting insurances for several years; he informed him, on the 17th of July, that he had obtained a settlement of 3000*l.* on account of the loss, and that that sum would appear to his, Le Quesne's credit, at two months after date. Le Quesne, in his answer, assents to that, by his stating "that the 3000*l.* shall be placed in due conformity," in other words, that he will debit Gibson with that sum at the end of two months. [PARKER, J. That might be an assent, if Le Quesne had had notice [*100] of the mode in which payment had been made to Gibson; *but he was not informed that any payment had been made, and much less that it was made by set-off in account.] Assuming that the finding of an assent cannot be supported, the cases cited in moving for the rule do not apply; for, in those, the actions were brought in the name of the assured, and not of the broker, and the assured disputed the authority of the broker to bind them; but here the action is brought in the name of the broker, and he attempts to repudiate his own act, and claims to be permitted to say that a payment which he himself has received is no payment at all. Any act done, or admission made by a party on the record, is evidence against him, even though he sue as trustee for another. *Banerman v. Radenius*, 7 T. R. 663. An admission by the obligee of an assigned bond (by whom the action must be brought), is evidence to bar the action: *Craib v. D'Aeth*, *Ibid.* 670, note (b). The issue raised on the record is, whether the sum mentioned in the plea was paid to the plaintiff; and the fact of payment to the plaintiff was made out.

R. V. Richards, contrâ. The issue is, whether payment was made according to the tenor and effect of the policy. It is consistent with the policy that Gibson may have effected it as agent, and that payment may have been made to him (as in fact it was) in that character. Then this payment to him by set-off in account, was not one which he had authority to receive as agent, and therefore not a payment made according to the tenor and effect of the policy. Secondly, there was no evidence to warrant the finding of the jury that Le Quesne had

¹ Before DENMAN, C. J., LITTLERDALE, J., and PARKER, J.

ever assented to the payment by set-off in account between the defendants and Gibson, for there *was no proof that Le Quesne was ever informed that the payment was made to Gibson in that mode. [PARKE, J. The difficulty [*101] is, that Gibson is the party to the record. Is there any authority for saying that a plaintiff, who has received payment in a mode satisfactory to himself, can be permitted afterwards to say that it is no payment?] In *Carr v. Hinchliffe*, 4 B. & C. 547, to assumpsit for goods sold and delivered, the defendant pleaded that the goods were sold and delivered, to the defendant by A., the factor and agent of the plaintiff, with the privity of the plaintiff as and for the goods of A., and that the defendant did not know that the goods were not the property of A.; that at the time of the sale and delivery, A. was and still is indebted to the defendant in more than the value of the goods, and that the defendant is ready and willing to set off and allow to the plaintiff the value of the goods, out of the moneys so due and owing from A.; and it was held, on special demurrer, that the plea was good. [PARKE, J. There, the principal was the plaintiff on the record; here, the agent is.] The covenant being with him, he is the only person who could sue on it, and the question is, whether, though a plaintiff sue in fact for the benefit of another, anything which would be matter of defence against him, the party on the record, is an answer to an action. *Cur. adv. vult.*

DENMAN, C. J., in the course of this term, delivered the judgment of the Court, and, after stating the facts of the case, proceeded as follows:—

On the trial before the late Lord TENTERDEN, at the *sittings after Trinity term, the defendant had a verdict, on the ground that Le Quesne [*102] had acquiesced in, and adopted the mode of, payment to the plaintiff, and was bound by it. Mr. Pollock moved for a new trial in the following term:—The case was afterwards fully argued before us; and if it had depended upon the propriety of the verdict we should have thought it right to submit the case to the consideration of another jury, for we are by no means satisfied that there was sufficient evidence of adoption by Le Quesne, as he was never correctly informed of the real state of facts.

Another objection was, that as the covenant was with Gibson, and he only could sue upon it, payment to him, in any mode by which he was bound, would be a good payment as against Le Quesne; and that as the settlement with the plaintiff bound him, it equally bound Le Quesne suing in his name. And upon full consideration, we are of opinion that this objection is valid.

The plaintiff, though he sues as a trustee of another, must, in a court of law, be treated in all respects as the party in the cause: if there is a defence against him, there is a defence against the cestui que trust who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself.

The following are the authorities which appear to us fully to warrant this position. In *Bauerman v. Radenius* (in which the question was, whether the admission by the plaintiff, who was clearly a trustee for another, could be received in evidence), Lord KENYON says (7 T. R. 668): “If the question that has been made in this case had arisen before Sir MATTHEW HALE, or Lords HOLT or *HARDWICKE, I believe it would never have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered [*103] third persons as parties to the cause. If the plaintiffs may be taken to be off the record, then they may be examined as witnesses; and yet it is not pretended they could have been examined. I cannot conceive on what ground it can be said that they may be considered not as the parties to the cause for the purpose of rejecting their admissions, and yet as the parties to the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that an admission made by the plaintiff on the record is admissible evidence.” So a relief by the plaintiff on the record suing for the benefit of another, was decided, in a case before Lord MANSFIELD (cited in *Bauerman v. Radenius*, 7 T. R. 666), to be a good answer at law, and LAWRENCE, J. ex-

presses the same opinion in the case last mentioned; and courts of law have been in the habit of exercising an equitable jurisdiction on motion, and setting such releases aside, or preventing the defendant from pleading them, as in *Legh v. Legh*, 1 Bos. & P. 447; *Payne v. Rogers*, Doug. 407; *Jones v. Herbert*, 7 Taunt. 421; and *ABBOT, C. J.*, in *Scaife v. Johnson*, 3 B. & C. 422; and many other cases, which practice shows very clearly the opinion of the Courts, that, but for their equitable interference, the real plaintiff would be barred. In *Craib v. D'Aeth*, 7 T. R. 670, note (b); the circumstances of fraud upon the real plaintiff were replied; but no objection appears to have been taken on this ground, and the general practice is undoubtedly to apply specially to the Court. Again, [*104] in **Alner v. George*, 1 Campb. 392; where trustees, for the benefit of creditors, sued in the name of the insolvent, Lord ELLENBOROUGH held that a receipt in full for the amount by the plaintiff, was an answer to the action; and his Lordship said: "If a motion had been made in term time to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look to the strict legal rights of the parties upon the record; and there can be no doubt, that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released the action; and it is impossible to admit evidence of his attempting to defraud others."

In *Jones v. Yates*, 9 B. & C. 539, Lord TENTERDEN says: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person;" and therefore it was held, that where one of two partners disposed of some of their effects in fraud of the other, both could not sue in a court of law to recover for them, in an action of trover.

Upon principle, and upon these authorities, we are of opinion, that if there be a good defence against the plaintiff, there is a good defence against *Le Quesne* suing in his name.

The only remaining question is, whether there is a good defence against the plaintiff.

Now, if the plaintiff was suing for himself, it is clear that the plea of payment would have been proved, for [*105] *credit given to the plaintiff by mutual agreement for the amount of the premiums, was equivalent to payment by the plaintiff to the defendants of that amount on account of the premiums, and a payment by the defendants to the plaintiff of the same sum on account of the loss.

We therefore think, that the defendants were no longer liable, but as this point, upon which we decide the case, was intended to have been reserved, if necessary, by Lord TENTERDEN, in which case a nonsuit would have been directed, we think that a similar rule should be now pronounced.

Nonsuit to be entered.

GRAVES v. WELD. June 12.

Tenant for a term determinable upon a life, sowed the land in spring, first with barley, and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing: Held, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which or-

dinarily repays the labor by which it is produced within the year in which that labor is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley.

TROVER for clover, the clover hay, and clover seed. Plea, not guilty. At the trial before **TAUNTON, J.**, at the Dorsetshire Summer Assizes, 1832, a verdict was found for the plaintiff, subject to the following case:—

The plaintiff being possessed of a close under a lease for ninety-nine years, determinable on three lives, in the course of the Spring of 1830, sowed it with barley; and in May of the same year, he sowed broad clover seed with the barley. The last of the three lives expired *on the 27th of July, 1830, [*106] the reversion then being in the defendant. In the autumn of 1830, the plaintiff took the crop of barley, in the mowing of which a little of the clover plant which had sprung up was cut off and taken together with the barley. In January, 1831, the plaintiff gave up the possession of the close to the defendant. According to the usual course of good husbandry, broad clover is sown about April or May, and the crop is fit to be taken for hay about the beginning of June, in the following year. The clover in question was cut by the defendant about the end of May, 1831, which was more than a twelvemonth after the seed had been sown. After the barley is cut, the clover is sometimes depastured by sheep in the autumn, whereby the crop is made thicker; if not so fed off, the shoots would be killed by the frost in the winter. In this case the clover was not depastured. Broad clover is sometimes sown by itself; but more frequently with barley, flax, oats, or wheat. The part of the clover plants cut off with the barley at the time of mowing it, makes the barley straw better as fodder; but the clover is sown for hay, or seed, and not to improve the barley straw. When the clover grows up high, it is injurious to the barley. It is the common course of husbandry, to take for hay a second crop of the clover in the autumn of the year after it is sown; and a second crop was so taken by the defendant in the autumn of 1831. But when it is intended for seed, no crop is taken for hay in the summer. Sometimes the clover is left for a third year, but it is not then a good crop. The usual course of husbandry is to plough up the land in the autumn of the second year for wheat. There was no covenant in the lease as to the away *going crop, or binding the tenant to any particular course of husbandry. [*107]

The learned Judge took the opinion of the jury on the two following questions. First, whether the plaintiff received any benefit from taking the clover with the barley straw, sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. Secondly, whether a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would sow clover with his barley in the spring, where there was no covenant that he should do so; and, whether, in the long run, and on the average, he would repay himself in the autumn for the extra cost incurred in the spring. The jury answered both these questions in the negative.

The question for the opinion of the Court was, whether the plaintiff was entitled to the clover cut in May, 1831, as emblements.

The case was argued in this term.

Follett, for the plaintiff. The question is, whether the tenant, whose interest has been put an end to by the death of *cestui que vie*, is to have the crop of clover as emblements? The rule is, that, where a tenant holding for an uncertain time sows and manures the land, or generally bestows labor and expense upon it, for the purpose of raising a crop, he is entitled to that crop as emblements; though he is not entitled to anything of a permanent nature, as trees planted by him, or their produce. The objection to the right of the tenant in this case will probably be, that the clover was sown early in the May, and not cut till the end of the May of the following year; and *that because some of the old authorities, in describing emblements, use the words “annual profits,” [*108] the tenant here cannot be entitled, the clover not coming under that description.

This use of the word "annual" arises from the fact, that the crop sown, in most cases, is taken in the course of a year. There are, however, several sorts of crops which are not cut in that time, as to which, nevertheless, the tenant is entitled to emblements. The principle is thus laid down by Mr. Justice BLACKSTONE: "If a tenant for his own life sows the lands, and dies before harvest, his executors shall have the emblements or profits of the crop, for the estate was determined by the act of God; and it is a maxim in the law, that, *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements, to compensate for the labor and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it; 2 Bla. Com. 122 (book ii., ch. viii.). The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass, and the like; which are not planted annually at the expense and labor of the tenant, but are either a permanent, or natural, profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit, but merely with a prospect of its being useful to himself in future, and to future successions of tenants, Ibid. 123." Both the reasons here given, the justice of compensating

[*109] the tenant, and the importance *of encouraging husbandry, apply to crops which are not annual. The doctrine of the passage in Blackstone is taken from Lord COKE's commentary on the sixty-eighth section of Littleton; Co. Litt. 55, a, b. The distinction is between those cases where an expense has been incurred by the tenant, on the expectation that the crop was to repay him, and those where the tenant has not been put to expense on such expectation, as in the instance of trees not planted by himself. Therefore, if the lessee for life of a hop-ground die in August, before the hops are severed, the executor shall have them, though growing on ancient roots: *Latham v. Atwood*, Cro. Car. 515. [LITLEDALE, J. What would you say of liquorice, or madder? PARKE, J. Or teasles?] The Court of Common Pleas has allowed the right to emblements of teasles; *Kingsbury v. Collins and Another*, 4 Bing. 202: at any rate, the right was not contested. But, in fact, no distinction can be taken between annual and other artificial crops. The party sows, and must receive compensation for so doing; otherwise no tenant for an uncertain interest would sow or manure. And the questions put to the jury by the learned Judge who tried the cause were intended to ascertain the nature of the crop, not the time it takes to come to maturity: the real ground of the tenant's claim being the expense and the labor. [PARKE, J. Would you extend that to four or five crops? the effect of manuring may continue for ten years.] Only one crop is claimed. [PATTERSON, J. That you have had, the crop of barley.] The finding of the jury is conclusive against that. Suppose the clover had been

[*110] sown without the barley; as the facts are found, the *plaintiff would be situated exactly as he is at present. The clover is not sown to benefit the barley: it may be injurious to it. The clover was sown with a view to repayment by cutting the clover; the barley with a view to repayment by cutting the barley. [PARKE, J. But you have had a crop of clover] Clover is sown that it may be mown in the following year. The plaintiff has had no compensation for sowing the clover. [PARKE, J. Some compensation he has had: you are insisting that he must have an adequate one.] It may perhaps be questionable whether the plaintiff be entitled to a second crop of clover: but that he does not seek; he does not complain of the crop cut in autumn, 1831, but of that cut in May. [PATTERSON, J. The question is this; if you sow a crop to be taken eighteen months after, are you to have emblements?] The sowing and the rolling were exclusively for the clover. Suppose the *cestui qui vie* had died a week before the maturity of the crop, would there not have been emblements? Then why not in the present case? When is the year to begin? Is it to be the next calendar year? if so,

the crop was taken by the defendant before the year was expired. [LITTLEDALE, J. The year may be reckoned from the sowing. PARKE, J. In the case of hops, the year runs from the time at which the additional expense is incurred which is necessary to make the hops grow.] There is no ground for confining the time to a year at all: it is a mere question of repayment. The distinction between crops which are usually annual and those which are permanent, is intelligible, only on the ground that expense is incurred in one case and not in the other. And the distinction, so understood, would be consistent with the allowance of emblements of crops which came to *maturity thirteen months after they were sown; a case which is clearly within the mischief sought to be prevented by the privilege of emblements. Dr. Burn, 4 Ecc. Law, 299; cited in 1 Williams' Executors, 454, remarks, that the matter had not come in question; but gives his opinion that, "for clover, saintfoin, and the like, the reason of manurance, labor, and cultivation, is the same as for corn."

Gambier, for the defendant. The true principle is, that the law confines its allowance of emblements to those cases in which there is an outlay of cost or labor in one part of the year, the recompense for which cost or labor is to arise, in the shape of a crop, in another part of the same year. If the decision in this case should be in favor of the plaintiff, it would lead to innumerable questions hereafter, all of which will be precluded by a strict adherence to the ancient rule, which is consistent with all the authorities cited on behalf of the plaintiff. With respect to the passage cited from Blackstone, although it is true that the privilege of emblements was established for the purpose of encouraging husbandry, and of compensating the tenant for his labor and expense, yet neither of these purposes furnishes the test by which it is to be determined to what extent that privilege is to be allowed. It is good husbandry to convert unproductive grass land into fertile meadow land, yet the law allows no compensation for so doing, Co. Litt. 69, a. It is good husbandry to plough and manure land; yet if the tenant's estate determine before he puts in the seed, he will be entitled to no compensation, Hale's MSS. note (4) to Co. Litt. 55, a (ed. H. & B.), *Br. Abr. Emblements, 7; also Tenant per Copie, &c., 3; 11 H. 4, 90, cited in each place. Then as to the compensation. If a tenant by statute merchant sow the land, and before the maturity of the crop he be satisfied by a casual profit, he shall have the corn, and therefore receives more than compensation for his expense and labor, Vin. Abr. Emblements, (A.) pl. 20, Co. Litt. 55, b. Therefore these two tests must be abandoned; and this destroys any argument which could be drawn from the finding of the jury, for the finding really amounts only to this, that, generally, a tenant who sowed clover in the spring would not receive compensation before the following Michaelmas, and that, in this particular instance, the tenant has not received compensation. It might be added, too, that the finding is imperfect, even as to the question of compensation; it ought to have extended to the July of the succeeding year. Again, clover is ordinarily fed in the autumn, and the feeding has not been taken into the account. But the rule, instead of being dependent upon these tests, has been laid down in positive and arbitrary terms. The compensation must arise, in the shape of a crop, within the year in which the cost is incurred. Lord COKE, after speaking of a corn crop, which is the instance put by Littleton, says, Co. Litt. 55, b, "And so it is, if he set rootes, or sow hempe or flax, or any other annual profit, if, after the same be planted, the lessor oust the lessee; or, if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, *because they will yield no present annuall profit." So Chief Baron COMYN, Com. Dig. Biens (G. 1), after speaking of corn and roots, as going to the tenant's executor, adds the following cases:—"If he plant hops from old roots; for he annually manures the land, &c. If he sow hemp, flax, or other thing of an annual profit." So in Rolle's Abridgment,

1 Roll. Abr. 728, Emblements (A.), 22, "If lessee at will sows the land with grain, roots, flax, hemp, or other annual profit, and the lessor enters before severance, yet he shall have it." The exceptions made by Blackstone, in the passage cited on the other side, 2 Bl. Com. 123 (book ii. ch. 3.), ante, p. 108, recognise the same criterion. The old law seems to have allowed emblements within the year to that tenant only who had actually sown. The case of *Latham v. Atwood*, Cro. Car. 515, went further; for, in that case, the party might, or might not, have put into the ground that which produced the crop. The language of the report is, that hops were like emblements. Cruise remarks upon this case, Cruise's Dig. (I.) 110 (Ed. 3), "This determination was probably on the account of the great expense of cultivating the ancient roots;" from which language it may be collected that the writer considered the decision to have introduced a novelty. [DENMAN, C. J. There was some discussion as to the time at which hops began to be cultivated at all in this country, in a case in the House of Lords: *Knight v. Halsey*, 2 B. & P. 180.] In *Kingsbury v. Collins*, 4 Bing. 202, the question was not argued at the bar; the [*114] point as to emblements was merely suggested by the *Court towards the end of the argument. No reference was made, in the pleadings or elsewhere, to the nature of the crop of teasles, or of their cultivation, nor to the time of their being planted, or coming to maturity, or being cut. [PARKE, J. And it was assumed that tenant from year to year was entitled to emblements, without any custom of the country to that effect being shown to exist.] In point of fact, teasles are sown in March, thinned and hoed after they come up, thinned and hoed again in the following year, and the crop is taken in the August of that following year. Again, in the case of hops, the fact is that they grow by the manurance and industry of the owner, by the making of hills and setting of poles. So that, in each case, there is not merely the original outlay, but an annual outlay and labor, which cannot be said in the present case. With respect to the passage cited from Burn, it is alluded to in a manuscript note of Mr. Serjeant Hill, on the following passage in Viner's Abridgment, Vin. Abr. 368 (folio), Emblements, 25:—"So, if lessee at will sows the land with hay-seed, and by this increases the grass, and the lessor enters and ejects him, yet the lessee shall not have it." The note is as follows:—"V. Burn's Eccl. Law, 2 vol. 647,¹ that it seems otherwise as to clover, saintfoin, and the like, but that no case occurs wherein these matters have come in question. If arable land is sown with a crop of corn and clover, &c., in March, and the estate of the tenant, being uncertain, determine not by his own act, after harvest, and before the next year's crop of clover is ripe (which [*115] is usually *in May or June), it seems that this crop of clover will belong to him in remainder or reversion; for this crop was not a present annual profit, according to the expression in Co. Lit. 5, b. But if the land had been sown only with clover, &c., and the estate had determined as aforesaid, before the clover was ripe, whether the first and second crops of clover in the same year (for there are usually two crops in a year), or whether the first crop only, or neither of them, shall belong to the tenant, or his executors or administrators." Independently of all authority, the importance of a fixed arbitrary rule is apparent, from the disputes and inconveniences which would arise from allowing the right to emblements in the present case. Who is to have the benefit of the autumn feeding? The case finds depasturing in autumn to be necessary; is the remainderman to do this or can he, by neglecting it, destroy the previous tenant's right, or is the previous tenant himself to occupy that he may depasture? Whose is the second crop of the second year? The case finds that, where the clover is for seed, no crop is taken for hay. Now, if the lessee be entitled to the first crop only, can he have it for seed, and so deprive the remainderman of the second crop altogether? The case extends the difficulty even to the third year; and the

¹ Sic in MS. The reference is to the edition of 1763, and corresponds to vol. iv. p. 299, of the later editions.

analogy will be applied to artificial grasses, some of which cannot be taken till the third year. In the case of fresh plants of hops, the remainderman may be kept out for three years, if the tenant is to have compensation.

Follett, in reply. The plaintiff claims only that crop which is the produce of his industry, and which is *actually growing at the determination of his estate. For that is no longer land, but personalty; it may be considered [*116] as virtually severed, and, if the land were occupied by the tenant in fee, it would go to his executor and not to his heir. And this relieves the case from the analogies which have been suggested on the other side. It might as well be contended that if a tenant put up a fixture, for the purpose of trade, he cannot take it after the expiration of a year, which would be in contradiction to the case of *Penton v. Robart*, 2 East, 88. Suppose a crop were delayed beyond a year, by a late season, is the tenant to lose this? The case of *Evans v. Roberts*, 5 B. & Cr. 829, shows that a growing crop is no part of the real estate, for it was there held by *LITTLEDALE, J.*, not to be an interest in land, under the fourth section of the statute of frauds. [*LITTLEDALE, J.* I am not prepared to say that I should not have considered that a crop of apples would go to the executor also; so that this proves too much. The ground of the decision was, that the executors were entitled to such a crop as chattels.] The crop might be taken in execution. And all the cases on the statute of frauds turn upon the question of personalty or not personalty, not upon the distance of time at which the crops have been sowed. The expressions cited on the other side apply to the distinction between periodical and permanent produce, not to the distinction between a year and a year and a day. [*PARKE, J.* Suppose the case of a nurseryman, who plants, intending to remove what he plants.] He would be entitled to do so, if his estate determined as in the *present case. No objection [*117] can arise from a crop of barley having been taken by the plaintiff after the determination of his estate; for, if his estate had lasted over the time at which he took the barley, the growing crop, without any additional act, or expense, would have been the clover simply. [*PATTESON, J.* Who is to hoe and weed?] The same party who would hoe and weed in the case of corn growing: the distinction between corn and clover is denied by the plaintiff.

Cur. adv. vult.

DENMAN, C. J., on a subsequent day delivered the judgment of the Court.

In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description? We think it does not.

In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant all the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop *of any vegetable of that nature, whether produced annually or not, [*118] which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced, within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law.

It is not, however, absolutely necessary to decide this question; for, assuming that the plaintiff's rule is the correct one, the crop which is claimed was not the crop growing at the end of the term. The last *cestui que vie* died in July; the

barley and the clover were then growing together on the same land, and a crop of both, together, was taken by the plaintiff in the autumn of that year, though the crop of clover of itself was of little value. Thus the plaintiff has had one crop: and if it were necessary, either generally, or in the particular case, that the crop taken should remunerate the tenant, we must observe, that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground: but as the more general and important question has been most fully and elaborately argued, we think it right to say we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends, are Littleton, sect. 68, and Coke's commentary on that passage. The former is as follows: "[*119] "If the lessee soweth the land, and the lessor, after it *is sown and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry, egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him." Lord COKE, Co. Litt. 55, a, says, "the reason of this is, for that the estate of the lessee is uncertaine, and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots or sow hempe or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yield no present annual profit. These authorities are strongly in favor of the rule contended for by the defendant's counsel; they confine the right to things yielding present annual profit: and to that year's crop, which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood*, Cro. Car. 515, they were held to be "like emblements," because they were "such things as grow by the manurance and industry of the owner, by the making of hills, and setting poles:" that labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and [*120] planting of other vegetables. Mr. Cruise in his Digest I. 110, Ed. 8, says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements; it by no means proves, that the person who planted the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to show that things which take more than a year to arrive at maturity, are capable of being emblements, except the case of *Kingsbury v. Collins*, 4 Bing. 202, in which teasles were held by the Court of Common Pleas to be so. But this point was not argued, and the Court does not appear to have been made acquainted with the nature of that crop or its mode of cultivation, or it may be, that in the year when the plant is fit to gather, so much labor and expense is incurred, as to put it on the same footing as hops. We do not therefore consider this case as an authority upon the point in question.

The note of Serjeant Hill in 9 Vin. Abr. 368, in Lincoln's Inn Library, which Mr. Gambier quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because there the estate of the tenant is supposed to determine after harvest, whereas here it determined before.

The weight of authority, therefore, is in favor of the rule insisted upon by the defendant. There are besides some inconveniences, doubts, and disputes,

*which were pointed out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in autumn, besides the crop in the following year? If so, he gets something more than one crop. Is he to have the possession of the land for the purpose? Or is the reversioner to have the feeding; and, in that case, is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant's rule is adopted. It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.

We are therefore of opinion, that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment.

Judgment for the defendant.

DOE dem. JOSEPH GWILLIM v. SAMUEL GWILLIM. [122]
May 30.

Testator devises as follows:—"As touching my worldly estate, I give, devise, and dispose of the same in the following manner: first, I give to my wife Ann the whole of my estates, goods, and chattels, living stock, and debts, during her widowhood, and no longer, but demearly to go to my dear children as I have appointed and disposed to them in lots and money." He then, after giving to his eldest son a sum of money, left to his second son a lot of land (therein described), to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever. Then followed four other devises in similar terms to four other sons, and then he gave to his son John a dwelling-house and piece of ground, &c., also his goods and living stock. He then devised to his daughter a house and gardens, and to her son and his lawful heirs for ever: Held, that John took a life estate only in the house and ground devised to him.

EJECTMENT for a dwelling-house, &c., in the county of Gloucester. At the trial before BOSANQUET, J., at the Gloucester Summer assizes, 1832, the lessor of the plaintiff, Joseph Gwillim, proved the marriage of his father and mother, the baptism of himself, and the death of his father, the testator, in the year 1817, in possession of the premises. In answer the defendant contended, that the property in question, being formerly part of the Forest of Dean, and encroached therefrom, the plaintiff could not recover in an action of ejectment unless he showed a title previous to the 20 Car. 2, c. 3, which avoided any grant made by the crown subsequent to that act, and for this *Goodtitle v. Baldwyn*, 11 East, 408, was cited. The defendant further put in the will of his father, the said Henry Gwillim, which bore date the 7th of May, 1804, and was as follows:—"As touching such worldly estate wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form: first, I give and bequeath to my wife Ann the whole of my estates, goods, and chattels, living stock, and debts, during her widowhood, and no longer, to keep it in possession, nor by any husband, or helpmate, or company keeper, or inmate, or by any person *that take a lease of her life, or lodger, but demearly to go to my dear children as I have appointed and disposed to them in lots and in money.

"Secondly, to my son Joseph Gwillim I leave 10*l.* out of my goods and chattels, to be paid him.

"Thirdly, to my son Henry Gwillim I leave the piece of ground called James's Patch, to him and his lawful heirs for ever, and if no heirs, to his next brother, and his lawful heirs for ever.

"Fourthly, to my son George Gwillim I leave the piece of ground called Jones's Patch, to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever.

"To my son James Gwillim I leave the piece of ground called Matthew's Patch, and the piece of ground called Dallamy's Patch, to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever.

"To my son Samuel Gwillim I leave the barn and the stables, and the low piece of ground next adjoining, called Herness's Patch, and the other called Clareer Patch, to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever.

"To my son, William Gwillim, soldier, I leave the piece of ground called Quance Patch, to him and his lawful heirs for ever; and if no heirs, to his brother John Gwillim and his heirs for ever.

"Also to my son John Gwillim I leave my dwelling-house and nail-shop, and cider mill, stables, and pigscot, garden, brewhouse, and the piece of ground adjoining to it; also my goods and chattels and living stock that I shall leave.

"Also to my daughter Mary Leyrige I leave the house called Dancing House and gardens, and to her son Henry Leyrige and his lawful heirs for ever."

[*124] *This will was properly executed and attested.

In 1817, Henry Gwillim, the testator, died; Joseph, the lessor of the plaintiff, was his heir-at-law; his two other sons, Samuel and John, and his widow, survived him. The widow afterwards died. The defendant produced a conveyance, bearing date the 24th and 25th of August, 1819, from the said John Gwillim, the devisee, to Samuel Gwillim, the defendant, of all his estate and interest in the premises, in consideration of natural love and affection and 10s. In reply, the lessor of the plaintiff called witnesses, who proved that when they first remembered the premises, seventy years ago, the premises were all inclosed, and had the appearance of old inclosures, and that the testator and the party of whom he purchased had occupied the same during the whole of that time. The lessor of the plaintiff further proved the conviction of John Gwillim, in 1820, and judgment against him for felony; and that at the time the deed was executed by him to the defendant, he was lying in Gloucester gaol on a charge of horse-stealing; and the plaintiff further relied on the statute 17 Ed. 2, c. 16, which recites, "that it is used in the county of Gloucester, by custom, that after one year and one day the lands and tenements of felons shall revert and be restored to the next heir, to whom they ought to have descended if the felony had not been done." The learned judge put two questions to the jury: 1st. Whether the premises in question were old encroachments, made previously to the 20 Car. 2? and the jury found that they were. 2dly. Whether the conveyance from John to Samuel Gwillim was bona fide or fraudulent? The jury found that it was fraudulent. Upon this the learned judge said that he

[*125] was of opinion that John *took only an estate for life, and therefore that the word *heir* in the stat. 17 Ed. 2, c. 16, did not apply to the case; and he directed the plaintiff to be nonsuited, but reserved liberty to move to enter a verdict.

R. V. Richards now showed cause. John Gwillim took under the will of the testator an estate for life only; and if that be so, upon his death, that estate vested in Joseph, the heir-at-law of the testator. If the devise to John had stood alone, it would clearly have given him an estate for life only, because there are in it no words of inheritance as there are in the devises to the five other sons. It appears from that, the testator knew how to give an estate of inheritance, and as he has not used words sufficient for that purpose in the devise in question, he must be taken to have intended to give John a life estate only. *Gall v. Esdaile*, 8 Bing. 323, will be relied upon by the other side. There, the testator, after commencing with a recital of his intention to dispose of his worldly estate, bequeathed some pecuniary legacies, and then proceeded, "As to the rest of my estate, the two houses (describing them) I give to my wife for life, and after her decease I give one house (describing it) to my daughter Mary," and the Court of Common Pleas held that the daughter took *a fee* under the words "the rest of my estate." There those words occurred

in the very same clause with the devise to the daughter, and the testator had no other real property. Here the word estate does not occur in the devise to John, nor is it incorporated in it by reference. Besides, even in that case the Master of the Rolls held that the daughter took *an estate for life only, [*126] 1 Russ. & M. 540. The general rule is, that the heir-at-law is not to be disinherited without express words or by necessary implication. Supposing that John took a fee, this is not a case within the custom mentioned in the stat. 16 Ed. 2, c. 16, because that applies only to cases of attainder and execution, and not to a case where the felon is still alive.

The Solicitor-General and *Busby*, contra. It may be collected from the whole of the will, taken together, that the testator intended to give a fee to John, and construing the devise to him in conjunction with the first devise to the wife and children, the words used are sufficient to give him the fee. The introductory clause, by which the testator expresses an intention to devise all his worldly estate, shows that he intended to depart with his whole interest; and the subsequent words ought, therefore, if possible, so to be construed as to pass an estate in fee, and to prevent an intestacy as to any part of the property. The testator, after that introductory clause, gives to his wife the whole of his estates, goods and chattels, &c. If the will had stopped there, she would, by force of the word estates, have taken a fee: *Rowe v. Bacon*, 4 M. & S. 362; but he afterwards cuts down the devise to her to an estate during widowhood, and then directs that the whole of his estates, and goods and chattels shall go to his children, as he has appointed to them, in lots and money. If the will had stopped at the word "children," they would, by force of the word estates, have taken a fee as joint tenants. By the first devise the testator has, in the words "the whole of his *estates," marked out the quantity of interest he intended his children [*127] to have in their respective lots, meaning, by the subsequent clauses, to apportion his property, real and personal, among them. The words, "the whole of my estates," may be considered as incorporated, by reference, in all the subsequent clauses; and, if so, those words, construed with reference to the introductory clause, will pass a fee. The question is, at all events, whether the words of the subsequent devises of the specific lots, vary or diminish the effect of the word "estates" in the first devise. The devise of the lot to the second son is to him and his lawful heirs for ever; but then, as the testator adds, "if no lawful heirs, to his next brother and his lawful heirs for ever:" it follows that, by the word heirs, he meant, not heirs generally, in which the next brother would be included, but special heirs, or heirs of the body; and consequently the second son took an estate tail in the lot devised to him. The same observation applies to the devises to the four other sons. The effect, therefore, of the word estates, may be so varied by the devises to the first five sons, as to cut down a fee to an estate tail; but in the devise to John there are no such words, and consequently there is nothing there to vary the effect of the words, "the whole of my estates," in the first devise. Besides, in the devise to John, the dwelling-house and land is coupled with the goods and chattels; and as there can be no doubt he intended to pass the entire property in the goods to him, it may be fairly inferred that he meant also to give him an entire interest in the land.

DENMAN, C. J. It is very difficult to apply any former decision to a case of this sort. Other cases are *valuable only as furnishing a rule of construction. *Gall v. Esdaile*, 8 Bing. 323, is not in point. It is true that, [*128] in the early part of this will, the testator expresses an intention to devise all his worldly estate; whence it may be fairly inferred (it is said), that he intended to devise the fee; but still, in order to effectuate that intention, it was necessary that he should afterwards use in the devising clause words sufficient to pass a fee; and the question is, whether, in the devise to John, there are any such words. At first I thought the words "the whole of my estates" over-rode and were to be considered as incorporated by reference in the other devising clauses of the will, so as to pass to the devisees a fee in their respective lots;

but, on further consideration, I think they cannot be so considered because in the devise to the five sons (which precede the one to John), the testator gives them estates tail only; he cannot, therefore, by the use of the words "the whole of my estates," in the first devise; have supposed that he had already given those sons a fee. And if these words are not to be considered as incorporated in the devise to John, the words there used will pass a life estate only. Assuming even that the actual intention of the testator as expressed in the early part of his will, was to give a fee, he has not in the devise in question used words sufficient to carry that intention into effect. John took only an estate for life.

LITTLEDALE, J. *Gall v. Esdaile*, 8 Bing. 323, cannot govern the construction of this will. The testator begins by expressing an intention to dispose of his worldly estate; and, first, he gives the whole of his estates and goods and [*129] *chattels to his wife during her widowhood, and then to his children, as he has afterwards disposed of them in lots and money. But when he afterwards divides his property into lots among his children, he does not give to all a fee, but to five sons estates tail; and then he devises one lot to John, without using any words of inheritance; and afterwards devises a house to his daughter for life, and after her death to her son and his heirs for ever; so that he gives a fee to the grandson. The devise to John, therefore, being framed without any words of inheritance, and coming between devises, in which he has given estates tail, and an estate in fee, passes no more than an estate for life. It is said, that because John took an absolute interest in the goods and chattels and living stock, it must be inferred that the testator intended he should take a fee in the realty. It is extremely difficult to say what the actual intention of the testator was. The question is, not what his actual intention was, but what is the meaning of the words he has used; and I have no doubt that a devise to one son, without any words of inheritance, contained in a will in which such words do occur in several devises to other sons, passes only a life estate. I think the heir-at-law is entitled to recover.

PARKE, J. In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used. I consider it doubtful what the testator actually meant should be done. But I have no doubt as to the meaning of the words used by him. Immediately before and after the [*130] devise in question, he uses words sufficient to *pass estates of inheritance; but in the devise in question there are no such words; there is, then, nothing to show that he meant to give more than an estate for life to John.

PATTESON, J. I am of the same opinion. It is not necessary to decide whether the judgment pronounced in *Gall v. Esdaile*, 8 Bing. 323, 1 Russ. & M. 540, by the Master of the Rolls, or by the Court of Common Pleas, was right, because the language used by the testator in that case was different from that in the present will. There the testator in one and the same clause devised the rest of his estate, the two houses describing them, to his wife for life, and after his decease, one of them (describing it) to his daughter Mary. In this will, after expressing an intention to devise his worldly estate, he by one clause gives all his estates to his wife during her widowhood, and then to his children as he has appointed in lots and money. Then by another clause he gives 10% to one son, and he afterwards, by separate clauses, devises distinct lots of land to five sons respectively, and their lawful heirs for ever. But in the devise to John, the next son, the testator gave the lot to him, but not to his lawful heirs for ever. I have no doubt that, by the words of that devise no more than a life estate passes.

Rule absolute.

*DOE dem. THOMAS TUNSTILL v. THOMAS BOTTRIELL. [*131]
May 31.

Copyholds are within the statute 27 Eliz. c. 4, which avoids all conveyances of any lands, tenements, or hereditaments, made for the intent and of purpose to defraud and deceive persons that shall afterward purchase the same.

EJECTMENT. At the trial at the Summer assizes for Yorkshire, 1832, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—

The premises for the recovery of which this action was brought, are copyhold tenements holden of the manor of Keesberry Hall, Cawood. John Long being seised in fee of the premises in question according to the custom of the said manor, on the 16th day of April, 1810, made a voluntary surrender of them out of Court to the use of George Rylah and Thomas Tunstall (the lessor of the plaintiff), in trust for the said John Long for life; and, after his decease, in trust for his children and grandchildren. On the 23d of December, 1811, the said John Long, in consideration of 300*l.* paid to him by the said Thomas Tunstall, which was a fair price for the premises, again surrendered them out of Court to the use of Thomas Tunstall for life; and, after his decease, to the use of such person or persons as he should by will direct or appoint; and, in default thereof, to the use of the right heirs of the said Thomas Tunstall. Both these surrenders were presented at the same Court, holden in and for the said manor, on the 8th of January, 1812, when, on the former, George Rylah and Thomas Tunstall were admitted; and, on the latter, Thomas Tunstall was admitted. The presentment of the surrender to Rylah and Tunstall, and their admission thereon, *were entered on the Court rolls, before the presentment of the surrender to Tunstall and his admission thereon. After these admissions, [*132] Tunstall entered into possession of the premises, and continued in possession till within twenty years before the commencement of this action. On the 25th of March, Tunstall contracted with J. Bottriell for the sale of the premises in question, to him (Bottriell) for a full valuable consideration, out of which it was agreed that a debt of 200*l.* then owing by Tunstall to J. Bottriell should be retained. Before that contract was finally completed, Tunstall became bankrupt, and a commission of bankruptcy was issued against him, under which assignees were duly chosen, who, at court holden for the manor on the 24th of January, 1815, were admitted tenants of the premises. On the 16th of February, 1818, the surviving assignees of Thomas Tunstall, in consideration of the residue of the purchase-money expressed in the contract of the 25th of March, 1813, over and above the said sum of 200*l.* due and owing by Tunstall to J. Bottriell, surrendered the said premises to J. Bottriell, who was thereupon admitted tenant at a court holden on the 14th of September, 1819. In 1827, J. Bottriell died intestate, leaving Thomas Bottriell (the defendant in this action), his customary heir. John Long and George Rylah died before the commencement of this action.

Knowles for the plaintiff. There are two questions in this case. The first is, whether copyholds are within the statute (27 Eliz. c. 4), against fraudulent conveyances; and, if they are, the other question is, whether the second surrender to, and admittance of Tunstall, are sufficient to bring the case within that statute. It must *be admitted that *Doe v. Manning*, 9 East, 59, [*133] has established generally that a voluntary conveyance is a fraudulent one within the statute, and void as against a purchaser, although, before the purchase, he has notice of the voluntary conveyance. There is however this peculiarity in the present case; the same party takes under the voluntary conveyance as under the one for valuable consideration. Now the statute, by section 2, makes void all conveyances, &c., of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive

such persons as shall purchase the same." The legislature, therefore, contemplates that, at the time when the voluntary conveyance is made, there exists an intention to deceive the party who afterwards purchases; that cannot be the case where the party taking by both conveyances is the same. A penalty is given by sect. 3; and if this circumstance makes no difference, a case might be supposed where the party would have to pay the penalty to himself. Independently of that, copyholds are not within the words "lands, tenements, or other hereditaments" in that statute. It is true that, in *Doe v. Routledge*, Cowper, 705, Douglas, 716, note 1, Lord MANSFIELD and ASTON, J., expressed an opinion that it did extend to copyholds; but it was not necessary, in that case, to decide the point. It was, therefore, a mere dictum; and WILLES, J., desired it might be observed that the Court gave no opinion on that question. In *Glover v. Cope*, 3 Lev. 326, it was stated in argument, but not decided, that copyholds are within that statute. In Buller's N. P., p. 108, there is a dictum of BLENCOWE, J., that copyholds are not within the statute. There are many cases where [*134] it has been held that copyholds or leaseholds "do not pass by the general words" lands or tenements." In *Rose v. Bartlett*, Cro. Car. 292, it was resolved, that if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years. And before the statute 55 G. 3, c. 172, a general devise of lands, tenements, and hereditaments would not pass copyholds, unless the testator had shown an intention to pass them by having made a previous surrender to the use of his will. Copyholds have been held not to be within the word lands in the statute, *De Donis Conditionalibus*, 13 Edw. 1, stat. 1, c. 1, or the statute of elegit, 13 Edw. 1, stat. 1, c. 18, or the statute 11 H. 7, c. 20, Gilbert's Ten. 186, relative to alienations by the wife of the lands, tenements, or other hereditaments, of her husband (see 3 Rep. 8, a, 9, a; Moore, 596,) or the statute 32 H. 8, c. 28, as to a discontinuance by the husband of the wife's land, see 3 Rep. 8, a, 9, a; Moore, 596. [LITTLEDALE, J. In Comyn's Dig. tit. Copyhold, N. and O., the general rule is laid down, that when no prejudice ensues to the lord by it, copyholds are included within the general words in any statute, lands, tenements, and hereditaments; but not when it alters the service, tenure, custom, or interest of the land, to the prejudice of the lord; and for that Heydon's case, 3 Co. 7, is cited. PARKE, J. The same rule is laid down in Coke's Copyholder, 151. Here I do not see how the lord's interest can be affected by the statute against fraudulent conveyances; for the purchaser must be admitted tenant, and pay his fine.] In *Matthews v. Feaver*, 1 Cox Ch. Ca. 278, it was held that copyholds were not within the statute 13 Eliz. c. 5, s. 2, which renders void [*135] all conveyance of lands, tenements, hereditaments, *made to defraud creditors. By the statute 27 Eliz. c. 4, s. 3, a penalty is imposed; it therefore creates an offence, and ought to be construed strictly. Secondly, Tunstall and Rylah were in by the first surrender. The surrenderor, for a valuable consideration, may revoke, but not if there be admittance on the first surrender, Co. Copyholder, 106. Kitchen, 160. [PARKE, J. If the first surrender was void, the admittance under it was waste paper.]

Cresswell, contra. The general words, "lands, tenements, and hereditaments," in the stat. 27 Eliz. c. 4, include copyholds. The dictum in Buller's N. P. is the only authority to the contrary; but in *Doe v. Routledge*, Cowp. 705; Lord MANSFIELD, C. J., and ASTON, J., both expressed an opinion that they did; and, according to the rule laid down in Heydon's case, 3 Rep. 8, a; copyholds are included in such words, when used by the legislature, unless the statute alters the service, tenure, custom, or interest of the land, to the prejudice of the lord. In that case the question was, whether copyholds were included in the word *land* in the stat. 31 H. 8, c. 13, s. 5? and it was held they were. So in *Kite* and in *Queinton's* case, 4 Rep. 26, a; it was said by WRAY, C. J., they were within the words lands and tenements in stat. 32 H. 8, c. 9, against buying titles; and in the *Dean and Chapter of Worcester's* case, 6 Rep. 37, a;

that they were within the words lands, tenements, and other hereditaments, in the stat. 13 Eliz. c. 10, s. 3, as to ecclesiastical leases. So with respect to the statute of fines, 4 H. 7, c. 24, as to fine and non-claim; *Marg. Podger's case*, 9 Rep. 104, a. The stat. *27 Eliz. c. 4. being passed to prevent fraud, [*136] must be construed literally. Even the rule which exempts the king from the operation of statutes, does not prevail when the act is for the enlargement of right, or the prevention of wrong; and therefore the crown has been held to be bound by the 13 Eliz. c. 10, as to ecclesiastical leases, and the 31 Eliz. c. 6, against simony. As to *Matthews v. Fever*, 1 Cox Ch. Ca. 278; the Master of the Rolls held, that voluntary conveyances of copyholds were not void against creditors by the operation of the 13 Eliz. c. 5; but that was not on the ground that they were not included within the general words of that statute, lands, tenements, and hereditaments, but because generally they were not subject to debts; and there an inquiry was directed to be made, whether, by the custom of the particular manor, copyholds were liable to debts? The Master of the Rolls must have been of opinion that if they were, they would come within the general words lands, tenements, and hereditaments, for otherwise the inquiry as to the custom of the manor would have been unnecessary. As to the argument here, that the voluntary conveyance, and that made for value, were to the same person, that is answered by the decision already referred to, that notice to the purchaser for value does not prevent the operation of the statute.

DENMAN, C. J. The words of the act 27 Eliz. c. 4, are sufficiently large to include copyholds. In *Doe v. Routledge*, Cowp. 705; Lord MANSFIELD expressed an opinion that copyholds were within that statute; and, except the dictum of BLENCOVE, J., in *Buller's N. P.*, there is no authority the other way.

*LITLEDAL, J. The statute extends to copyholds. The general rule laid down in *Heydon's case*, 3 Co. 7; and adopted in *Comyns's Dig.* [*137] Copyhold, N., is applicable here, that when no prejudice ensues to the lord by it, copyholds are included within the general words lands, tenements, and hereditaments, in a statute.

PARKE, J. I have no doubt in this case that the statute affects copyholds according to the general rule laid down in *Co. Copyholder* 53, and *Heydon's case*, Rep. 7, a. As to *Matthew v. Fever*, 1 Cox Ch. Ca. 278; the very reason there given by the Master of the Rolls, for saying that the statute did not extend to copyholds, shows that in a case where that reason had not applied, his opinion would have been that they are within the stat. 27 Eliz. c. 4. As to the second objection, that the plaintiff was a party to both conveyances, the answer is, that if the first conveyance was fraudulent, it was void from the first, although the subsequent purchaser had notice; *Doe v. Manning*, 9 East, 59. His knowledge was perfectly immaterial, and his subsequent admittance, on purchase for a valuable consideration, gave him a good title.

PATTESON, J. I think the statute applies to copyholds: the words lands and tenements are sufficiently large to embrace them, and there is nothing to take them out of the enactment. In 2 *Watkins on Copyholds*, chap. 10, the matter is considered how far statutes apply to copyholds; and he adopts the rule laid down in *Heydon's case*, Rep. 7, a; stating that "if the interest of the lord be not prejudiced; if no injury accrue to the copyholder any more than, under the same circumstances, *would accrue to the fee; copyhold tenements must, equally with freehold, be within the public acts of the state." [*138] The present case is within the rule, and does not fall within any exception.

Judgment for the defendant.

The Right Honorable GEORGE Lord OAKLEY v. The KENSINGTON Canal Company and Others. May 31.

By acts of parliament enabling a company to make and maintain a canal navigation, and to take lands for that purpose, making satisfaction, it was proved, that the company

should not take any garden ground without consent of the respective owners and occupiers, and that any action to be brought for anything done in pursuance of those acts, should be commenced within six calendar months next after the fact should have been committed; or if there should be a continuance of damages, then within six calendar months next after the committing of such damage should have ceased.

The company wishing to take garden ground for the purpose of sloping the banks of the canal, told the occupier, a tenant, that they had obtained the consent of the owner's agent, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land in consequence was from thenceforth overflowed by the Thames at every high tide. For this damage the landlord sued the Company more than six calendar months after the ground was taken, and the tide first let in:

Held, that the injury was one for which an action should have been brought within six months from the taking away of the land; and that the defendants were within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statutes, though in the prosecution of that purpose, the defendants had been guilty of a misrepresentation to bad faith towards the occupier.

CASE for wrongfully entering plaintiff's land in the occupation of a tenant' and digging and carrying away the soil, so that the said land was lowered and became overflowed with water; and for continuing the said land so lowered, whereby the same remained overflowed, and was diminished in value, to wit, from thenceforth, &c. Plea, the general issue. At the trial before PATTESON, J., at the sittings in Middlesex and Hilary term, 1832, the plaintiff was nonsuited, with leave to move to enter a verdict. On motion, the Court directed a special case to be stated. The case was in substance as follows:

[*139] By statute, 5 G. 4, c. lxx., for making navigable a *certain creek from Counter's Bridge on the road from London to Hammersmith, to the river Thames, certain persons were incorporated by the name of the Kensington Canal Company, and were empowered (by sect. 2) to enlarge the said creek, and make and maintain a canal for navigation; and for the purposes aforesaid, they were empowered (by the same section) to enter upon any lands and set out such parts thereof as they should think necessary for making the canal, and there to bore, dig, cut, trench, and drain, and to carry away the earth, &c., so dug, and to construct such works, &c., as they should think necessary or convenient for making, improving, &c., the canal, in pursuance of, and within the true intent and meaning of the act, making satisfaction, as after mentioned, to the owners or proprietors, tenants or occupiers of the lands, for all damages to be by them sustained in or by the execution of all or any of the powers of that act. And that act was to be an indemnity to the company and their servants for what they should do by virtue of the powers thereby granted, subject to the provisos and restrictions thereinafter mentioned.

Section 7 provided, that nothing in the act should extend to empower the company, or any other person, to take or use any garden, &c., without the consent in writing, of the respective owners and occupiers thereof, except such as were specified in a schedule to the act.

Section 16 enacted, that owners and occupiers, &c., should receive satisfaction for the value of their lands, &c., and for the damages to be sustained in making and completing the works before directed, in gross sums, as should be agreed upon between them and the company; and immediately after the executing of [*140] the sale and conveyance, or contract for the same, the company should *be at liberty to enter upon, and for ever have, take, and enjoy the lands, &c., for the use and maintenance of the canal; and if the parties could not agree as to the amount of satisfaction, the same was to be settled by a jury. Section 25 contained further provisions respecting the satisfaction to be made for lands, and the rights of the company on payment or tender.

By section 22 it was enacted, "That the said company shall not be obliged by virtue of this act to receive or take notice of any complaint or complaints to be made by any person or persons whomsoever, for any injury or damage by him,

her, or them sustained, or supposed to be sustained, by virtue or in consequence of this act, unless notice in writing shall have been given in relation thereto by or on the behalf of such person or persons to the said canal company, within the space of six calendar months next after the time that such supposed injury or damage shall have been sustained, or such supposed injury or damage shall have ceased."

Sect. 116 enacted, that if any person should sustain any damage in his lands, &c., by the execution of any of the powers given by the act, for which compensation was not before provided, such damage should be ascertained by a jury, as therein directed, and the amount recovered and applied as in the cases before provided for.

By sect. 128 it was enacted, "That if any action, suit, or information shall be brought or commenced by any person for anything done or to be done in pursuance of this act, or in execution of the powers and authorities, or the orders and directions hereinbefore given or granted, every such suit or information shall be brought or commenced within six calendar months next after the fact shall have been committed, or, in case there shall be a continuance of damages, then within *six calendar months next after the doing or committing of such damage shall have ceased, and not afterwards;"—"and the defendant, in such action or suit, shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by authority of this act; and if it shall appear to have been so done, or if any action, suit, or information shall be brought after the time so limited for bringing the same, then and in such case the jury shall find for the defendant."

The schedule to this act did not include the lands mentioned in the declaration.

By an act 7 G. 4, c. xevi. (May 1826), for amending the former, it was provided (sect. 1) that all and every the powers, provisions, and authorities contained in the former statute (except as by this act altered or repealed), should be applicable to that statute as if now repeated and that the two should be construed as one. Powers were then given (sect. 2) to the company to slope the banks of the canal, making compensations to the owners and occupiers of land which should be required for that purpose; but, by sect. 5, nothing in the act was to authorize the company to take or injure any land for the last-mentioned purpose, without the consent in writing of the respective owners and occupiers, except such lands as were specified in a schedule to that act.

It did not appear by the case that the lands in question were in this schedule. Each of the statutes had a clause enacting that it should be deemed and taken to be a public act.

The land in question was garden ground, in the occupation of Thomas Adam, the plaintiff being the reversioner. In 1825, the canal company took part of it for *the purpose of sloping the bank, making the tenant a compensation, and further promising him 67*l.* for the crops which he then had [*142] upon the land so taken. In 1827, they applied to him to be allowed to cut away more of the land for the same purpose; but he refused permission, unless the company obtained the consent of Mr. Lee, Lord Oakley's solicitor, and Mr. Handford, his surveyor, and paid him (Adam) the 67*l.* They told him they had got the consent of the gentlemen named, and they paid the 67*l.*; after which, in September, 1827, they entered upon the land, and dug it away, for the purpose of sloping the banks, lowering it to such an extent that, at the next and every high tide afterwards, the river Thames flowed in and covered it, and rendered it incapable of cultivation. Neither Mr. Lee nor Mr. Hanford had ever given consent to the proceeding. No notice of complaint was given by the plaintiff till January, 1831, more than four years after the land was sloped away, and the tide first flowed over it. The defendants insisted that the case was within the compensation clause, s. 116; and, if not, that the damage accrued

when the land was sloped away, and the action ought to have been brought within six months after that time. The plaintiff contended that the damage was a continuing injury, and had not ceased within six calendar months before the action was brought; and also that the defendants had not acted as persons who considered themselves really and bonâ fide pursuing the authority given by the statutes, but had been guilty of a fraud upon the occupier of the land, and were not protected by the restrictive clauses. The case was now argued by

R. Bayly, for the plaintiff. The acts of parliament, though declared to be public, are substantially private, *and operate in derogation to private [*143] rights. They must, therefore, be construed strictly. (This was not disputed.) *Boothby v. Morton*, 3 B. & B. 239, may be relied upon as an authority against the present action; but there it was only held that the commissioners could not be sued at any unlimited time; and it did not appear, nor did the Court presume, that they had contravened the provisions of the act. *The Governor and Company of the British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794, was cited at the trial; but there the statute under which the defendants proceeded had a clause authorizing the commissioners of paving (under whom they acted) to make satisfaction for injuries done; and this was relied upon by the Court. Besides, the express proviso here, that the company shall not take garden ground without a written consent, distinguishes the present case. And by s. 2 of 5 G. 4, c. lxxv., they had no right to enter upon the land without making satisfaction for damages to be sustained. Section 116, does not apply to this case, because it is one for which compensation is before provided in the act. The defendants must, therefore, rely on section 128, and the protection of that clause extends only to acts done bonâ fide in pursuance of the statute. The conduct of the defendants here, shows that they did not act bonâ fide. In *Daniel v. Wilson*, 5 T. R. 1; *Gaby v. The Wiltshire Canal Company*, 3 M. & S. 580; *Theobald v. Crichmore*, 1 B. & A. 227, and *Graves v. Arnold*, 3 Camp. 242; where protecting clauses like the present were held applicable to parties exceeding their authority, the defendants had acted under a supposition that they were doing right, *and only erred from inadvertence. Here they [*144] were guilty of a wilful deception. There was in this case a damage within six calendar months by the overflowing of the land, in respect of which the plaintiffs might sue. *Roberts v. Read*, 16 East, 215; *Wordsworth v. Harley*, 1 B. & Ad. 391, is distinguishable. There the reversioner of land declared against defendant (who was a surveyor of highways) for digging his close and separating a portion of it from the residue, and keeping it so separated, and adding such portion to the public road. The separation was by a wall, which was begun more than three calendar months before the action brought; it was at that time very low, but still it formed a complete division between the parcels of land. After the commencement of the three months, the wall was raised and finished; and it was held, that the separation having been complete before that period, the raising of the wall was not such a new injury as would take the case out of the limitation in 13 G. 3, c. 78, s. 81, which required actions for any thing done in pursuance of that statute to be commenced within three calendar months after the fact committed. Here there was a new injury within six months.

Thesiger, contra, was stopped by the Court.

DENMAN, C. J. No sufficient reason is given why the action should not have been brought within the six calendar months. The limitation is a beneficial one, and should be adhered to. The words, "anything done or to be done in pursuance of this act, or in execution of the powers and authorities" thereby [*145] given and *granted, must be taken to mean something done in prosecution of the works contemplated, and not merely making the act a color. The conduct of the company cannot be approved of, but the action is commenced too late. The plaintiff had notice of the injury, and might have proceeded sooner.

LITTLEDALE, J. I am of opinion that this is a case in which the defendants are entitled to protection, though they have exceeded their authority.

PARKE, J. The statute 5 G. 4, c. lxxv., s. 128, requires the action to be commenced within six calendar months next after the fact shall have been committed, or, in case there shall be a continuance of damages, then within six calendar months after the doing of such damage shall have ceased. Here the action might have been brought, and the tenant have recovered a proper compensation, within six months after the land was taken away. The words "anything done in pursuance of this act, or in execution of the powers," &c., apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as a cloak for their own private purposes. Although the defendants here misrepresented facts to the tenant, that makes no difference in the application of the clause.

PATTESON, J. I am of the same opinion. The injury was complete when the land was taken. Judgment for the defendants.

*HARRISON and Another, Assignees, v. WARDLE and Others. [*146]
May 31.

Declaration of Easter term, 1831, on a replevin bond, by the assignees of the sheriff against W., the plaintiff in replevin, and his sureties, after stating the condition, assigned as a breach, "that although the suit was removed into K. B. by re. fa. lo. returnable in Michaelmas term, 1829, at the instance of W., the plaintiff in replevin, yet he did not prosecute his suit with effect and without delay." Plea, first, that by the re. fa. lo. the sheriff was commanded to record the plaint, to have the record on the return day in K. B., and to prefix the same day to the parties, that they might be ready to proceed in the said plaint; that W., the plaintiff in replevin, appeared in court at the return, and was ready to proceed in the suit, and prosecute the same with effect and without delay, but that the now plaintiffs did not appear, and the sheriff returned to the re. fa. lo., amongst other things, that he had prefixed the same day to the parties that they might be ready there to proceed in the said plaint. It then averred that W., was always ready to prosecute his plaint with effect, and without delay, and would have done so if the defendants in replevin (the now plaintiffs), had appeared. To this plea there was a general demurrer.

The second plea stated that the sheriff, in pursuance of the re. fa. lo., recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the now plaintiffs to appear in K. B. to proceed in the plaint; and that W., the plaintiff in replevin was ready to proceed, but the now plaintiffs did not appear. Replication, that the sheriff did not summon the now plaintiffs to appear. Rejoinder, by way of estoppel, that the sheriff, before the assignment, returned to the re. fa. lo. that he had prefixed a day to the parties that they might be ready to proceed in the plaint. General demurrer.

Held, first, that a plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined.

Secondly, admitting that upon the replication to the second plea it was to be assumed that the now plaintiffs were not summoned (and semble that, in the present action, they were not estopped from alleging this), still, as it appeared by the pleas that the re. fa. lo. contained a direction in effect to summon the now plaintiffs, W., the plaintiff in replevin, was not responsible for the default of the sheriff, or guilty of delay in that suit by reason of the sheriff having neglected to serve a summons.

DECLARATION in debt, entitled of Easter term, 1831, by the plaintiffs, as assignees of John Bateman, sheriff of the county of Stafford, stated, that on the 21st of April, 1829, the plaintiff distrained the goods of the defendant, Wardle, for money then due from him to J. Ault, one of the plaintiffs, for rent; that Wardle, within five days, made his plaint to the said J. B., then being sheriff of the county aforesaid, out of the county court of the said sheriff, of the taking and unjustly detaining of the goods of the defendant Wardle, *and prayed [*147] the sheriff that the same might be replevied by him (the sheriff) and delivered to Wardle; and thereupon the said J. B., so being sheriff, &c., did take from Wardle, and from the other defendants, as two responsible sureties, a

bond in double the value of the goods distrained, &c., and the defendants in this suit, on the 23d of April, 1829, by their writing obligatory, acknowledged themselves to be bound unto the said J. B., so being sheriff, &c., in 146l., to be paid to the said J. B., &c., with a condition thereunder written, "that if the defendant Wardle should appear at the then next county court to wit, at the county court of the said sheriff, on the 7th of May then next, and should then and there prosecute his action with effect and without delay, against the said plaintiffs in this suit, for taking and unjustly detaining the goods in the condition mentioned, and should make a return of the said goods, if a return thereof should be awarded, then the obligation should be void, or otherwise it should remain in full force;" that the sheriff, at the prayer of the defendant Wardle, replevied and made deliverance of the goods to him; and afterwards, at the then next county court of the said sheriff, Wardle appeared, and, without writ, levied his plaint against the plaintiffs in this suit, for the taking and unjustly detaining of the said goods, and then and there found pledges, as well for prosecuting his said plaint as for returning the said goods, if return thereof should be adjudged by law, to wit, the other two defendants, which plaint, in Michaelmas term, 1829, was duly removed, at the instance of Wardle, out of the county court of the said sheriff into the Court of King's Bench, by virtue of a writ of recordari facias loquelam, returnable on the morrow of All Souls.

[*148] Averment, that *Wardle did not prosecute his aforesaid suit in the Court of K. B. with effect and without delay, against the plaintiffs in this action, for taking and detaining the goods aforesaid, nor had he further prosecuted such suit, nor did he make a return of the said goods, or any part thereof, according to the form and effect of the said writing obligatory, whereby the same became forfeited to the sheriff, who assigned it to the plaintiffs.

Plea 1st, that by the writ of re. fa. lo. the sheriff was commanded that he should cause the plaint to be recorded, and that he should have the record in K. B. on the morrow of All Souls, and that he should prefix the same day to the parties, that they might then be there ready to proceed in the said plaint, as should be just; that at the return of the re. fa. lo., Wardle came into the Court of K. B., and was then and there ready to proceed in the said suit, and to prosecute the same with effect and without delay against the now plaintiffs; but that the said now plaintiffs came not, and did not appear in the said Court of K. B.; and the said sheriff, on the morrow of All Souls, returned to the said Court of K. B., upon the said writ of re. fa. lo., that, by virtue of that writ, he had caused the plaint to be recorded, &c., and had the said record in court on the day in the writ mentioned, and that he had prefixed the said day to the said parties, that they might be there ready to proceed in the said plaint as should be just, as in the said writ, he, the sheriff, was commanded. The plea then averred, that Wardle was always ready to prosecute his action with effect, and without delay, against the now plaintiffs; and would have so prosecuted his suit against the said now plaintiffs, if they had appeared in the Court of K. B., according to the exigency *of the writ; but that the said plaintiffs did not, [*149] nor would, appear in K. B. on the day prefixed to them by the sheriff for that purpose, or at any other time, but wholly neglected and refused so to do, and had not as yet appeared to the said writ.

Plea 2d, that the sheriff, in pursuance of the writ of re. fa. lo. mentioned in the declaration, recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the (now) plaintiff to appear in the King's Bench to proceed in the plaint; and that Wardle was ready to proceed, but the plaintiffs did not appear, as before.

To the first plea there was a general demurrer; to the second a replication, that the sheriff did not summon the plaintiffs to appear, as in the plea alleged, concluding to the country.

To this there was a rejoinder, by way of estoppel, that the plaintiffs ought not to be admitted so to reply, because the sheriff, before the assignment, re-

turned to the re. fa. lo., "that he had prefixed a day to the parties, that they might be ready to proceed in the plaint, as he was commanded." General demurrer to the rejoinder.

This case was argued in Easter term.¹

R. V. Richards in support of the demurrers. The first plea is insufficient, because it merely shows that Wardle appeared in court at the return of the writ, and was ready to proceed in the suit, and prosecute the same with effect, without showing that he did so, or how the suit was disposed of. It states further, that the sheriff returned that he had prefixed a day to the parties, that they *might be ready to proceed with the plaint, but it does not allege [150] that the sheriff had in fact summoned the defendants in replevin to appear. In Dalton's Office of Sheriffs, p. 272, it is said, "that the sheriff is first to record the suit in full court, and then to return the same under his own seal, and the seals of four suitors of the same court, and after, the sheriff is to summon the defendant to be there at the day of the return thereof." It was the duty of the sheriff, therefore, to summon the defendants; and the duty of the obligor of the bond was to see that it was done. In *Brackenbury v. Pell*, 12 East, 585, where the plea to a declaration on a replevin bond stated, that the suit was still depending and undetermined; and the plaintiff replied, "that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending;" on special demurrer it was held, that the replication was insufficient, for not showing how the suit was determined and had ceased to depend. In *Morgan v. Griffith*, 7 Mod. 380, it was said by LEE, C. J., "that in all replevin bonds there are several independent conditions," one of which is to prosecute with effect, and a breach may be assigned on non-performance of any. *Gwillim v. Holbrook*, 1 Bos. & P. 410, and *Axford v. Perrett*, 4 Bing. 586, show that the condition of a replevin bond is not satisfied by a prosecution of the suit in the county court; but the plaint, if removed by re. fa. lo. into a superior court, must be prosecuted there with effect and without delay. And it appears from *Vaughan v. Norris*, Cas. temp. Hardw. 137, and *Turnor v. Turner*, 2 Brod. & B. 107, that the plaintiff in a replevin suit so removed, by becoming *nonsuit, fails [151] to prosecute his suit with effect. The rejoinder to the replication to the second plea is bad, because the sheriff's return to the re. fa. lo. is no estoppel in this action, which is not between the same parties as the replevin suit, for the sureties in the replevin bond were no parties to the suit in replevin.

Follett, contra. Wardle, the plaintiff in replevin, having appeared in court at the return of the writ, and been then ready to prosecute his suit with effect, has done all that, by law, he was required to do. It is true that the conditions of the bond are distinct and independent. But assuming that it was the duty of the sheriff to summon the defendant in replevin, he returned that he had prefixed the same day (i. e., the day of the return of the re. fa. lo.) to the parties, that they might be ready to proceed with the suit in the court above. From that it may be inferred, that he had summoned the defendants in replevin, as his duty was; and, if so, it then was their duty to enter an appearance. The question is, whether, when the defendant in replevin does not appear on the return of the re. fa. lo., the plaintiff is bound to take any other step. [PARKE, J. If the defendants did not appear, the plaintiff in replevin might have sued out a distringas to compel them. By the condition of the bond, he is bound to do all he can to prosecute his suit with effect, and without delay.] The general rule is, that the condition of the bond is not broken, until the action be determined in favor of the landlord, *Brackenbury v. Pell*, 12 East, 585. It lies on the plaintiffs here to show that it was legally determined in their favor, so as to *establish the breach alleged, that it was not prosecuted with effect. [152] In the *Duke of Ormond v. Bierly*, Carth. 519, the breach assigned was, that the action brought on a replevin bond was not prosecuted with effect. The

¹ Before DENMAN, C. J., LITLEDAL and PARKE, Js.

defendant pleaded, that E. G. levied a plaint in replevin, and died before the suit was determined, whereby the suit abated: the plaintiff replied, that although E. G. levied such a plaint against the defendant, the defendant, by injunction, hindered the proceedings until E. G. died. Upon demurrer to the replication, the defendant had judgment, for per HOLT, C. J., "This was a prosecution with effect, because there was neither a nonsuit nor verdict against E. Y." In *Vaughan v. Norris*, Cas. temp. Hardw. 137, and *Turnor v. Turner*, 2 Brod. & B. 107, the plaintiff in replevin was nonsuited, and the action was thereby terminated. It appears, therefore, plainly established, that the suit must be determined against the tenant before it can be said that there is any breach of the condition of the bond. In *Brackenbury v. Pell*, 12 East, 585, a replication, stating that the replevin suit was abandoned, without showing how, was held to be bad on special demurrer. In *Axford v. Perrett*, 4 Bing. 586, it appeared that the defendant had taken no step in the replevin cause for more than two years; and after verdict for the plaintiff, it was held, that after the time which had elapsed without any proceedings, the replevin cause, by analogy to the practice of the higher tribunals, was out of Court; but here there is nothing to show that the cause is not depending. The plaintiff ought to have shown that it was actually determined. [PARKE, J. Where the breach assigned is that the [*153] plaintiff in replevin did not prosecute *his suit with effect, it is a sufficient answer to show that that suit is still pending; but it is no answer where the breach also is, as in this case, that he did not prosecute it without delay.] The plea shows, that the delay arose from the act of the plaintiffs. Then, as to the rejoinder to the replication to the second plea, the plaintiffs are assignees of the sheriff; and if he would be estopped by his return, in an action on the replevin bond, they must also be. Having returned that he has prefixed a day to both parties to be in Court to prosecute their suit, he would be thereby estopped from saying that he did not summon either of them. Assuming, however, that the return is not an estoppel in this action, and that it must be taken, on the replication to the second plea, that the plaintiffs were not summoned to appear in the Court of King's Bench; still, as the plea shows that the sheriff was commanded by the re. fa. lo. to have the record in the King's Bench on the morrow of All Souls, and to prefix the same day to the parties, that then they might be ready to proceed in the plaint, his omission to summon the plaintiffs to appear in the King's Bench is his default, and not that of Wardle. The latter, therefore, has not committed a breach of the condition to prosecute his suit without delay; for the plea alleges that he was ready to prosecute it.

Richards in reply. The replevin suit was removed into the Court of King's Bench in Michaelmas term, 1829. The plaintiff in replevin having since taken no proceedings in the suit, has committed a breach of the condition of the bond by not prosecuting without delay. In *Axford v. Perrett*, 4 Bing. 586, where [*154] the plaintiff in *replevin had allowed two years to elapse without taking any proceeding, the Court of Common Pleas intimated that the replevin suit must be considered at an end, by analogy to the practice of the superior courts; but they added, that, at all events, the defendant had not prosecuted his suit without delay.

Cur. adv. vult.

DENMAN, C. J., now delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows:—On the argument before us, it was contended that the plaintiffs had shown no breach of the condition of the bond, because the suit was still continuing, and it was said that there could be no breach, unless there was a judgment for the defendants; and an authority was cited to this effect from *Carthew*, 519. But in that case the question did not arise upon a breach assigned for not prosecuting without delay; and if any effect is to be given to those words, it seems impossible to say, that if the plaintiff in the suit does not use due diligence in its prosecution, the condition is not broken; and the opinion of the Court in the latter part of the judgment in the case of *Axford v. Perrett*, 4 Bing. 586, is to the same effect.

The question then is, whether it sufficiently appears upon the pleadings that there has been a delay on the part of Wardle? It is said there has been none, because the plaintiffs are estopped by the sheriff's return from saying that they were not summoned; and, if they were summoned, it was their own fault, and not the defendant Wardle's, that the action was delayed.

But it is difficult to say that the sheriff would be *estopped by his return in this action, which is not between the same parties as that in [*155] which the return was made; and if he is not, the plaintiffs certainly are not concluded by this return.

Admitting, however, that the plaintiffs are not thus concluded, and that, upon the replication to the second plea, it is to be taken that the plaintiffs were not summoned at all, still it appears, in both pleas, that the writ of recordari, which was sued out at the instance of Wardle, contained a direction to the sheriff to prefix a day to the parties, which is, in effect, a direction to summon the plaintiffs; and we think that the defendant Wardle was not responsible for the default of the sheriff, or guilty of delay in the suit, if the sheriff neglected to serve the summons. On this ground it appears to us that the defendants are entitled to judgment.

Judgment for the defendants.

*The KING v. The Governor and Company of The CHELSEA Water Works. *June 1.* [*156]

By a grant of G. 1, reciting that the Chelsea Water Works Company had undertaken works for supplying Westminster, &c., with water, and had petitioned the Crown for liberty to use a certain canal or basin and old pond in St. James's Park, and to lay mains through the park to and from the same for the purpose aforesaid; and that the surveyor-general had reported that the said undertaking might be convenient to his Majesty, and to many of his subjects, and ornamental to the park; the King gave, granted, and assigned to the company and their successors the said canal, &c., to be converted into reservoirs, and to be used and enjoyed by them as such, for the purposes aforesaid, during the royal pleasure. Liberty was also granted them to break up the ground at all time through the said park for laying therein pipes or mains to and from the old pond and canal for the purposes aforesaid, making good the ground so broken as soon as possible. Certain conditions were added, prescribing the direction in which the pipes should be carried, the breadth of ground to be broken, &c. The company were to supply St. James's Palace at reasonable rates; and the ranger was empowered to supervise all the company's works in the park, and order them to rectify and reform the same, if not done according to the conditions.

The company took the basin and pond in pursuance of the warrant, and made a reservoir, into which they conveyed water, and laid pipes communicating with it, for the purposes aforesaid. They subsequently made expensive improvements in and about the reservoir, on the requisition of the Crown; and they were never allowed to alter or repair it but by leave and under the inspection of the crown surveyor. They pay no rent, and are paid for supplying the palace, as well as other residences. The ranger is rated to the poor for the herbage growing on the surface of the soil in the park, including that under which the pipes pass.

Held, first, that the company were rateable as occupiers of the reservoir. Secondly, that they were rateable for the occupation of land below the surface of the soil by their pipes, though another person was rated for the herbage.

THE governor and company of the Chelsea water-works were rated to the relief of the poor of the parish of St. Martin-in-the-Fields, "for land, basin, reservoir, and tanks in the Green Park, and for water-trunks and pipes there, and for their occupation of all other land and ground for the purposes of all their other water-trunks and pipes laid in and under ground, for the supply of persons with water." On appeal to the quarter sessions for the county of Middlesex (November, 1830), the rate was confirmed, subject to the opinion of this Court on the following case:—

The Chelsea Water-works Company was incorporated by statute 8 G. 1, c. 26, which authorized them, for the purpose of supplying a certain district of London with water, to lay pipes and branches in and through any of the streets, pas-

sages, &c., in or about Westminster, and the parts adjacent, and to break up the pavements and *ground, and to dig and sink for laying, amending, [*157] and repairing such pipes and branches from time to time, they, so soon as might be, filling up and making good the same. In pursuance of the act, engine-houses and other works were erected in the parish of St. George, Hanover Square, for which the company are there rated; and from those works divers pipes and branches for the supply of water have been laid under ground in and through the public streets of various parishes, and, among others, of the respondent parish.

Another portion of similar pipes, and also a basin, reservoir, tanks, and water-trunks, are situate within his Majesty's park called the Green Park, in the respondent parish; and were included in the above assessment. The pipes in the park are laid in the ground, and used for the conveyance and supply of water to persons paying the company for the same. The herbage growing on the surface of the soil in the park, including that under which the pipes pass, is rated in the hands of the ranger of the park, to the relief of the poor of the respondent parish.

The basin or reservoir is also situated in the Green Park in the respondent parish, and was formerly a pond. It communicates with the last-mentioned pipes, and, together with the tanks and water-trunks above mentioned, forms part of the company's works. In the year 1725 permission was given to the company to make use of the pond, by the following warrant.

"Warrant to the governor and company of Chelsea Water-works to convert into and use for reservoirs two ponds in St. James's Park.

"By the Lords Justices. W. CANT, KING C., DORSET, ROXBURGH, HOLLES NEWCASTLE, BERKELEY.

*"We, in his Majesty's name and on his Majesty's behalf, do give [*158] and grant the commission and license and authority following:—

"GEORGE, by the grace of God, &c.—Whereas the Governor and Company, &c., have, by their petition to us, humbly represented that, being encouraged by our royal charter, they have undertaken a very great work, in order to supply the City of Westminster and parts adjacent with water, which is so much wanted; and that they have so far succeeded in their undertaking, that they intend forthwith to make their reservoirs, and lay their mains from their machines to serve those reservoirs; but that they cannot have a proper place to make a reservoir to supply our palace at St. James's and the middle and lower part of Westminster, unless we shall be graciously pleased to permit them to make use of the canal or basin lately made in St. James's Park, over against Devonshire House, and the use of the old pond adjoining to the Deer-pen Grove there; and have, therefore, humbly prayed the liberty to use and enjoy the said basin and canal, and the said old pond, and to lay a main or mains through the said park, to and from the same, for the purposes aforesaid: which petition being, by the Commissioners of our Treasury, referred to our Surveyor-General, he hath, amongst other things, reported that this undertaking, which must be very chargeable, may be of great convenience to many of our subjects in and about Westminster; and if the petitioners be allowed the use of the said canal and old pond for reservoirs, our palace of St. James's may be constantly supplied with a sufficient quantity of water, not only for common use, but for a fountain, or other water-work, which we at any time may think fit

[*159] to have *made in our garden of our said palace; and, moreover, that the said canal, which is now dry, and the said old pond, only being put into and kept in good repair, and full of water, which the petitioners are willing to do at their own proper charge, will be an ornament to that part of our said park, rather than any prejudice to it, and it may be of good service to have two such bodies of water ready, in case of fire: all which we having taken into our royal consideration, are graciously pleased to gratify the petitioners in their request:—Know ye, therefore, that we, for the considerations

aforesaid, and for other good causes and considerations us hereunto moving, have given, granted, and assigned, and do by these presents give, grant, and assign unto the said governor and company, &c., and their successors, all that the canal or basin, and all that the old pond in our said park afore described, to be converted into reservoirs, and to be used and enjoyed by the said company and their successors as such and for the purposes aforesaid, for and during the pleasure of us, our heirs and successors. And, moreover, we have given and granted, and by these presents do give and grant, unto the said governor, &c., and their successors, and such agents, servants, workmen, and others, as the said governor, &c., shall from time to time think fit to employ, full and free liberty, license, privilege, and authority, from time to time and at all times hereafter, to dig and break up the ground through our said park, for laying therein pipes or mains to the said old pond and canal, and from the said old pond and canal to such places as shall be found most proper for conveying water to our said palace, and to the streets and houses adjacent, and and also for altering, repairing, and amending such pipes and mains [*160] from *time to time, as occasion shall require. Provided nevertheless, and our meaning is, that the grant, power, and authority hereby given, or meant or intended to be given to the said company and their successors, shall be subject and liable to the rules and conditions following; that is to say:—

The conditions were, that the company should lay their mains and pipes in a certain line, described by reference to a plan; that the ground to be broken up should not exceed a certain breadth, and that the mains or pipes should be of a particular quality and thickness; that on the digging up of the ground for laying, or for altering or repairing the mains or pipes, it should, at the expense of the company, be made good again as soon as conveniently could be done, and sown with hay-seeds; and that the company should repair any damage to be done by them to the walls or otherwise in the park. It was further stipulated as follows:—

“That the said governor and company, and their successors, shall supply our royal palace at St. James’s, with such quantity of water as shall be necessary, at such low and moderate rates as the Commissioners of our Treasury, or High Treasurer for the time being, shall think reasonable to direct and appoint.

“That the ranger of our said park for the time being shall be, and is hereby empowered to supervise all works that shall from time to time be done within our said park by the said company and their successors, or their agents, servants, workmen, and others, in pursuance of this our grant, license, and authority; and to inspect and see that the said works be at all times done and performed in manner before directed; and to order the said company, and their successors, to rectify and reform *the works they shall do and perform, [*161] or be at any time a-doing or performing, in case they be not done and performed conformable to the foregoing rules and directions.” The ranger of the park, and other his Majesty’s officers whom it might concern, were required to be aiding and assisting to the company in the execution of the powers, privileges, and authorities thereby granted or meant to be granted. The warrant was “Given at his Majesty’s palace, at Whitehall, the 29th day of July, 1725, in the eleventh year of his Majesty’s reign. By their Excellencies’ command. —(Signed) R. WALPOLE. CHAS. TURNER. GEO. DODINGTON.”

Under this warrant the company have ever since used the pond, and have made the reservoir, and basin and tanks, and laid the pipes above-mentioned in the Green Park, and have conveyed water into the said reservoir or basin, and through it in its progress to the houses they supply. The tanks are works necessary to the reservoir or basin, and to be considered as a part of it. About two years ago, when certain improvements were being made in that vicinity, the company were required by the crown to cleanse and reconstruct the reservoir, and to brick the sides and bottom, which they did under the superinten-

dence of the crown surveyor; at the same time they erected tanks and other works for cleansing the surface of the water while in the reservoir, and keeping it at a proper level. They have also, at a considerable expense, enclosed the reservoir with an ornamental railing, under the same superintendence, it having been represented to them, on behalf of the crown, that some fence was necessary [*162] to prevent the recurrence* of accidents, some of which had lately happened.

The company have no interest in the basin or in the soil, other than is conveyed by the royal warrant, nor do they occupy it further than as above stated. The use of it is not essential to their purposes, but it is beneficial to them by enabling them to charge or fill their main pipes without working their engines at the head of their works,¹ and the company are by this means better enabled to use the said engines when they think proper for the supply of other districts than those communicating with the reservoir, and for other purposes; and in particular it may be useful in case of fire. The fish in the reservoir have been taken by the deputy ranger, the company not objecting; and the company have been always restrained from making alterations in, or doing repairs to, the basin, unless by the express permission of the crown surveyor, and under his inspection. They pay no rent, and are paid for supplying the palace, in the same manner as for the supply of their other customers.

The question for the consideration of the Court was, whether any, and what portion, of the works in the Green Park, before-described, was rateable to the relief of the poor of the said parish; and the case fixed the rates to be assessed, if the Court should be of opinion that the reservoir, and works forming part of it, were rateable, and not the pipes within the park; or the pipes only, or both.

[*163] No question was made as to the *pipes in the streets. The case was argued in Easter term.²

Sir James Scarlett, J. L. Adolphus, and Channell, in support of the rate. First, as to the reservoir and works annexed. The question is, whether the company are occupiers of the reservoir, or have only an easement in it. It is clear from the king's grant, that a continued and exclusive enjoyment of it was contemplated. The terms used in granting, the reasons assigned in the recital, the purposes enumerated, and the conditions imposed, all show this. The case, therefore, is not like that of *Rex v. The Mersey and Irwell Navigation Company*, 9 B. & C. 95; where the parties rated had (as to the bed of the river) a mere privilege, and took nothing corporeal by the authority given them, and had no exclusive occupation. The same distinction will apply to *Rex v. Thomas*, 9 B. & C. 114; and *Rex v. The Undertakers of the Aire and Calder Navigation*, 9 B. & C. 820. There nothing was held but an incorporeal hereditament; here the Company have the soil for the purpose of keeping water in it. They have a possession, in respect of which they might maintain trespass, *Dyson v. Collick*, 5 B. & A. 600. In *Rex v. Joliffe*, 2 T. R. 90, a person who rented a mere way-leave over another's land was held not rateable; but in *Rex v. Bell and Others*, 7 T. R. 598, where parties held a lease of wagon-ways, constructing the ways as was most convenient to themselves, and excluding all persons but themselves and [*164] those whom they authorized, the rate was confirmed. *The difference is the same between this and the three cases above cited. If the crown had, by such a grant as this, given the company a granary to keep corn in, there could have been no doubt as to the occupation; it makes no difference here, that the premises granted are an excavation in the ground, and the thing kept upon them is water. The water which they sell, is as much the goods of the company as if it were grain, or oil. In *Rex v. The Mayor, &c., of Bath*, 14 East, 619, Lord ELLENBOROUGH said, "They (the corporation) are occupiers of the reservoirs, which they are empowered to make, and in which the water, which they are also authorized to collect, is kept." It is true the occupation in this case is only

¹ The water is brought from the Thames. See the act, 8 G. 1, c. 28.

² Before DENMAN, C. J., LITLEDAL and PARKS, Js.

during pleasure, but that is immaterial. In *Rex v. Bell*, 7 T. R. 600, Lord KENYON said, "the question is merely, whether the defendants are or are not possessed of property that is rateable to the poor. We are not," he says, "to inquire into the titles of the occupiers." The same doctrine was before laid down in *Lord Bute v. Grindall*, 1 T. R. 338. In that case, and in *Rex v. Terrott*, 3 East, 506, the occupation was at the pleasure of the crown. The conditions imposed in this case make no difference, but rather tend to show the exclusiveness of the company's occupation. At all events they are only like the covenants in many leases, to cultivate in a certain manner, or to do repairs subject to the approbation of the landlord's surveyor.

Then as to the pipes. No question is made as to the pipes laid in the streets, and there is no substantial distinction between them and those in the park. The Company are empowered to break the soil there, for *the purpose of [*165] laying therein their pipes and mains; and that is done. The purpose of these pipes is as permanent as that of the reservoirs, which would be useless without them. In *Rex v. The Mayor, &c., of Bath*, 14 East, 618, where the corporation were held rateable as occupiers of their reservoirs, the Court being of opinion that these came within the description of "land" in 43 Eliz. c. 2, Lord ELLENBOROUGH said: "I confess I have great difficulty in distinguishing between the case of water collected in a trunk, or reservoir, so many yards wide, or in pipes so many inches wide, each being attached to the soil." And in *Rex v. The Rochdale Water-works Company*, 1 M. & S. 634, the pipes and reservoirs were held to be undistinguishable, and both liable to the rate. A reservoir receiving water in one part, and discharging it in another, is, in fact, nothing more than an open pipe. In *Rex v. The Birmingham Gas-Light Company*, 1 B. & C. 506, it was taken for granted that the company were rateable for their gas-pipes; and this was expressly held in *Rex v. The Brighton Gas-Light Company*, 5 B. & C. 466. In *Rex v. The Mersey and Irwell Navigation Company*, PARKE, J., says, (9 B. & C. 112): "No person can be an occupier, unless he has the exclusive right to enjoy some portion of the soil. The companies who have gas-pipes have the exclusive right to enjoy a portion of the soil: they have the exclusive right of occupying, by means of these pipes, that portion of the soil in which the main is." It is true that, in the present case, the ranger is rated for the herbage on the surface of the soil under which the pipes are laid; but there is no doubt that the surface of land may be in one person, while the substratum is *in another, who may, or may not, have the privilege of using that under-portion: *Rowe v. Brenton*, 8 B. & C. 766. Here, by the royal warrant, [*166] that privilege is in the company, and they occupy the substratum by their pipes.

F. Pollock and Bodkin, contra. It would be difficult, after the cases of the Birmingham and Brighton Gas-Light Companies, 1 B. & C. 506, and 5 B. & C. 566, to contend, generally, that pipes of this description are not rateable. But here the herbage of the ground under which the pipes are laid is the ranger's, and he is rated for it; and there is no authority for the rating of an underground occupation, where the surface of the soil is in different hands. This view appears to have been taken by BULLER, J., in *Rex v. Joliffe*, 2 T. R. 94; where he observes, that the appellant had a mere way-leave over the surface, and if he could be assessed for that, the soil would be doubly rated. The rating of pipes under the streets does not affect this question, because no person is rated for the surface of the streets. In the cases cited on the other side, as to occupation by pipes, the parties had an absolute interest in the soil, or at least no one else had a rateable interest. The dictum of PARKE, J., which has been cited, is, that no person is an occupier, unless he has the *exclusive* right to some portion of the soil. It cannot be said that if the owner of a field, or a house, gives permission for pipes to be passed under part of his property, there is a rateable occupation by means of such pipes. As to the reservoir, it was not made by the company; they had only the King's permission to avail themselves of it, as if the crown had permitted *them to make use of the Serpentine River, or Virginia Water, for a like purpose. There is no exclu- [*167]

sive occupation. The recital of the warrant of Geo. 1, which states the petition of the Company, shows, that they did not even ask for an exclusive occupation: they only prayed the liberty to use and enjoy the reservoir and pond; that petition only was referred to the Commissioners of the Treasury; and the recommendation of the Surveyor-General, and the grant of the crown thereupon made, are not to be extended in construction beyond what the parties asked. The crown only gives the use of a reservoir and pond. The case may be different, in this point of view, as to the pipes, because the Company do ask permission to "lay their mains," which may imply an exclusive occupation; but with respect to the reservoir, there is no such occupation asked or given: they use it in common with the crown. The Board of Works might at any time exercise a control over it. Substantially, the Company have no greater interest in this basin, than the Mersey and Irwell Navigation Company had in the water under their jurisdiction in the case cited on the other side, 9 B. & C 95. It is nothing more than the case of proprietors obtaining leave to pass a body of water through lands of the crown, on condition of keeping it in an ornamental state.

DENMAN, C. J. I think it is quite clear the pipes in the park are rateable. The ranger is rated for the herbage only. It is evident, therefore, that the soil beneath may be rated in the hands of other persons, who have the exclusive use and possession of that. As to the reservoir, the Court will take time to look into the grant, and consider its effect.

[*168] *LITLEDALE, J. As to the pipes in the park, I entertain no doubt. The circumstance of the herbage being rated in the hands of the ranger, affords no ground for exempting them.

PARKE, J. I am of the same opinion. Nothing is rated in the ranger's hands but the herbage.

As to the other part of the case,

Cur. adv. vult.

In the present term, the judgment of the Court was delivered by

DENMAN, C. J., who, after stating the case, proceeded as follows:—With respect to the pipes laid in the park, it was admitted by the learned counsel for the appellants, that, unless he could distinguish this case from those in which it was decided that pipes of similar companies laid in the streets were rateable, the rate in the present instance, in that respect, must be confirmed. The ground of distinction was, that here another person was rated for the surface of the land under which the pipes were placed. But we are clearly of opinion that this makes no difference. That part of the soil which the Company occupied was not included in that rate. Upon this question the Court expressed a clear opinion in the course of the argument.

The only reason for deferring our judgment was, that we might have an opportunity of more attentively considering the effect of the royal warrant, under which the reservoirs were made. We have done so; and we are of opinion that it gave to the Company as much interest in the space where their reservoirs are made, as in that where the pipes are laid. It is impossible [*169] to distinguish one from the other. Their interest, indeed, in the former is expressly, in the latter by implication, at will only; but a tenant at will is, until the will be determined, an occupier of the land; and as the company are, on the authority of the decided cases, the occupiers of the land filled by the pipes, they must be considered as the occupiers of that where the reservoirs are constructed. They appear to us to have the exclusive right in a portion of the soil in both cases, though for a limited purpose only.

Rate confirmed, for the amount stated in the case.

The KING v. the Inhabitants of ST. JOHN BEDWARDINE. June 1.

A person of the age of twenty-one years, is not a poor child whom the parish officers are to bind out apprentice with the assent of two justices, within the meaning of the 56 G. 3, c. 139.

Section 11, of that statute extends only to indentures of apprenticeship of poor children; and, therefore, an indenture whereby a person of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two justices.

On appeal against an order of two justices, whereby Robert Shirton was removed from the parish of Saint John Bedwardine to the parish of Hanbury, both in the county of Worcester, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper, R. Shirton, had, before he was twenty-one years of age, gained a settlement in Hanbury, by a hiring and service for a year with one John Stain. After he came of age, and before he was twenty-four, being lame, he applied for relief to the overseers of Hanbury, who recommended him to learn some trade, but refused to bind him out; nevertheless, they promised *that, if he could find a master, they would give him 4*l*. The pauper then put himself apprentice to one Hatch, living in St. John Bed- [*170] wardine. The parish officers of Hanbury gave the money to the pauper, who paid it to Hatch. The indenture was by deed, sealed by the master and the apprentice, but was not approved of by two justices. Whilst under this indenture, the pauper slept for more than forty nights in St. John Bedwardine, and would be settled there, if the indenture were good in law.

Lee, in support of the order of sessions. The pauper being above the age of twenty-one years when bound, was not a "poor child" within the meaning of those words in 56 Geo. 3, c. 139, s. 11. The 5 Eliz. c. 4, s. 26, enacted, that every householder dwelling and exercising an art or mystery in any town corporate, might have and retain the son of any freeman to serve and be bound as an apprentice for seven years at the least, so as the term of such apprentice should not expire before such apprentice should be of the age of twenty-four years: and sect. 36, provided, "that no person should, by force or color of that statute, be bound to enter into any apprenticeship, other than such as were under the age of twenty-one years," see 54 G. 3, c. 96. The 18 G. 3, c. 47, after reciting 43 Eliz. c. 2, s. 5, which authorized parish officers, by the assent of two justices, to bind children of parents who were not able to keep and maintain them, to be apprentices till such man-child should come to the age of twenty-four years, enacts, that any man-child bound apprentice under the said act, shall be bound "for no longer term than till such *child shall come [*171] to the age of twenty-one years." The stat. 56 G. 3, c. 139 (as appears by the preamble), was passed to remedy the grievances which had arisen from the binding of poor children apprentices by parish officers, to improper persons, and to persons residing at a distance from the parishes to which such poor children belonged, whereby the parish officers and the parents of such children were deprived of the opportunity of knowing the manner in which such children were treated, and enacts (sect. 1), that before any child shall be bound apprentice by the parish officers, such child shall be carried before two justices, and they are to inquire into the propriety of binding such child apprentice to the proposed master, and also whether he reside, or have his place of business, within a reasonable distance from the place to which such child belongs; and if the father or mother of such child be living, and reside in or near the place to which such child shall belong, such justices are (if they think fit) to examine such father or mother; and if they, the justices, think it proper, they are to make an order for the binding. The justices, therefore, are, in fact, invested with the character, and are to perform the duties of parents, in selecting a proper master. A person, however, who has attained the age of twenty-one does not require their protection, but is capable of judging for himself as to the fitness of the master to whom he is to be bound: he does not come within either the spirit of the act, or the meaning of the word child. It will be said, however, that assuming the pauper not to have been a poor child within the meaning of the act, and admitting that the first ten sections apply to poor children only, still

section 11, applies to all indentures whatever, whereby parties, whether children or not, may *be bound. That section, after reciting, that the salutary provisions of the 43 Eliz. are frequently evaded in binding out poor children, enacts, "that no indenture of apprenticeship by reason of which any expense whatever shall be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices, according to the provisions of the said act and of this act." The enacting words here must be restrained to such indentures as were within the general mischief intended to be prevented;—that was the improper binding out of poor children. Besides, here no payment was made by the parish officers for binding the pauper. The putting out was not occasioned by them: they gave him relief, and he applied it in learning a trade. And *Rex v. St. Peter Hereford*, 1 B. & Ad. 916, shows that s. 11, must be construed with some restrictions.

Godson, contra. The pauper, at the time of the binding, was within the meaning of the term "poor child" in 56 G. 3, c. 139. The stat. 43 Eliz. c. 2, contemplated that a party might continue a poor child till the age of twenty-four years. [PARKE, J. That the apprenticeship might continue till then, but not that a party up to that age might be bound by the parish officers.] A person who continues part of his father's family after twenty-one is not emancipated; *Rex v. Sowerby*, 2 East, 276. [DENMAN, C. J. In that sense a party might continue a child all his life.] Then, secondly, the 56 G. 3, c. 138, s. 11, avoids every indenture of apprenticeship, if any part of the consideration for it, or the expense relating to it, is paid out of the parish funds, unless it receive the assent of two justices. *Rex v. St. Paul's Exeter*, 10 B. & C. 12, shows [*173] *that the first ten sections apply to cases where the parish officers are parties to the indenture, and the eleventh to cases where the parish officers do not join in the indenture, but where some part of the expense is paid out of the public parochial funds. The object in that section is to protect parishes against a wanton or clandestine expenditure of their funds. It is perfectly consistent with the language used by the legislature, that the first ten sections may apply to the binding out of poor children, and the eleventh to all indentures whatever.

DENMAN, C. J. It is impossible to say that a person who has attained the full age of twenty-one years, is a poor child within the meaning of this statute. Although a person might have been compelled to serve as an apprentice till the age of twenty-four, it does not follow that he might be bound by indenture after twenty-one. It is, however, said that the enacting words of the eleventh section are not confined to indentures of apprenticeship of poor children, but extend to all indentures. The words, "no indenture," are undoubtedly very large, but they must be construed with reference to the recital, and to the concluding words of the clause. The recital refers to the binding out of poor children; and the enactment is, that "no indenture by reason of which any expense whatever shall be incurred by the public parochial funds shall be valid, unless approved of by two justices, according to the provisions of the said act and of this act." Now the provisions of the recited act, as to the binding out of apprentices, apply to children whose parents shall not be thought by the parish officers, able to keep and maintain them; and the provisions of 56 G. 3, c. 139, in the first ten [*174] sections, apply to the binding out of poor *children. *Rex v. St. Paul's Exeter*, 10 B. & C. 12, does not show that the first ten sections contemplate children and the eleventh those who are not children.

LITTLEDALE, J. I think the first ten sections of the 56 G. 3, c. 139, apply to children under the age of twenty-one years. The first section directs the justices to inquire into the propriety of binding the child apprentice, and whether the intended master has his place of business within a reasonable distance from the place to which such child shall belong, and if the father or mother of the child be living, they are to examine them. There, the word child is used in its ordinary sense. Then it is said that sect. 11 has no limitation, but applies to all indentures whatever, of children or others. I should have doubted as to

this point, because it seems reasonable that the check there imposed should be provided for in all cases; but the words in the latter part of the clause are, "according to the provisions of the said act and of this act;" and those provisions apply to the binding out of children only. It follows that sect 11 can apply only to indentures whereby children are bound.

PARKE, J. I am clearly of opinion, that a person above the age of twenty-one years is not a poor child within the meaning of this statute. My only doubt has been, whether sect. 11 applies to indentures of all persons whether children or not. The concluding words of that section, satisfy me that it is confined to indentures of apprenticeship of poor children only. The words of the enacting part of a clause may be larger than the recital, and where they are, they will *comprehend any case within the general mischief intended to be prevented. But here, that was the improper binding out of poor children [*175] by parish officers. The first ten sections apply to such children only. Then sect. 11 recites, that the salutary provisions of the 43 Eliz. are frequently evaded in the binding out of poor children, and the premium, or part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out poor children without the sanction of justices. The mischief recited in that section, therefore, is not so much the misapplication of the parish funds, as the binding out of poor children without the sanction of justices. Then the enactment is, "that no indenture of apprenticeship, by reason of which any expense shall be incurred by the public parochial funds shall be valid, unless approved of by two justices according to the provisions of the said act and of this act." Now, the provisions of the 43 Eliz. c. 2, on this head, and those of the first ten sections of 56 G. 3, c. 139, apply to indentures whereby a child or children are bound out. The latter words, therefore, of the enacting clause, control the former, and confine them to indentures of apprenticeship whereby poor children are bound.

PATTESON, J. Looking at the terms of s. 11, I have not the least doubt that it is confined to indentures of poor children. The enactment is, that no indenture, by reason of which any expense whatever shall be incurred by the public parochial funds, shall be valid, unless approved of by two justices, according to the provisions of the said act and of this act. Now, those provisions authorized justices to approve of indentures only whereby poor children were bound out by the parish *officers. The enactment, therefore, which avoids the indentures unless approved of by two justices, being construed with reference [*176] to those provisions, can apply only to the binding of poor children.

Order of sessions confirmed.

The KING v. The Inhabitants of BANBURY. June 1.

(BANBURY v. WITNEY.)

Pauper was bound apprentice for seven years to a breeches-maker, and served his master half a year; the latter then failed in business, and told the pauper he might go and work for one B., who lived in another parish, and if pauper did not become troublesome to him, the first master, or to his parish, till the end of his time, he would give pauper his watch. The pauper agreed with B., and worked for him at breeches-making, by the piece, at the usual rate. B. frequently carried messages between the first master and the pauper. The latter having worked for B. a year, in B.'s parish, agreed (with the consent of his first master) to work by the piece for C., another breeches-maker, living in a third parish, who gave better terms. While he so worked for C. his first master came to see him, and again promised him his watch at the end of his time. The pauper worked two years for C., living in C.'s parish; he afterwards left, and his first master then sent him his watch. The pauper kept his earnings and maintained himself:

Held, by DENMAN, C. J., LITTLEDALE, J., and PATTESON, J. (PARKE, J., dissentiente), that the inhabitation of the pauper in the parishes of the second and third masters was connected with the apprenticeship, and that he thereby gained settlements in those parishes.

ON appeal against an order of two justices, whereby Richard Carpenter and his three children were removed from the parish of Banbury to the parish of Witney, both in the county of Oxford, the sessions discharged the order, subject to the opinion of this Court on the following case:—

By indenture of apprenticeship, dated the 10th of Sept., 1801, the pauper, R. Carpenter, was bound apprentice by the trustees of a charity in Charlbury, to J. Hobbs, of Witney, tailor and breeches-maker, to serve for seven years. The master's covenants were, to teach the trades, and to find the apprentice sufficient meat, drink, washing, lodging, clothing, and all other necessities during the term. The pauper entered into his service on the 6th Sept., 1801, at which [*177] time he was about twenty years of age, and served his master *in Witney about half a year. Hobbs, the master, then failed in business, but did not become bankrupt; and, having little or no work for the pauper to do, said,—“Richard, it is of no use your stopping here; I have nothing for you to do; you had better go, if you can get a place; Barry of Bloxham, wants hands, and he is a Witney man,—you may go and work for him, if you like; and if you do not become troublesome to me or Witney parish till the end of your time, you shall have my watch,” which he then showed him. The pauper went to Barry at Bloxham (which is about twenty miles from Witney); he paid his own conveyance. The pauper agreed with Barry to work for him, and to receive 2s. 6d. a pair for making breeches, which was the regular price. Barry used often to go to Witney; and several times carried friendly messages between the pauper and Hobbs. The pauper worked for Barry, in Bloxham parish, a year, maintaining himself by the wages he received; he then heard that one Baker, of Banbury, wanted hands, and that he gave better wages than Barry; he therefore sent by letter to Hobbs for his leave to work for Baker, and received a verbal assent from Hobbs, and a promise to come and see him. The pauper went to Baker, and agreed to work for him to make breeches at 2s. 9d. a pair. After the pauper had been with Baker about three months, Hobbs came to Banbury to buy leather of Baker, and told the pauper he was glad to see him doing so well for himself, and going on so comfortably; he gave the pauper 1s., and again promised him the watch when his time was out. He afterwards came again to buy leather, and again saw the pauper at Baker's, at work, and repeated his promise of the watch. The pauper worked for Baker two years, [*178] living the whole time in Banbury, and *then left. Hobbs then sent the pauper his watch; the same he promised, and showed him, when he left his house at Witney. The pauper maintained himself by the wages he received from Barry and Baker, and Hobbs had nothing to do with his earnings. The question for the opinion of the Court was, whether the residence in Bloxham or Banbury was a residence under the indenture, sufficient to confer a settlement in either of those places.

Walesby in support of the order of sessions. The pauper gained a settlement in Banbury. There was a consent of the master to the particular service in each of the places, and therefore the residence in each was under the indenture, *Rex v. Shebbear*, 1 East, 73, *Rex v. The Holy Trinity, Minories*, 3 T. R. 605, is expressly in point. There, the master, after giving his apprentice leave to get another master, recommended him to go to a particular person in the same business, and make an agreement with him for his own good, which he accordingly did, and served his second master two months before the indentures were given up to him by his first master: and it was held that by such service with the second master he gained a settlement in his parish. Independently of that, the pauper's absence was in this case a benefit to the master; and it has been held, even in a case of general consent, that if the apprentice works for the benefit of the master, it is a service with him: *Rex v. Offerton*, Barr. S. C. 802. Besides, in this case, the master, in the first instance, exercised his control for the good of the apprentice. *Rex v. Whitechurch*, 1 B. & C. 574, may be relied [*179] on by the other side. But there, the first master did *not know whom the apprentice was going to serve, nor did the second know that the

pauper was an apprentice. In *Rex v. Ashby-de-la-Zouch*, 1 B. & A. 116, the service with the second master was under a contract of hiring, and not under the indenture of apprenticeship.

Chilton, contra. To establish a settlement in the parish of the second master, the service with him must be under the indenture; and there must be an express consent of the first master to the particular service, and a knowledge by the second that the relation of master and apprentice subsisted between the first master and the pauper. Here that is not found. That mere knowledge and acquiescence on the first master's part, without express consent, is not sufficient, appears from *Rex v. Crediton*, 1 East, 59, and *Rex v. St. Helens, Stonegate*, 1 East, 285. In *Rex v. Whitchurch*, 1 B. & C. 574, the apprentice asked his mistress's leave to go into another service, to which she consented, saying, she was not against it, if he could better himself; he did not mention where he was going; he hired himself to one Jenkinson for a year, returned, and told his mistress, who said, "very well, she was not against it." In a few days he went to his new place, and in about a fortnight returned to his old mistress for his clothes; she said, "she hoped he liked his new place;" and he said he did; it was held that that was not a service with Jenkinson under the indenture, but a service under a contract of yearly hiring; because it did not appear that Jenkinson knew that the pauper was an apprentice, and it was not expressly stated that there was any consent of the mistress to the particular service, or that the name of Jenkinson was mentioned to her, *either when the apprentice went [*180] away the first time, or when he returned and told her he had hired himself. [PATTESON, J. How is the present case distinguishable from *Rex v. The Holy Trinity, Minories*, 3 T. R. 605? In that case there was nothing to show that Edwards, the second master, knew that the pauper was an apprentice.] That case was determined before the rule had been distinctly laid down that the service with the second master must be referable to the indenture, and it is virtually overruled by *Rex v. Whitchurch*, 1 B. & C. 574. In *Rex v. Shipton*, 8 B. & C. 88, the master of a parish apprentice, not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, and agreed with her to work there for a twelvemonth for his meat and drink. He worked for her four years and four months, having made a new agreement at the end of the second year for wages; and it was held that no settlement was gained by service with the sister, inasmuch as such service was not under the indenture, but under a contract of yearly hiring. The inhabitation of the pauper in Bloxham and Banbury was under a contract of hiring, and not of apprenticeship; and according to the construction put upon the statute in *Rex v. Ilkeston*, 4 B. & C. 64, and *Rex v. Linkinhorne*, 3 B. & Ad. 413, the inhabitation in those parishes ought to have been in the character of an apprentice, and in some way or other in furtherance or pursuance of the objects of the apprenticeship. Anything which indicates an intention that the service with the second master should not continue under the original indenture, will prevent the gaining of a settlement *in the parish where it is performed. In *Rex v. Ecclesfield*, 6 M. & S. 173, a new indenture was entered into with the second master, [*181] and this, though not capable of taking effect so as to constitute an apprenticeship, yet, as it served to indicate an intention that the service should not continue under the original indenture, but begin de novo, was held to prevent the gaining of a settlement in the place where the service with the second master was performed.

DENMAN, C. J. I am of opinion that a settlement was gained in Banbury. I am unwilling to introduce into the construction of an act of parliament terms or definitions which are not to be found in it. The stat. 3 W. & M. c. 11, s. 8, enacts, "that if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement." There must, therefore, be a binding, as well as an inhabi-

tation in a parish to give a settlement. But the authorities show, that where a party has been bound apprentice in one parish and expressly permitted by his first master to work for another in a different parish, the service to the second master is, constructively, a service under the indenture, and that the original binding continues in force during the whole period of such service. That being so, the facts of this case show that the binding continued in force during the whole time of the pauper's service with the second and third master. It appears that the first master having failed in business, and having no work for the pauper to do, told him to get a place, and said that one Barry, of Bloxham, a breeches [*182] maker, wanted hands, and that the pauper might *go and work for him if he liked. The pauper accordingly agreed to work for Barry, and was to be paid by the piece. Barry carried messages to and from the first master and the pauper, and therefore must be taken to have known that the relation of master and apprentice subsisted between them. The pauper (having first applied for and obtained the consent of his first master), went afterwards to work in Banbury, with one Baker, another breeches maker; so that, during the whole time, he worked at his original trade: and both he and his first master considered the apprenticeship as continuing; for the pauper applied for leave to work for Baker, and the first master, on that occasion, promised, as he had done before, to give him his watch at the end of his time, and he afterwards gave it to him. I agree that the binding must not only continue during the whole of the service, but that the inhabitation of the pauper, to give him a settlement, must, in some way or other, be connected with the apprenticeship. But as the pauper here not only continued to work at his original trade, but he and Hobbs both considered the relation of master and apprentice to continue between them, I think the inhabitation in Bloxham and Banbury was referable to the binding, and one of the consequences of the apprenticeship. Hobbs and the pauper may have thought that the best way for the latter to learn the trade was by serving other persons in the same business. The third master, as well as the second, must be taken to have known that the relation of master and apprentice subsisted between Hobbs and the pauper, and he and the pauper considered the indenture still in force. I think, therefore, there was in this case a sufficient binding and inhabitation in the parish of Banbury within the statute and the decided cases, to confer a settlement.

[*183] *LITTLEDALE, J. I am entirely of the same opinion. The indenture was not cancelled, nor intended so to be. The master gave an express assent to the apprentice's working with Barry, and promised to give him his watch; he afterwards, on the application of the apprentice, assented to his working with Baker; and when he had been in the service of the latter some time, again promised him the watch. By the deed, the master was bound to provide the apprentice with board and lodging, but the apprentice went to a place where these were found for him, worked at the same occupation, and was paid by the piece. I think it sufficiently appears that he continued to work under the indentures; indeed, I hardly know how that could appear more strongly, unless there had been an actual assignment of the indenture. I consider the indentures to have continued in force during the whole term of the apprenticeship. The next question is, did the pauper serve the second and third master as an apprentice? The leave given by Hobbs must be taken to be for the pauper to work for Barry and Baker as he did for him, Hobbs, viz. as an apprentice. It is not found expressly that Barry or Baker knew the pauper was an apprentice to Hobbs; and if that fact be necessary, it appears to me not sufficiently proved; but I do not see why it should be requisite that the second master should have that knowledge. In some of the cases on this subject there was want of notice to the second master, and in others not; and in some of them are expressions which tend to show that such knowledge is necessary. I think, however, that it is not so, and that the assent of the first master is sufficient. The pauper, then, in this case, must be considered to have

served the second and third master under a contract of apprenticeship, and not of hiring.

*PARKE, J. I am of opinion that no settlement was gained in Banbury. [*184]
In order to gain a settlement by apprenticeship, the statute 3 W. & M. c. 11, s. 8, requires a binding and inhabitation; and according to the construction put upon that provision in *Rex v. Ilkeston*, 4 B. & C. 64, and *Rex v. Linkinhorne*, 3 B. & Ad. 413, the inhabitation must be in the character of an apprentice, and in furtherance or in pursuance of the object of the apprenticeship. The statute does not, in terms, require a service in the parish; it is sufficient if there be an inhabitation which is, in some way or other, connected with the apprenticeship. The question, then, is, whether the pauper, during the time he worked for Barry or Baker, worked for them in the character of an apprentice. It seems to me that he did not, but that he was employed as a servant. If the first master had assigned over the apprentice to the second, and thereby obliged the apprentice to serve in that character, the service then would be clearly referable to a contract of apprenticeship; or, if the first master had communicated to the second that the pauper was his apprentice, and the second master had received him in that character, the inhabitation would have been connected with the apprenticeship. But there is no authority to show, that if the apprentice, having leave from his original master to work for another, goes and hires himself to and works for that other as a journeyman, such service is, in any way, connected with the indenture. In *Rex v. The Holy Trinity, Minorities*, 3 T. R. 605, the pauper lived with the second master in the character of apprentice; for, by the very terms of the agreement between them, he was to instruct the pauper in his business. The modern authorities *are very strong on this subject. In *Rex v. Ashby-de-la-Zouch*, 1 B. & A. 116, the master of several apprentices, upon quitting business, proposed to assign all his apprentices, without mentioning either their names or number, to one Peele, but no assignment was ever made; the pauper, one of the apprentices, was afterwards hired by Peele as a servant for fifty-one weeks; and her former master, on meeting her, expressed his approbation of her having gone into Peele's service. The sessions having found that there was no particular assent of the original master to the second service, and therefore that the relation of master and apprentice never subsisted between Peele and the pauper, the Court thought them well warranted in that conclusion; and BAXLEY, J., observed that the master to whom the pauper went to be hired was never apprised of the relation of master and apprentice having subsisted; he hired her as a servant, which constituted a new and different relation. So in *Rex v. Whitechurch*, 1 B. & C. 574, it is said by the Court, "In this case it is impossible to say that the pauper served Jenkinson (the second master) as an apprentice, under the indenture; it does not appear that Jenkinson even knew that the pauper was an apprentice." In *Rex v. Shipton*, 8 B. C. 88, where the master, not having sufficient work for his apprentice, proposed to him to go to a farm in a different parish, occupied by the master's sister, and the pauper agreed with her to work there for a twelvemonth for his meat and drink, and worked for her for four years and four months, receiving from her during the first two years, meat and drink, and during the third and fourth, wages: Lord TENTERDEN said, "it *appeared from the facts stated, that the pauper hired himself to Mrs. Corser, the master's sister; the service, therefore, was not under the indenture, but under a contract of hiring." [*186]
The authorities show that an apprentice, who, with the assent of his first master, serves a second, must, in order to gain a settlement in the place where he serves the second master, be inhabiting there in the character of an apprentice, and not in that of a hired servant. Now, here, the pauper did not live with Barry and Baker in that character, because non constat that they ever knew he was an apprentice. If they had been privy to the relation of master and apprentice having subsisted between Hobbs and the pauper, they might be taken to have contracted the same relation, and to have received him into their service as an apprentice, and his inhabitation in their parishes would be considered as having been in

that character; but, in this case it seems to me that there was no obligation on the part of the second or third master to teach the pauper, or, on the part of the pauper, to perform the duties of an apprentice to either of them. Upon the whole, therefore, I have come to the conclusion, that there was no sufficient inhabitation in Bloxham or Banbury to give the pauper a settlement in either of those places.

PATTERSON, J. The cases on this subject are exceedingly difficult to reconcile with each other. On the whole, I think a settlement was gained in Banbury. I agree in the rule laid down by Lord TENTERDEN in *Rex v. Ilkeston*, 4 B. & [*187] C. 64, that the inhabitation must be in the *character of apprentice, and in some way or other in furtherance of the object of the apprenticeship. The pauper, in this case, was bound apprentice to Hobbs, a tailor, who failed in his business and could not maintain him. The apprentice therefore went to Barry, and bound himself to work, not as a servant, but as a journeyman by the piece; and while there, hearing he might do better for himself, applied again to his first master, and the latter consented to his working with Baker; and on that occasion, for the second time, promised to give his watch to the apprentice at the end of his time. Both master and apprentice therefore considered the contract of apprenticeship as still subsisting. The pauper did not bind himself to the third master for any specific time, but agreed to work by the piece. I think an action of covenant might have been maintained by either party (Hobbs or the pauper) against the other. In *Rex v. Whitchurch*, 1 B. & C. 574, there was no assent on the part of the first mistress to the particular service. In the first instance, she did not know to whom the apprentice was going; and when he had hired himself, and returned and told his mistress of his having so done, he did not mention the name of the second master. In these cases small circumstances are laid hold of in each particular instance; but I should say, in general, that whenever the original contract continues, and the apprentice, with the consent of the first master, works at a trade with a view to be taught that trade, he must be considered as living with the person under whom he so works, in the character of an apprentice.

Order of sessions confirmed.

[*188] *The KING v. The Inhabitants of GREAT GLENN. June 1.

A. rented a house in the appellant parish of L. as tenant from year to year, and died. His widow, a fortnight after his death, told the landlord that she wished to pay the rent weekly; he assented, and she paid it weekly for the following nine months, when she quitted on a week's notice. Two months after her husband's death, the attorney for the respondent parish (which had relieved the widow) told her she had a right to take out administration if she chose, and if she would leave it to him, he would do whatever was necessary; she assented. The letters of administration were obtained, and the pauper resided forty days afterwards in the appellant parish. The sessions found that the administration was fraudulently taken out by the direction and at the expense of the respondent parish, for the purpose of settling the pauper in the appellant parish:

Held, that as the widow was not only entitled, but bound by law, to take out administration, there was no fraud in the transaction which would prevent her from taking, as administratrix, her husband's interest as yearly tenant, and thereby acquiring a settlement. But the Court referred it back to the sessions as a question of fact, whether the widow, after administration granted, continued a weekly tenant, or became a tenant from year to year, in her husband's right.

UPON appeal against an order of two justices, whereby Mary Stevens and her three children were removed from the parish or township of Great Glenn to the parish or township of Leir, both in the county of Leicester, the sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper Stevens was married to John Stevens in April, 1827; and on their marriage she and her husband went to live in a house in the appellant

parish, which her husband had taken of Thomas Eaglefield as tenant from year to year, at the rent of 3*l.* per annum, which was a rack-rent. They continued to live in this house until the 14th of May, 1831, when the husband died. The widow (the pauper) continued the possession from thence for about a fortnight or three weeks. She then went to the respondent parish for a few days, viz., from Monday till Saturday, when she returned to Leir, having left her sister in possession of the house during her absence. She was relieved there by the respondents until the 3d of December following. On the next 2d of June after her husband's death, the pauper had an *interview with the landlord, and told him she wished to pay the rent weekly; he assented, and it was agreed that the pauper should pay 1*s.* 2*d.* per week, which she paid accordingly until the 5th of March, when she quitted in consequence of having received a week's notice to quit. [*189]

Some time in August after her husband's death, the pauper took out letters of administration to the effects of her husband, under the following circumstances. The attorney for the respondent parish, accompanied by a clergyman, in that month called upon the pauper, and administered the oath, saying, "We shall be obliged to get you to take out letters of administration: I dare say you don't understand it. You have a right to take out letters of administration, if you like; and if you will leave it to me, I will do whatever is necessary." This explanation was not understood by the pauper. However, she said she had no objection, but hoped they would not take her goods, which she believed the respondent parish were going to lay claim to. The pauper was ignorant of administering, any further than she understood her oath was to declare that what she had was not worth 20*l.*; and she never heard until the 6th of December following, that letters of administration had been taken out; when the attorney for the respondent parish, having laid some papers on a table before her, said, "Those are your letters of administration." The pauper's goods, at the decease of her husband, were not worth more than 5*l.*; 3*l.* of which were due for rent, and 2*l.* for other debts. The letters of administration were taken out by the direction, and at the expense, of the respondent parish, for the purpose of settling the pauper in the appellant parish. The pauper resided forty days and upwards in the house *late her husband's, in the appellant parish, after the grant of the above-mentioned letters of administration; [*190] whereupon the order of removal appealed against was obtained. The court of quarter sessions found that there was fraud in taking out the letters of administration, and discharged the order.

Humfrey and Barnaby in support of the order of sessions. The pauper did not gain any settlement by residing after her husband's death in the parish of Leir, where the house was situate of which he had been tenant from year to year. His interest in that house did not vest in her before the letters of administration were granted, and the sessions have found that they were taken out fraudulently, and for the purpose of settling the pauper in Leir. No settlement can be legal which is brought about by practice or compulsion. Resolution of the Judges, 1633, Dalton, c. 40, 1 Nolan, P. L. 290. The only exception to that rule is the case of settlement by marriage: *Rex v. Birmingham*, 8 B. & C. 29. Assuming that the letters of administration were valid, the wife was not irremovable for forty days. Her husband's interest as tenant from year to year, vested in her as soon as the administration was granted; but nineteen days after his death, it was agreed between her and the landlord, that she should pay 1*s.* 2*d.* per week. She then became a weekly tenant in her own right. She paid the rent weekly from that time, and afterwards quitted on a week's notice. She therefore continued a weekly tenant till her term was put an end to. The grant of letters of administration may have the effect of vesting leasehold *property by relation, so as to enable the administratrix to bring [*191] action in all matters relating to that property subsequent to the death of the intestate, but it cannot operate by relation for a purpose perfectly collateral,

and so as to put her in the situation of a person irremovable at a time past: *Rex v. Harsley*, 8 East, 405. *Doe v. Porter*, 3 T. R. 13, shows that the letters of administration vest in the administrator the same interest as the intestate had; but here the agreement on the part of the tenant to hold from week to week, and on the part of the landlord to accept her as weekly tenant, and the payment of the rent weekly by her, amounted to a surrender by operation of law of the old yearly term. The sessions have found fraud: it was a question for them, and they have decided it rightly: *Rex v. Tillingham*, 1 B. & Ad. 180.

Amos and Hildyard, contra. The sessions have stated the premises, from which they concluded that the letters of administration were fraudulently obtained, and the premises do not establish that species of fraud which will render the administration void, and prevent the pauper from gaining a settlement. To avoid a settlement on the ground of fraud, there must be an attempt to make a thing appear to be done, which is not done, as where there is a hiring for eleven months, and to give one month over. That was held to be substantially a hiring for a twelvemonth, *Rex v. Milwich*, Burr. S. C. 433. In *Rex v. Mursley*, 1 T. R. 694, the pauper was hired three days after Michaelmas until Michaelmas following, and the sessions stated that such transactions *on [*192] the part of the masters were fraudulent; but BULLER, J., said, "fraud only arises where there is, in truth, a hiring for a year, and the parties endeavor to color it, in order to prevent a settlement." In *Rex v. Tillingham*, 1 B. & Ad. 180, the question was, whether the pauper gained a settlement by renting a tenement under the 6 G. 4, c. 57, which required that the rent to the amount of 10*l.* should be actually paid for the term of one whole year at the least. There was no payment of rent at all by the pauper; but he applied to the parish officers of Tillingham for relief, and they gave him a sum of money, which enabled him to pay a year's rent for a tenement which he had occupied in Bradwell, another parish; and the Court held it to be a question for the sessions, whether that payment was fraudulent or not: adding that if the sessions should be of opinion that the money was given merely to enable the pauper to gain a settlement in Bradwell, they ought to find fraud. There, if the money was paid with such a view by the parish officers, there was no payment of rent at all by the pauper; it was a colorable payment, instead of a real one. In *Rex v. Birmingham*, 8 B. & C. 29, there was a settlement by marriage in the appellant parish; and it was held that the marriage of a female pauper, brought about by parish officers, did not prevent her from gaining a settlement in the husband's parish; because there the whole transaction was not colorable: the woman had acquired a new legal capacity, and though the motive for investing her with it was fraudulent, her new capacity was not fictitious. This is a [*193] stronger case; here the pauper was not only entitled, but bound by *law, to take out letters of administration; for a party who administers, and omits to take out letters of administration within six months after the intestate's death, is subject to a penalty of 50*l.* by the 37 G. 3, c. 90, s. 10. Now entering on a term of years is administering. Besides, here there was in fact no fraud practised. There was no misrepresentation or concealment of any fact; the pauper was merely asked to allow administration to be taken out, and she consented. If the parish officers of Leir had been informed of her intention to procure administration, they could not have prevented its being carried into effect. Assuming even that there might be ground for avoiding the letters of administration, still so long as they remain unrepealed, they operate to vest the property of the intestate in the administratrix. In *Allen v. Dundas*, 3 T. R. 125, payment to an executor under a probate of a forged will, was held not to be invalid, because probate is a judicial act, and conclusive till repealed, and courts of law have no jurisdiction over the subject-matter. Suppose the husband had been trustee of a term, and the widow as administratrix had assigned the term, could the assignment be avoided because the motive for investing her with the character of administratrix was to give her a settlement? Here the

widow clearly was invested in the character of administratrix, and was entitled to be so invested; and she could not be removed after having obtained letters of administration. Fraud may easily be suggested in such cases: but where a party comes by operation of law to an estate from which he cannot be removed, the legal consequence must follow, and a settlement *be gained by forty days' residence, *Rex v. Stone*, 6 T. R. 295; *Rex v. Ynyscynhanarn*, 7 B. [*194] & C. 233.

It is said that there was a surrender of the term from year to year by act and operation of law, but the pauper had no power to surrender her interest before she took out letters of administration. In *Middleton's case*, 5 Rep. 28, b, it is said that if A. releases an action, and afterwards takes out administration, it shall not bar him, for right of action was not in him at the time of the release; and there is a *Nisi Prius* decision of Lord TENTERDEN in *Williams on Executors*, 240, note s, to the like effect.

DENMAN, C. J. The pauper, as administratrix of a tenant from year to year, though at a less rent than 10l., would gain a settlement by forty days' residence, because the interest vested in her by act and operation of law. The only question as to this point, is, whether the settlement is altogether void because the sessions have found that there was fraud in taking out the letters of administration. They have stated the facts on which that finding was grounded; I am of opinion that there was not, in this case, any fraud sufficient to prevent the estate of the intestate from vesting in his widow. She not only had a right, but was bound, to take out letters of administration; and she consented that they should be obtained. There is no ground for saying that they should not have their full legal operation of vesting in her the property of the intestate. Another question is, whether she resided in the parish forty days while the leasehold estate (formerly her husband's) was vested in her. There *are [*195] premises from which the sessions might have inferred an agreement by her, after administration granted, to become a weekly instead of a yearly tenant. They have not drawn any such inference; but have left it doubtful whether she resided forty days in the parish of Leir, while the leasehold estate, which formerly belonged to the husband, was vested in her. If that be really a matter of doubt, the case must go back to the sessions, in order that they may determine it.

LITTLEDALE, J. I think that, under the circumstances stated in this case, the leasehold interest of the husband was not prevented from vesting in his widow, on the ground that the letters of administration were fraudulently obtained. She was not only entitled, but bound by law to take them out; and was merely told by the solicitor to the parish of Leir that she was so entitled, and assented to administration being obtained. There was no misrepresentation, or suppression of any fact. The only other question is, whether she resided forty days in the parish of Leir after her husband's interest as tenant from year to year had vested in her as administratrix. If within that period she held as a weekly tenant, and continued to do so ever afterwards, she was not irremovable. It is stated that, on the 2d of June, she told the landlord she wished to pay the rent weekly, and that he assented; but whether she then actually took the premises from week to week, or only gave notice to the landlord that she wished to do so, is not very clear. I should rather think she then became a weekly tenant. It is true she could not surrender her husband's interest before taking out administration, but as the facts are left doubtful, the case must be sent back *to the sessions, in order that they may say [*196] whether, after taking out administration, she was a weekly tenant in her own right, or a tenant from year to year in right of her husband.

PARKE, J. I should be satisfied to dispose of this case on the ground that the sessions had found (as I think they would) that the pauper, before the letters of administration were taken out, had become a weekly tenant in her own right, and continued so afterwards, and consequently that she did not reside

forty days in Leir while she was irremovable by reason of the estate which had vested in her by operation of law. She paid the rent weekly from the 2d of June, 1831, to March, 1832, and quitted on a week's notice. As soon as she obtained the letters of administration, she might have disaffirmed the weekly tenancy, and claimed to hold as tenant from year to year in right of her husband; but I think there is abundant evidence of her having confirmed the weekly tenancy, for she afterwards always paid the rent weekly, and quitted on a week's notice.

Then as to the other question, there were no sufficient premises to warrant the sessions in finding such fraud as would avoid the letters of administration, and prevent the leasehold estate of the husband from vesting in his widow. The pauper had a right to take out letters of administration, and a consenting mind that it should be done. She was only induced by the solicitor for Great Glenn to exercise that right, but there was no deceit practised by him; if there had, the case would have been different.

*PATTESON, J. In order to acquire a settlement by estate, the pauper must have resided forty days in the parish where the estate lay, and where her interest in that estate, by operation of law, still continued. If, before that time elapsed, she acquired an interest in her own right as weekly tenant, and resided in the parish in respect of that interest, she was not irremovable, and acquired no settlement. The sessions will probably find, on the evidence, that she had become a weekly tenant. The letters of administration are not void on the ground that they were obtained by fraud, because the widow had the right, and, indeed, was under a legal obligation, to take them out, and consented that they should be taken out.

Case to go back to the sessions, in order to ascertain whether the pauper became a weekly tenant within forty days after the letters of administration were taken out.

[*198] *The Bailiffs, Assistants, and Commonalty of GUMCESTER, otherwise GODMANCHESTER v. PHILLIPPS.

By an act for inclosing common lands in G., after reciting that the corporation of G. claimed the right of soil as lords of the manor, and that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted, that the commissioners might set out and allot plots of ground out of the East and West Commons, in G., as a compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said common as on certain other lands named; such plots of ground to be used and enjoyed as the commissioners should by their award direct. Parties dissatisfied with the award might bring an action against the persons in whose favor the determination should be, within three months, or might appeal within six months to the justices in quarter sessions, who were to determine the matter, and award costs and damages. In default of such action or appeal, the determination of the commissioners was to be final.

The commissioners, by their award, allotted a plot of land on the West Common as common pasture, to the owners and proprietors of commonable messuages or cottages, and their respective tenants or occupiers of the said messuages and cottages only having right of common on the said West Common; and they limited the use of the pastures as the act empowered them.

Before the passing of the act, the rights attached to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of G. Subsequently to the act, one of the messuages on West Common being in the hands of a person not a freeman, the corporation brought trespass against him, for turning his cattle on the above-mentioned allotment:

Held, that the act, though general in its words, did not authorize the commissioners to extend the benefit of their allotments in lieu of common, to occupiers who were not freemen; and that the award itself did not purport to do so; nor could it have done so unless the act had given power to the commissioners to ascertain who should be entitled to the newly granted rights: and consequently, that the present action was maintainable, though brought more than six months after the award.

TRESPASS for breaking and entering the plaintiff's close, called the West Common, at Godmanchester, and depasturing it with cattle, &c. The defendant pleaded, first, not guilty, and then three pleas of justification under rights of common, upon which issues arose, to be tried by the country. The last of these pleas set out at length an act of parliament of 43 G. 3 (private), for dividing and inclosing certain open and common fields and lands in the parish of Godmanchester.

The act, after reciting, among other things, that the bailiffs, assistants, and commonalty of G. were lords of the manor of G., and, as such, claimed to be entitled to the right of soil within the said manor, and that certain individuals *were owners and proprietors of all the common fields, &c., intended [*199] to be inclosed, went on to appoint certain persons commissioners for valuing, dividing, setting out, allotting, and inclosing the said common fields, &c., and to give them authority for putting the provisions of the act in execution. It further empowered and required them to decide any dispute between parties claiming interest in the said division and inclosure, touching the right to the soil in the said commons, &c. The commissioners were to set out, allot, and award to the said bailiffs, &c., and their successors, as lords of the manor, a certain portion of the lands to be divided and inclosed, as a compensation for all their rights and interests as lords in and to the soil of all the waste or unknown common lands within the parish. And whereas there were certain meadows within the parish, containing 500 acres, belonging to several persons, but the lands were intermixed, and were subject to rights of common for commonable cattle at certain seasons, it was enacted, that the commissioners should set out, allot, and award the said meadows to and among the persons who were owners in severalty, in such parcels as should afford them compensation, and also should allot to the persons entitled to common, not being proprietors, such part of the other commonable lands intended to be inclosed, as should be a compensation for their respective rights of common and other interests in the said meadows, and they were authorized to inclose the whole, or part of the said meadows as they should think proper. Then followed these clauses:—

“But, for the full enjoyment of such part of the said meadows which shall be left uninclosed, the said commissioners *shall and may, and they are [*200] hereby authorized and empowered by their award to stint, ascertain, and express what number and sorts of cattle each of the proprietors of commonable messuages and lands in the said meadows shall be at liberty at seasonable times to feed or depasture thereon, and also to ascertain the time or times when such feeding or depasturing shall begin and end; and the same meadows from thenceforth shall be fed and depastured only by such number and sorts of cattle, and at such time or times, as in the award to be made by the said commissioners shall, for that purpose, be expressed.

“Provided always, and be it further enacted, that the said commissioners shall set out, allot, and award, as and for a common pasture, to be used, stocked, and enjoyed as hereinafter mentioned, out of and from certain commons in Godmanchester aforesaid, called the East and West Commons, such plot or plots of land or ground as shall, in the judgment of the said commissioners, be a full equivalent, satisfaction, and compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said commons as on the said meadows and common fields, within the said parish of G., which said plot or plots of land shall be held, used, stocked, and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages and cottages only, as a common pasture, in such manner as the said commissioners shall in and by their award direct.”

The residue of the lands to be divided and inclosed under the act, was to be fairly allotted among the several proprietors and persons having interests therein.

[*201] *By a subsequent clause it was enacted, "that in case any person or persons interested or claiming to be interested in the said intended division and allotments shall be dissatisfied with any determination of the said commissioners touching any claim or claims, or other rights or interests in, over, or upon the lands and grounds hereby directed to be divided, allotted, and inclosed, or any part thereof, it shall be lawful for the person or persons so dissatisfied to proceed to a trial at law of the matter so determined by the said commissioners, at the then next or at the following assizes to be holden for the said county of Huntingdon;" for which purpose the party so dissatisfied, upon giving notice of action within a month of the determination, should cause an action to be brought upon a feigned issue "against the person or persons in whose favor such determination should have been made," within three calendar months after such determination; and the verdict in such action should be final, binding, and conclusive upon all persons, unless the Court should set aside such verdict and order a new trial. But the determination of the commissioners touching such claims, rights, or interests in, over, or upon the lands directed by the act to be divided, &c., which should not be objected to, or respecting which, if objected to, the party complaining should not prosecute his action in due time, should be final and conclusive upon all parties. Proviso, "that nothing in this act contained shall authorize the said commissioners to determine the title to any messuages, cottages, lands, tenements, or hereditaments whatsoever." The party aggrieved, except in cases where the determination of the commissioners was declared to be final, and [202] except in such cases where an issue at law should be tried as before mentioned, might appeal to the quarter sessions within six calendar months next after the cause of complaint should have arisen, giving eight days' notice to the commissioners and to the parties concerned; and the justices were to determine the matter, and award costs and damages.

The act ended with a clause, saving the rights of all persons except those to whom any allotment should be made in pursuance of the act in respect of such rights and interests as were thereby intended to be barred.

The fifth plea stated, that before and at the time when, &c., the defendant was, and still is, seised in his demesne as of fee of and in a certain messuage, being one of the commonable messuages referred to in the act set out in the preceding plea; and that before and at the time of making that act the owner and proprietor of the said messuage for the time being had a certain right of common of pasture in, upon, and throughout a certain common, situate within the said parish of G., called the West Common, mentioned in the said act; that the plaintiffs are the successors of the bailiffs, assistants, &c., mentioned in the act; that the commissioners, on the 23d of June, 1809, made and executed their award concerning the division and inclosure aforesaid, and did thereby "allot and award common pasture to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages or cottages, and their respective tenants and occupiers of the said messuages and cottages only having right of common upon the said common in G. aforesaid, known by the name of the West Common, the plot of land or ground there mentioned, that is to say; West

[*203] Common allotment. Unto and for the owners and occupiers of commonable messuages or cottages and toftsteads, and their respective tenants or occupiers of the said messuages, and cottages, and toftsteads, having right of common upon the West Common in G. aforesaid, one plot of land containing 171 acres," bounded, &c. And the said award gave directions (stated in the plea) as to the time of turning on cattle, and the number and kind to be turned on by the owners and occupiers, according to the list contained in a schedule to the award, &c. The plea then stated, that the plot of ground before mentioned, being the locus in quo, was part of the said West Common; that the defendant's messuage in that plea mentioned was inserted in the said schedule as one of those in respect of which the owner or occupier might use, stock, and enjoy the

said plot of ground, being the close in which, &c., as directed by their award; and that by virtue of the act of parliament and of the award, the defendant, being seised and the occupier of the said messuage as aforesaid, at the times when, &c. had, and still of right ought to have, a right of common pasture in and over the close in which, &c., that is to say, a right to stock the same with two cows on, &c., until, &c., as to the said messuage with the appurtenances belonging: and being so seised, he, on, &c. (within the limited time), entered, &c., to turn on, and did turn on, two cows, being his own cattle, &c., to pasture and use the common, &c. The sixth and seventh pleas did not materially differ from the fifth.

The eighth plea stated, as before, that the defendant was seised of a messuage, being one of the commonable messuages in the act mentioned: "and that all those whose estate he now hath, until the making of the award in the fourth plea mentioned, had and enjoyed, and of *right ought, &c., for themselves, their tenants and occupiers of the said last mentioned messuage, [*201] being freemen of the borough of Godmanchester aforesaid," a certain right of common of pasture in, upon, and over the said close in which, &c., amongst other the open and common fields, commonable places, &c., within the said parish; and that the said close, in which, &c., called the West Common, at the time of the making of the act, was part of the open and common fields, &c., in the parish of G. in the said act mentioned. The plea then stated the making of the award and a schedule thereto, in which the commissioners inserted the messuage in this plea mentioned as one in respect of which the owner might stock upon the said West Common (being the locus in quo) during the times mentioned in the award. The defendant then justified under the act and award, as before; not stating himself to have been a freeman. The ninth and tenth pleas did not differ materially from the fifth.

Replication to the fifth plea, that at the time of the making of the act, "the owner and proprietor of the said messuage, now of the said defendant in the said plea mentioned, had no other or different right of common of pasture in, upon, and throughout the said common, called the West Common, mentioned in the said act of parliament, than in respect of his being a freeman of the borough of G. aforesaid, and occupier of the said messuage, and not in respect of his being occupier only of the said messuage; and that the said defendant, at the said several times, when, &c., in the said declaration mentioned, was not, nor is a freeman of the said borough. There were similar replications to the sixth, seventh, ninth, and tenth pleas. The replication to the eighth *plea, after reciting the clause of the act (anté, p. 200), directing the commissioners [*205] to award common of pasture out of the East and West Commons, as a compensation for the rights of proprietors of commonable messuages, went on as follows: "And the plaintiffs in fact further say, that under color and pretence of the said enactment in the said act of parliament hereinbefore mentioned, the said commissioners awarded, and in the schedule to the said award did insert and specify, so far as respects the said messuage now of the said defendant, in manner and form and to the effect in the said eighth plea of the defendant in that behalf expressed; and the said plaintiffs further in fact say, that the said defendant, at the said time, when, &c., in the said declaration mentioned, was not, nor at any time before or since hath been or is, a freeman of the said borough of G."

Rejoinder to the replication to the fifth plea: That the owner and proprietor of the messuage in that plea mentioned, before and at the time of the making of the act, had not a right of common of pasture in and upon and throughout the said West Common, in respect of his being a freeman of the borough of Godmanchester aforesaid, in manner and form, &c. Conclusion to the country.

General demurrer to the replications pleaded to the sixth, seventh, eighth, ninth, and tenth pleas. Joinder in demurrer.

General demurrer by the plaintiffs to the rejoinder to the replication to the fifth plea. Joinder in demurrer. The demurrers were argued in last Easter term.

B. Andrews for the defendant. The replications demurred to are bad, as tendering immaterial issues. The *question cannot now be raised [206] whether, previously to the award, the rights of common were in the freemen, as such, or not. The award under the act of parliament is now conclusive; the old rights, whatsoever they were, are gone, and new ones substituted; and it would be very hard that the original right should be inquired into after so long a time as has now elapsed. There must be a limit to disputes; and the only way to affix it, in this case, is to say that the award, made under the act, must be final. In *Phillips v. Maile*, 7 Bing. 188, where the same question was raised under this act in the Court of Common Pleas, *TINDAL*, C. J., said, "We are of opinion that the original right of common, for which a new right has been substituted by the act, was not intended to be traversable, except in the way prescribed by the act." And the Court held the award conclusive. The plaintiffs here contend that the original right of common was solely in the occupiers of these messuages, being freemen; that the pleadings admit this; that the defendant was not a freeman; and therefore that the award, as to the common claimed in respect of the messuage in question, is void. [PARKE, J. The argument, I suppose, will be, that the commissioners had power only to set out common, over which the former commoners were to exercise their right, but that they were not to adjudicate who were or should be entitled.] They were to make the allotment, whether the owners of the several messuages were, at the time, freemen or not. If they were not so at the time, they or their children might become so; the right before latent would then be called into operation.

[207] [PARKE, J. *The act does not provide for a specific allotment to be made in respect of particular messuages; the commissioners are only empowered to ascertain a right, to be exercised by the proprietors of commonable messuages, subject to a stint.] The defendant here was the owner of a commonable messuage, and the award (to which a schedule of particular messuages is annexed) gives the West Common allotment to "the owners and proprietors of commonable messuages." [PARKE, J. "Having right of common on the West Common aforesaid."] If the award did not give the new right of common to all who were proprietors of commonable messuages at the time, the inclosure alters their situation for the worse. Before the award was made, they might, at all events, have acquired rights of common by becoming freemen as well as occupiers, but now according to the argument used, if they were not freemen at the time of the award, it finally excludes them from the right. Suppose the commoners had released their rights to the corporation, in consideration of a substituted right, which had been granted in the terms of this award, could the corporation afterwards have repudiated the grant, and said they only meant it to extend to owners of commonable messuages, "being freemen?" The argument on the other side would tend to admit parol evidence in explanation of an act of parliament. If the original rights may be inquired into now, the award is not binding and conclusive, though it has not been contested within the time and in the manner directed by the act; and it clearly might have been so contested, on the point now raised. [PARKE, J. They will contend that the award is only final so far as the commissioners had jurisdiction.] They had

[208] jurisdiction over the subject-matter, and have made their allotment in unequivocal terms. It may be supposed that, at the time of the award, there might have been only one or two owners of commonable messuages who were freemen; and it cannot be contended that, in such a case the benefit of the allotment must have been confined to them. If the defendant's title, in this case, be not established by the award, all the claims of common founded upon it are likewise set loose, and all the rights which it gives liable to be disturbed.

Kelley, contra. Although the defendant is not a freeman, it may be assumed that the person who held this commonable messuage, at the time of the award, was one; and if all the occupiers at that period were in the same situation, there would, of course, be no appeal against the allotment. The questions

are, first, whether the commissioners had authority, under the act, to award rights of common to a totally different class of persons from those entitled before; and, secondly, whether they have, in fact, exercised such a power. There are no words in the act itself, giving power to conclude parties as to the rights then existing. It only refers generally to rights already in existence, empowering the commissioners to give equivalents for them, but not to determine the nature or extent of the rights. Certain persons, being freemen, have common on particular lands; the commissioners are to substitute other lands for these, to be enjoyed by the parties who had the former right, in such manner and at such times as the commissioners shall direct. And that is done by the award. The commissioners allot common pasture to be used by the owners and proprietors of commonable messuages, and *their tenants and occupiers of the said messuages only, having right of common upon the said West [209] Common; meaning that the allotment is made as compensation for the rights they enjoyed when the act passed. There is no pretence for arguing that the act empowered them to raise a new right, independent of the former qualification of being freemen, and to say, "from henceforth the enjoyment shall be in the occupiers of commonable messuages generally." It would be an injustice to the plaintiffs, who are lords of the soil, if without any equivalent given to them, the benefit in question were extended by the act to a more numerous class of persons. Their right, as lords, is not to be abridged by general terms in an award: *Place v. Jackson*, 4 D. & R. 318. Besides, it was their interest that the advantage in question should be confined to their own freemen. And if the award was injurious to them in these respects, the case was not one to which, by the terms of the act, the remedy by appeal, or by action against the party in whose favor the determination was, could apply. There was no issue by which the question could have been tried; and if, at the time of the award, none but freemen were occupiers, there was no party against whom a complaint could be made. In *Phillipps v. Maile*, 7 Bing. 133, the present point was not sufficiently pressed on the attention of the Court; and it was assumed there, whether justly or not, that the right disputed in the action "was capable of being litigated at the time of making the award." The question comes to this, whether there be anything in the words of the inclosure act to alter the then existing rights, and to render the qualification of freedom no *longer indispensable. The [210] words to that effect ought to be express, this being an act granting rights to one party in another's soil. There is, indeed, a clause in general terms, directing that common shall be set out as a compensation to "all the owners and proprietors of commonable messuages;" but the generality of such words may be restrained by reference to the other matters stated in the act, as general words in a deed are qualified by a particular recital: and the more so in this case, inasmuch as no compensation is made to the plaintiffs for the supposed enlargement of rights to their prejudice: *Thorpe v. Cooper*, 5 Bing. 116.

Andrews, in reply. As to the last argument, the plaintiffs have a compensation expressly provided for them in the act. [LITLEDAL, J. That is in respect of their rights and interests in and to the soil of the waste and unknown common lands, which is entirely distinct from their interest in the soil over which common of pasture was claimed by the owners of commonable messuages.] The plaintiffs, at all events, have the benefit of so much of the lands as is not otherwise allotted. And if the act gives an extension of rights in one way to the proprietors of these messuages, it is but just, inasmuch as their rights are curtailed in another by the inclosure. [PARKE, J. They had the same benefit of common after the inclosures as before, only restricted in space. It does not appear that, before the inclosure, all the commonable messuages together were sufficient to consume the herbage. And if the condition of the owners was made worse, they might have appealed within the time limited *by the act.] [211] The plain meaning of the statute is, that when the award is made, the rights in question shall depend upon the messuages, and not be affected by the

condition of the owners. *Phillips v. Maile*, 7 Bing. 133, is a direct authority for the defendant. *Cur. adv. vult.*

DENMAN, C. J., in this term delivered the judgment of the Court. After having stated the pleadings as far as the rejoinder to the replication to the fifth plea, his Lordship continued as follows:—

This rejoinder has been demurred to; there are no special causes of demurrer assigned; but we think it is bad, because it does not deny any allegation in the replication.

The plea alleges that the defendant, at the time of the act, had a right of common, in respect of being owner and occupier of the messuage.

Then the replication is, that, at the time of the act, the defendant had no other right of common than as being a freeman of the borough, and occupier of the messuage, and not as occupier only. Now this tenders an issue which the defendant might have accepted, and concluded to the country; but he says the owner of the house had not any right of common in respect of his being a freeman; which, though glancing at the real dispute, does not put it in a way which the plaintiff was bound to accept, and we think that the demurrer may be maintained, and then it is the same as if the defendant had demurred to the replication.

[*212] There are five other pleas, varying in some measure *from the fifth plea, to which there are replications, and demurrers to those replications; and upon all these the same questions arise as on the fifth plea and the replication to that plea.

And upon the pleading, it must be taken that, at the time of making the act, it was only such of the occupiers of messuages as were freemen of the borough that had a right of common.

And then the question is, if, upon the construction of the act of parliament and award, the same limitation now continues,—or whether the occupiers of those messuages are, as occupiers only, entitled to right of common?

The act of parliament itself is silent on this subject; but it appears by the act, that several persons had a right of common on some parts of the land mentioned in the act. And the act authorizes the commissioners to make regulations for the enjoyment of the right of common on such part of certain meadows as should be left uninclosed.

And then comes the clause which applies to this case. [His Lordship then read the clause, *anté*, p. 200, directing the commissioners to set out common of pasture from the East and West Commons, as an equivalent for the rights of common of all the owners and proprietors of commonable messuages or cottages.]

According to the words of this clause, without further information, it would seem that all the owners of commonable messuages, as such, had the right, and more particularly by using the word *only* near the end of the clause; but then, when the further information is brought to bear upon the construction of the [*213] act, and which is admitted in the pleadings, that, at the time of *passing the act, it was only such occupiers of commonable messuages as were freemen, that had the right, it comes to be considered whether the act was meant to let in to the exercise of the common right all the owners of commonable messuages, without any qualification; or whether it was merely an enactment as to the place where the commoners were to exercise their right of common, but so that no other persons should be entitled than were before.

The object of the act of parliament was, that the persons who had rights of property in the land, or rights of common on the land which was the subject of the act, should enjoy those rights more conveniently than they did before. But there is no indication in the act of any intention to confer any rights or benefits on persons who before had no rights there, but which the defendant wishes to introduce.

There is no reason why it should have been meant that a more extensive class of persons should have a right of common than before; there is no consideration
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for their doing so ; and, therefore, we think that, when the act speaks of common to be enjoyed by owners of customary commonable messuages or cottages in general terms, it must mean such owners as had right of common before the act by being also burgesses, and that the object of the clause in the act was to confine their exercise of the right of common to a particular spot, seeing that other places where, before the act, they used to turn on cattle were to be inclosed.

The award could not extend the right to any further class of persons than the act mentions, unless powers had been given to the commissioners to ascertain what class of persons were entitled ; but the act does not do *that* : it says, the right of common is to be enjoyed in such ways as the commissioners shall direct, which means the number and species of cattle, and the times of the year when they are to be turned on, and other things of that sort ; and, indeed, looking at the award itself, it does not carry the defendant's argument as to the extent of his right, at all further than the act itself ; for the award is, that the common shall be enjoyed by the owners, &c., of messuages, &c., having right of common. If the words "having right of common" are to be taken as "having rights of common under the provisions of the act," it carries it no further than the act does ; and if the words mean, "persons having right of common" when the act passed, then it excludes all who were not freemen, and therefore, in no point of view can the award carry the defendant's claim further than the act does.

And we are of opinion, that neither the act nor the award give the defendant any greater right than he had before the act, and that, therefore, there must be judgment for the plaintiffs. It is to be observed, that in the case of *Phillips v. Maile*, 7 Bing. 133, in which the judgment of the Court of Common Pleas was the other way, the point upon which we decide was not so distinctly brought to the notice of the Court, in the pleadings or in the argument.

Judgment for the plaintiffs.

**The KING v. The Inhabitants of RUTHIN. June 1. [215]*

The first section of the statute 1 W. 4, c. 18, which enacts, "that from and after the passing of that act, no person shall acquire a settlement by reason of the yearly hiring of a dwelling-house, building, &c., unless the rent for the same to the amount of 10*l.* at least shall be paid by the person hiring the same," is prospective only.

On appeal against an order of justices, whereby David Jones, his wife, and family, were removed from the parish of Ruthin, in the county of Denbigh, to the parish of Cwm, in the county of Flint, the sessions quashed the order, subject to the opinion of this Court on the following case.

The appellants admitted the pauper's settlement to be with them, unless he had acquired a subsequent one under the following circumstances.

The pauper took from Mr. Eddisbury, who was mortgagee in possession, a farm called Tynyffirrh, in the parish of Llanrhaiadr yn Cimmerch, in the county of Denbigh, as tenant from year to year, at the rent of 24*l.* per annum. The tenancy was to commence according to the custom of the country, viz., as to the land, from St. Andrews's Day, 1829, and as to the farm-house and out-buildings, from the 1st of May following. The rent was made payable half yearly, on the 25th of March, and the 29th of September following, though, according to custom, the first half year was not to be called for until St. Andrew's, 1830, and the second half year on the 1st of May, 1831. The pauper entered upon the premises at the appointed periods, and occupied the land until after the 30th of November, 1830, and the house and out-buildings until the 1st of May, 1831. In August, 1830, the mortgagor and mortgagee having agreed upon a sale of the property, and a purchaser having been found, the three parties met by appointment, and were **attended* by the pauper's wife, whose husband sent her on his behalf, he having been desired by Shaw, the mortgagor, [**216*]

to come to pay his half year's rent. Mr. Eddisbury insisting upon being paid the half year's rent due the 25th of March, 1830, and declining to complete the sale without it, the pauper's wife said that her husband was then unprepared, owing to its being demanded before the usual time, namely, St. Andrew's Day : whereupon Shaw, being anxious to avoid delay in order to get the business concluded, agreed, without the previous knowledge or request of the pauper, but with the consent of the pauper's wife, to pay the 12*l*. for the pauper; and did so. The pauper had not repaid the amount when the appeal was heard; but there had been disputed accounts between him and Shaw.

The year's holding as to the land, which was the principal taking, was begun and concluded, and the rent was due, and paid as before mentioned, while the stat. 6 G. 4, c. 57, was in operation, and before the passing of the act of 1 W. 4, c. 18; but the year's holding of the house and out-buildings was not concluded until the 1st day of May, which was after the last-mentioned act came into operation. The court of quarter sessions found that the pauper had gained a settlement in Llanrhaiadr yn Cimmerch, and quashed the order, subject to the opinion of this court upon the case.

Justice, in support of the order of sessions. There was a payment of rent to the amount of 10*l*. while the stat. 6 G. 4, c. 57, continued in force, and it was not necessary that that payment should be made by the party hiring the tenement. That is required by the first section of 1 W. 4, c. 18, which is prospective only; *though the second is retrospective, *Rex v. Dursley*, 3 B. & [*217] Ad. 465. Besides, here the half year's rent was paid to the landlord with the consent of the pauper's wife, and she was authorized by her husband to give such consent. Shaw was his agent.

J. Jervis, contra. The 12*l*. was paid by the mortgagor to the mortgagee in consideration of the latter giving up possession of the land. The statute 1 W. 4, c. 18, is retrospective in both sections; and if that be so, the rent must be paid by the party hiring the tenement. The words "by the person hiring the same," which were in the previous act of 59 G. 3, c. 50, are omitted in the 6 G. 4, c. 57; and under that act it was decided in *Rex v. Ramsgate*, 6 B. & C. 712, that the whole years' rent, whatever its amount might be, must be paid; in *Rex v. Kibworth Harcourt*, 7 B. & C. 790, that the rent need not be paid by the party hiring; and in *Rex v. Ditchet*, 9 B. & C. 176, and *Rex v. Great Bentley*, 10 B. & C. 520, that a person who rented premises at the yearly value of 10*l*. and resided thereon, but underlet part, thereby gained a settlement. The stat. 1 W. 4, c. 18, recites, that doubts had arisen with respect to the intention of the legislature on these several points, and then enacts, that no person shall acquire a settlement by reason of a yearly hiring of a tenement, unless the occupation and payment of rent be "by the person hiring the same." Here there was no payment by the tenant himself. The wife had no authority to consent. She was sent by her husband, but not for the purpose of paying [*218] the rent or authorizing any one to *pay it in his behalf. The payment was made by the mortgagor. The facts might have been evidence to support a plea of accord and satisfaction, but not of payment.

DENMAN, C. J. The only question here is, whether the rent to the amount of 10*l*. has been actually paid. The party entitled to receive the rent has been satisfied, and the stat. 6 G. 4, c. 57, does not require that it should be actually paid by the party hiring. The sessions might have decided this case themselves.

LITTLEDALE, J. concurred.

PARKER, J. The rent to the amount of 10*l*. has been paid by some person, and that is sufficient. The second section of the 1 W. 4, c. 18, is retrospective; but the first is prospective only. The enactment is, that from and after the passing of that act, no person shall acquire a settlement except as there stated.

PATTESON, J. The first section of 1 W. 4, c. 18, prevents the gaining of a settlement, unless the rent to the amount of 10*l*. at the least shall be paid by the party hiring; if that were retrospective, section 2, which provides, that

where the yearly rent shall exceed 10*l.* payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under the recited act, would have been unnecessary. Order of sessions confirmed.

***The KING v. The Inhabitants of ST. NICHOLAS, ROCHESTER.' [*219]**

To give a settlement by renting a tenement, since the stat. 1 W. 4, c. 18, there must be an occupation in fact of the whole dwelling-house or building of which the tenement consists, by the party hiring the same; and therefore, where A. took a lease for a year, of a house consisting of three floors, at the rent of 40*l.* per annum, and after he had been in possession three months, underlet two floors by the quarter, at the rate of 22*l.* per annum, to another person, who occupied them for two quarters, the ground-floor only, during that time, being occupied by A., and in all other respects the provisions of 6 G. 4, c. 57, and 1 W. 4, c. 18, were complied with, it was held, that A. did not gain a settlement.

ON appeal against an order of two justices, whereby Cooper Tress and his wife and children were removed from the parish of St. Margaret, in the city of Rochester, to the parish of St. Nicholas, in the same city, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper, Cooper Tress, on the 3d of October, 1831, took a lease for a year of a house in the appellant parish, at the rent of 40*l.* per annum. Under this lease he entered into possession of the house, and remained there with his family until the third day of October in the following year; he paid the rent for half the year, and fulfilled all the conditions of the statutes 6 G. 4, c. 57, and 1 W. 4, c. 18, unless the court should be of opinion that, under the following circumstances, the house was not occupied by the pauper within the meaning of the 1 W. 4, c. 18.

The house in question was a separate and distinct dwelling-house, consisting of three floors. When the pauper had been in the possession of the premises about three months, viz., on the 4th of January, 1832, he underlet the two upper floors, unfurnished, to one Boucher; and during all the time Boucher staid in the house, the pauper occupied the ground-floor, only by *himself and [*220] his family. Boucher's agreement with the pauper was, that he should take these two floors of the pauper, by the quarter, at the yearly rent of 22*l.*; that Boucher should have the use of the wash-house on the ground-floor in common with the pauper, and that the pauper should have a sleeping-room in the upper floor for one of his children, whenever Boucher did not want it for his own family. Boucher entered into possession of the two floors on the 4th of January; furnished the rooms himself, staid in them upwards of two quarters, and paid the rent agreed on. During Boucher's residence there, he had the joint use of the wash-house, and the pauper's child, by the permission of Boucher, occupied the sleeping-room in the upper floor about a fortnight or three weeks according to the agreement. The ground floor was not separated from the upper floors by any door or partition, and both the pauper and Boucher, during Boucher's residence in the house, had common access to it by the front and back doors, and each took the key of the front door whenever he had need of it, without asking permission of the other.

Walsh and *Espinasse* in support of the order of sessions. The question in this case is, whether there was an occupation of the house by the pauper sufficient to satisfy the stat. 1 W. 4, c. 18. *Rex v. North Collingham*, 1 B. & C. 578, and *Rex v. Tonbridge*, 6 B. & C. 88, show that a party who rented a dwelling-house at the annual rent of 10*l.*, and resided in it, but underlet part, would have gained a settlement under 59 G. 3, c. 50; but that statute required that the house should be held, and the land *occupied, by the person hiring the same. The statute 6 G. 4, c. 57, omits the word "held," and the [*221]

¹ This case (which was determined in Hilary term, 1834), being of great practical importance, it has been deemed advisable to insert it here.

words, "by the person hiring the same," and requires that the house, building, or land, shall be occupied under the yearly hiring; and in *Rex v. Ditchet*, 9 B. & C. 176, and *Rex v. Great Bentley*, 10 B. & C. 520, a pauper who rented a dwelling-house of the yearly rent of 10*l.*, and resided in it, but underlet part, was deemed to occupy the whole under the yearly hiring, so as to gain a settlement under this statute. LITTLEDALE, J., in the former case, goes fully into the meaning of the word occupy, and says, "It is not necessary, in order to make a man an occupier, that he should actually sleep or take his meals in a house, or that his family should actually dwell in the whole house, but the law considers him, for this purpose an occupier, if he hold the whole, and by himself or his family occupy part;" and afterwards he says, "the word occupation, as applied to a house, undoubtedly implies personal residence. But if a lessee of a house dwell in any part of it, though he let the other part, he, in point of law, is to be considered as the occupier of the whole." That observation applies to the present case. It is true that the statute 1 W. 4, c. 18, requires that the house, &c., shall be actually occupied under the yearly hiring by the person hiring the same; but those words will be satisfied if the party hiring is personally resident by himself or his family; for such a person, though he underlet part of the house to lodgers, actually occupies. In *Fludier v. Lombe*, Cas. temp. Hardw. 307, the question was, whether certain householders of houses above the value of 10*l.* a year, who paid the parish and other rates in [222] respect of their *houses, but underlet part of the houses to lodgers on such terms as reduced their rents below 10*l.* per annum, were legal voters within the statute, 11 G. 1, c. 18, s. 7, which enacted, "that the right of election of alderman and common councilmen should belong to freemen of the city of London, being householders, paying scot and bearing lot;" and Lord HARDWICK said, that their letting lodgings did not make them cease to be the sole occupiers. The word *occupy* ought to receive the same construction in this statute as it has in other statutes relating to the poor laws. The 43 Eliz. c. 2, imposes the rate for the relief of the poor on the occupier. The person who rents a house and resides in it, though he underlets part, is deemed to be the occupier for the purpose of rateability. In *Nolan's Poor Laws*, vol. i. 176, it is said that "no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is, in the eye of the law, the tenant for the whole, and is rated as an occupier." If a different construction be put upon the word *occupier* in this statute, the consequence will be that the same party may be an occupier for the purpose of being rated, and not for the purpose of gaining a settlement. Great inconveniences will follow from such an interpretation. As the case was put at the sessions, if this construction prevailed, the mayor of Maidstone, who occupies a house of considerable value in that town, and lets part of it during the assizes for the accommodation of the Judges, would be prevented from gaining a settlement.

Cresswell and Hills, contrà. The opinion delivered by LITTLEDALE, J. in *Rex v. Ditchet*, 9 B. & C. 176, was, that a lessee *who dwells in any part [223] of a house, and underlets the other part, might be considered occupier of the whole, so as to satisfy the statute 6 G. 4, c. 57, which merely required the house to be occupied under the yearly hiring; but the statute 1 W. 4, c. 18, which was passed partly for remedying the inconveniences produced by that decision, requires an occupation in fact, and not merely in point of law. That this is the meaning of the statute is to be collected as well from the enacting words as from the doubts recited in the preamble. The statute 59 G. 3, c. 50, required that the house should be held, and the land occupied; and in *Rex v. North Collingham*, 1 B. & C. 583, Lord TENTERDEN relied on that difference of expressions, as showing that it was probably intended that a party taking lodgers, properly so called, should not be prevented from thereby gaining a settlement. Now when the legislature, in the 1 W. 4, c. 18, omitted the word

held, and required that the house or building, &c., should be actually occupied by the party hiring it, they must have intended to prevent a party taking lodgers from gaining a settlement. In *Rex v. Tonbridge*, 6 B. & C. 88, Maynard, the joint occupier, never agreed with the original landlord; he agreed with the pauper to share the expense and the profits arising from the cultivation of the garden. [PATTERSON, J. The landlord might have sued the pauper for the whole rent, but the latter was not the sole occupier. The joint occupation of the land there would have given a settlement if the value had been sufficient. Here the value of the house is sufficient; and the joint occupation would have been sufficient, if the case had depended on 59 G. 3, c. 50. The question is, whether the statute 1 W. 4, c. 18, requires *that the "distinct dwelling-house, or building, or land, of which the tenement is to consist, should [*224] be occupied by the party hiring. The statute 6 G. 4, c. 57, was passed to obviate doubts, and enacted that no person should gain a settlement by the renting of a tenement; unless such tenement should consist of a separate and distinct dwelling-house, or building, or of land, or of both, rented by such person for the sum of £40. a year for the term of one whole year; nor unless such house (viz., a separate and distinct dwelling), or building, or land, should be occupied under such yearly hiring; and *Rex v. Ditchet*, 9 B. & C. 176, and *Rex v. Great Bentley*, 10 B. & C. 520, show that the doubt on that statute, whether a party who hired a house or land for a year, and occupied part of it, and underlet the residue, occupied under a yearly hiring, so as to satisfy the statute. It was decided that he did; and that partly on the ground that the words by the party hiring the same, which were in the 59 G. 3, c. 50, were omitted in the 6 G. 4, c. 57. Then an attempt was made to remedy the inconvenience resulting from those decisions, by a third statute, the 1 W. 4, c. 18, which recites the 6 G. 4, c. 57, and that doubts had arisen respecting the intentions of the legislature concerning the occupation of such house, building, or land, by the person hiring the same. Now, those doubts were, whether it was necessary that the party hiring the house should actually occupy the whole, or whether it was sufficient that he occupied part, though he underlet the rest. The statute then enacts that no person shall acquire a settlement by reason of such yearly hiring of a dwelling-house, or building, or of land, or of both, *as in the former act expressed, unless such house, or building, or land, shall be actually occupied under such yearly hiring by the person hiring the same. The words "such" yearly hiring are important, because they refer to the 6 G. 4, c. 57, which is recited, and therefore evidently mean the yearly hiring of a distinct and separate dwelling-house and building, or land. The statute of 1 W. 4, c. 18, must be read as if it enacted, in express terms, that no settlement should be gained by reason of the yearly hiring of a distinct and separate dwelling-house, &c., unless such distinct and separate dwelling-house, &c., should be actually occupied by the party hiring the same. Now, here the dwelling-house hired by the pauper was not actually occupied by him; two-thirds of it were occupied by another person. He might be liable as an occupier to pay rates and taxes; but in that case a constructive occupation is sufficient. Here an occupation in fact is required; but the lodger might have excluded the pauper from the two-thirds. The case put, of the Mayor of Maidstone letting part of his house, during the assizes, for the accommodation of the Judges, is an extreme one. To put another case: suppose a party were to let all the house but a space six feet square, would he be settled? [PATTERSON, J. Difficulties of this kind may be raised either way. Suppose he let a bed for the night. Or put the case of an innkeeper.] Merely taking an inmate, as an innkeeper, would not be sufficient; no part of the house is there given up; the inmate only has the use of it for a certain purpose. In *Rex v. Macclesfield*, 2 B. & Ad. 870, the pauper had let part of the house to a tenant; and *PARKE, J. said that such an occupation would not have been sufficient to satisfy the stat. 1 [*226] W. 4, c. 18. [LITLEDAL, J. That statute requires the occupation to be under

the yearly hiring. If he had underlet for a less period than a year, would there have been a sufficient occupation?] If underletting for the whole twelve months would prevent the party from being an occupier, it is difficult to say how it can be otherwise, where he lets for a less period than a year. If he excludes himself from a part of the premises, so that trespass would lie against him for entering that part, he cannot, while that is the case, be said to be the occupier of such part. [LITTLEDALE, J. That rule would prevent all lodging-house keepers from gaining a settlement by renting.] That undoubtedly would be so. The object of the legislature was not to favor one kind of settlement or other; and the act having been introduced to avoid ambiguities, it is more important that its meaning should be rightly ascertained, and a simple rule of settlement given, than that one or another class of persons should or should not be settled under particular circumstances which may be suggested.

DENMAN, C. J. The meaning of the word occupied may vary according to the occasion or the subject-matter. The meaning, therefore, which it has received in considering what occupation was necessary to constitute a mansion-house in which burglary might be committed, or to give a right of voting, or to make a party rateable to the relief of the poor, is no test of its meaning in this particular case. A new distinction is introduced by the stat. 1 W. 4, c. 18.

[*227] Under the former statute, 6 G. 4, c. 57, a constructive occupation *was sufficient. This statute requires an occupation in fact. It recites the former act, and that doubts had arisen with respect to the intentions of the legislature concerning the occupation of *such* house, building, or land, by the person hiring the same, and enacts, that "no person shall acquire a settlement in any parish by reason of such yearly hiring of a dwelling-house, or building, or of land or of both, as in the said act expressed, unless such house or building, or land, shall be actually occupied under such yearly hiring by the person hiring the same." A constructive occupation will not satisfy these words. The statute requires in terms an actual occupation. Here it appears that the pauper underlet the two upper floors, and occupied the ground floor himself. It is impossible to say, in the face of the statute, that the pauper, who occupied the ground floor only, actually occupied the whole house. The consequences resulting from this statute are remarkable: a person of whatever degree of respectability who hires a house by the year at a high rent, and underlets a part of it, will be prevented from acquiring a settlement by renting. But whatever the consequences may be, I must say that the words which the legislature has used prevent a settlement being gained in this case.

LITTLEDALE, J. What I am reported to have said in *Rex v. Ditchet*, 9 B. & C. 176, as to the meaning of the word occupation, applies to a constructive occupation only, which was sufficient to satisfy the statute that governed that case. The stat. 1 W. 4, c. 18, referring to the 6 G. 4, *c. 57, enacts, that [*228] no person shall acquire a settlement by such yearly hiring of a dwelling-house, &c., unless such house, &c., shall be actually occupied under such yearly hiring by the person hiring the same. That evidently means an occupation in fact. But in this case another party, not the person hiring, had a right to occupy two-thirds of the premises; there was not, therefore, an occupation in fact of the whole house by the pauper, for he could not in an action of trespass justify going into the rooms which he had let; he had parted with all right to them from quarter to quarter. The word actually must have effect given to it; and giving the word full effect, it must mean occupation in fact, as distinguished from a constructive occupation. To the question I put during the argument, whether it would make any difference if the underletting were for a less period than a year, the proper answer has been given. If there be not an actual occupation of the whole house, within the statute, when part of it is let for a year, neither would there be when part of it is let for a week. It may be said that, deducting 22*l.*, which the under-tenant in this case was to pay, from the whole rent of 40*l.*, that part of the premises which the pauper retained was still rented

at 18*l.* : but this cannot be taken into consideration. There must be an actual occupation of the whole house. The consequence undoubtedly will be, that all persons who let lodgings will be prevented from gaining a settlement by renting a tenement of any value. But it is better to adhere to the plain words of a statute than to depart from them on the ground of some supposed inconvenience.

*TAUNTON, J. It is a safe rule of construction to adhere, on all occasions, to the language of a statute. It has been often much lamented, that the Judges have departed from the plain and literal construction of the statutes relating to the settlement of the poor. On the language of this statute, which was made to remove doubts arising as to occupation, I have no hesitation in saying, that it requires an occupation of the whole house by the party hiring. The word "such," which comes before the words "yearly hiring," is very material, because, by reference to the recited statute, it must be taken to mean the yearly hiring of a separate and distinct dwelling-house or building, or land, or both. There must be an occupation in fact, of a separate and distinct dwelling-house, and not only under the yearly hiring, but also by the person hiring the same. Now, were all these conditions performed here? The pauper took a distinct and separate dwelling-house at 40*l.* a-year, but divided the occupation of that dwelling-house between himself and Boucher. The latter probably had the larger part; but whether that was so or not, is immaterial. We cannot say that the pauper actually occupied a separate and distinct dwelling-house under the yearly hiring, when there was an exclusive occupation of part by another person. I am therefore satisfied that there was not an actual occupation within the meaning of this statute. The order of sessions must be quashed. [*229]

PATTESON, J. I am of opinion, on the plain words of this statute, that no settlement was gained by the pauper. The words "actually occupied" put an end to all question; and the case must be considered as if the word "actually" were incorporated in the former statute, which is not repealed by the 1 W. 4, c. 18. Then reading the 6 G. 4, c. 57, as if that word as well as the words "by the party hiring the same," were incorporated in it, it will prevent any one from acquiring a settlement by renting a tenement, unless such house or building (that is, the separate and distinct dwelling-house, or building, or land, or both, of which the tenement is required to consist), shall be actually occupied under the yearly hiring, by the party hiring the same, for the term of one whole year. Now in this case it is clear that the whole dwelling-house was not actually occupied by the party hiring the same; part of it was occupied by another person. The decisions on the liability of persons to be rated, and their rights of voting, as occupiers, which have been referred to, are not affected by this case. Order of sessions quashed. [*230]

In the Matter of CULLEY.

The Court, on the application of the Crown, set aside a coroner's inquisition, for defects apparent on the face of it. Rule absolute in the first instance.

A CORONER's inquisition, taken on view of the body of Robert Culley, stated that on, &c., at, &c., a public meeting of a great number of persons then and there assembled, took place, in consequence of a certain placard, "to adopt preparatory measures for holding a national convention," and that the said Robert Culley, being one of the constables of the metropolitan police, in the execution of his duty, was present; and that a person, to the jurors unknown, in and upon the said *Robert Culley, in the peace of God and of our said lord the King being, did make an assault, and him, with a certain sharp instrument, did strike, stab, and penetrate; and by such striking, stabbing, and penetrating, did give unto the said Robert Culley a mortal wound, of which he died. It then proceeded as follows:—And the jurors aforesaid upon [*231]

their oaths do say, that we find a verdict of justifiable homicide, from no riot act or any proclamation ordering the people to disperse being read; and we consider that government did not take proper measures to prevent the meeting, and that the conduct of the police was brutal, ferocious, and unprovoked by the people; and we hope that government will take such steps in future as will prevent the occurrence of such disgraceful scenes. In this term

The Solicitor-General (having, on the preceding day, obtained a certiorari to bring up the proceedings), moved (May 30th), that the inquisition might be quashed, on the ground that it was bad in point of law; and that, as it might be evidence on an indictment relative to the same transactions, it ought not to be suffered to remain on record. Independently of this reason, such an inquisition may, undoubtedly, be quashed by the Court for defects apparent on the face of it, *Dearing's case*, Cro. Eliz. 193; *Francis Oily's case*, Cro. Jac. 635; *Rex v. Hethersal*, 3 Mod. 80; *Anonym.* 12 Mod. 112. [DENMAN, C. J. Must not the application to quash it be made by a party interested?] The present application is made on the part of the crown, which has an interest in the administration of justice. The jury, by the inquisition, state that the killing of Culley was justifiable homicide, not because he *had given any [*232] provocation to the party who assaulted him, or because that party was wholly free from blame, but because certain other persons, viz., the magistrates or the government, had not done what the jury thought ought to have been done, and because the conduct of the other policemen was not what it ought to have been. To make homicide justifiable, the party killing ought to be wholly free from blame. There is nothing to show that the person who inflicted the wound on Culley was blameless. There is sufficient ground for quashing the inquisition, or, at least, for granting a rule nisi. [PATTESON, J. It is the ordinary practice at the assizes to quash coroners' inquisitions for defects apparent on the face of them.]

DENMAN, C. J. The inquisition is a nullity. I doubt whether there is any finding at all. The jury, in effect, say that the slaying of Culley was justifiable because certain other persons had either acted improperly or been guilty of neglect of duty. There is no pretence for saying, on the facts found, that it was justifiable homicide. There is nothing to show that the deceased had ever given any provocation for the assault. I entertained at first some doubt whether the inquisition ought to be quashed by this Court except on the application of some party interested. On further consideration, however, I think it may be quashed on the application of the Crown, which has an interest in the general administration of justice.

LITTLEDALE, PARKE, and PATTESON, Js., concurred.

Inquisition quashed.

[*233] *The King on the Prosecution of MICHAEL SCALES v. The Mayor and Aldermen of LONDON. June 1.

By custom the court of mayor and aldermen of London have always had authority to examine and determine whether or not any person returned to them by the court of wardmote as an alderman is, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whenever the fitness and qualification of the person so returned has been brought into question. In February, 1831, M. S. was elected alderman by the citizens, and returned as elected to the court of mayor and aldermen. That court, on the petition of persons interested in the election, adjudged and determined that M. S. was not a person fit and proper to discharge the duties of alderman. In January, 1832, M. S. was a second time elected alderman by a majority of votes, and returned so elected to the court of mayor and aldermen, but they again refused to admit him to the office.

A rule nisi having been obtained for a mandamus to admit M. S. to the office, Held, that an affidavit stating that the court of mayor and aldermen had again determined that he was not a fit and proper person to be admitted, is no ground for

refusing the mandamus, because the prosecutor has a right to have the facts stated in the return, in order that he may have an opportunity of controverting the truth of them :

Held, at all events, that the affidavits in answer to the rule ought to show that the court of mayor and aldermen had, on the second occasion, come to the conclusion that M. S. was not a fit and proper person to be admitted to the office, on a fresh investigation.

A mandamus having issued, the return stated that M. S. was elected by a majority of votes, and returned as so elected to the court of mayor and aldermen ; that a petition was presented to that court against M. S.'s admission to the office, whereupon they examined the merits of the petition according to custom, and determined that he was not a fit and proper person to be admitted to the office, nor duly elected ; and further, that he was not in fact duly elected : Held, that this return was not inconsistent.

THE return to the mandamus, which had issued in Trinity term, 1831, at the instance of the prosecutor, having been adjudged to be good in law, 3 B. & Ad. 255, the latter afterwards brought an action (which was now pending) against the mayor and aldermen for a false return. In January, 1832, another election of alderman took place in the ward of Portsoken, when Mr. Hughes and Mr. Scales were the two candidates, and Scales again had a majority, and he was returned to the court of aldermen as duly elected, but they admitted and swore in Hughes. An information in the nature of a quo warranto was then filed against Hughes, who suffered judgment of ouster to be entered against him. Upon *affidavits stating these facts, the Court in last Hilary term granted a rule nisi for a mandamus, directed to the defendants to admit [*234] Scales as an alderman of the ward of Portsoken, but pending that rule, stayed the proceedings in the action for the false return to the mandamus which formerly issued. The affidavits in answer to the rule set forth the immemorial custom for the court of mayor and aldermen to judge of the fitness of the person elected to fill the office of alderman, and the by-law of 1714, as to the mode of conducting the election, 3 B. & Ad. 257, and then stated, that on the 3d of January, 1832, the lord mayor reported the proceedings on the second election of Scales, whereby it appeared he had a majority of votes ; that a petition was presented to the court of aldermen by freemen inhabitant householders and electors of the said ward, the proceeding in the action for a false return being stayed in the mean time, against the admission and swearing in of Scales to the office of alderman, to the effect that he was not eligible to be a candidate, for that he was not a person fit and proper to support the dignity of the office, and discharge its duties, nor to be admitted and sworn into it ; and also that he had not been duly elected. The affidavits then stated that Scales petitioned the court of mayor and aldermen to be admitted, and also presented himself before the court, for the purpose of being sworn in, as having been twice elected by the freemen of the ward ; whereupon, and as it appears by an entry of the proceedings of the said court of mayor and aldermen so holden on the said 3d day of January last, all the said several petitioners were called in, and the petitions were openly read in their presence and in that of Scales, and the said several petitioners *were fully heard in support of the allegations contained in the several petitions, by themselves and their agents. It then [*235] stated that the said court having taken the several petitions into consideration, and having heard the several petitioners as aforesaid touching the merits of the said election, and also the qualification and fitness of Scales to be such alderman ; and having referred to the minutes of the proceedings of the several courts of aldermen held on the several days therein specified, it appeared that Scales was on the said 10th day of May, 1831, adjudged by the court of mayor and aldermen to be not a person fit and proper to support the dignity and discharge the duties of the office of an alderman of the said city, nor a fit and proper person to entitle him to be admitted and sworn into the office of alderman ; and that due deliberation being thereupon had, the said court of mayor and aldermen, so holden on the said 3d day of January, 1832, did adjudge and determine, according to their discretion and sound consciences, that the said M.

Scales, from the said 10th day of May, 1831, and continually from thence hitherto, had been, and then still was, not a person fit and proper to support and discharge the duties of the said office of alderman, nor a fit and proper person to entitle him to be admitted and sworn into the office of alderman, according to the custom of the said city; and that the said court of mayor and aldermen, so holden on the said 3d of January last, did further adjudge and determine that the said M. Scales was not duly elected to be alderman at the election. In Hilary term last,

Campbell, Solicitor-General, *Law*, and *Follett*, showed cause. It would be useless to grant a mandamus, because it is manifest, from the affidavits, that [236] a return would be made similar to that which the Court has *already adjudged to be good. The affidavits show that, on the 3d of January, 1832, the court of mayor and aldermen again adjudged that Scales was not a fit and proper person to be admitted. [*LITTLEDALE, J.* It does not distinctly appear that they had any fresh investigation on the 3d of January, 1832, or that witnesses were examined, or whether the mayor and aldermen did not found their judgment on what had been done by them in the preceding year. A new state of things has arisen; a fresh election has taken place. Although Mr. Scales may have been unfit in January, 1831, it does not necessarily follow that he was unfit in January, 1832. Besides, he ought to have an opportunity of controverting the facts stated in the affidavits; and that he cannot have, unless a return be made.] The affidavits state that the court of mayor and aldermen "took the petitions into consideration, heard all the petitioners touching the merits of the said election, and the qualification and fitness of Scales to be alderman; and having referred to the minutes of the former proceedings, and due deliberation being thereupon had, the said court of mayor and aldermen so holden on the 3d of January last did, according to their discretion and sound consciences, adjudge that the said M. Scales, from the said 10th of May, 1831, and continually from thence hitherto had been, and then still was not a person fit and proper to discharge the duties of the said office of an alderman of the said city, &c." He had no right to be admitted, unless the court of mayor and aldermen, according to their discretion and sound consciences, thought fit to admit him; and it was not necessary for them to examine witnesses.

Sir *James Scarlett*, *contrâ*, was stopped by the Court.

[237] **DENMAN, C. J.* We think this rule must be made absolute, on the ground that it is left uncertain by the affidavits, what was done on the 3d of January, 1832. That ought to be distinctly before the Court. The facts stated in the affidavits may furnish materials for making a sufficient return, and if such return be made, the prosecutor may then have an opportunity of disputing the facts stated in it.

LITTLEDALE, J. The affidavits do not state distinctly whether Mr. Scales now is or is not an improper person to fill the office of alderman. If he is now an improper person, that ought to be so returned. There are facts stated in the affidavits that may be a ground for such a return, but the defendant ought to have an opportunity for controverting them. The question is, not what the power of the mayor and alderman is, but whether they ought to make a return to the mandamus, and I think they ought. They may then state what they think proper. If they make a return, the defendant ought to have an opportunity of taking the opinion of the Court upon its sufficiency in point of law, or of denying the facts stated in it.

TAUNTON, J. The rule ought to be made absolute, principally on the ground that this is a new transaction, and that Mr. Scales ought to have an opportunity of controverting the truth of the facts on which it is alleged that he is not now eligible. He has no opportunity of doing so upon this interlocutory motion; but he will have that opportunity when the return is made. Supposing the court of mayor and aldermen should make the same return as to the right which they formerly did, and that Mr. Scales should be advised to controvert the legality

*and sufficiency of it, admitting the facts stated in it to be true, this Court would probably come to the same conclusion as it did on the former occasion; but he has a right to deny the truth of the facts stated in the return, and there is one very material fact stated on affidavit, viz. the existence of that immemorial custom by which the corporation claims a right and power to decide upon the fitness of the individual elected by the citizens. He may be advised to deny that custom; and if the mandamus does not go, no return can be made as to this second election, and he will be, as to that, without remedy. As to the former action, if he proceeded in that, it might be said that he had waived his right of contesting the first return, by appearing as a candidate at a subsequent election. [*238]

PATTESON, J. I think the rule ought to be made absolute. It is true the action for the false return, which was stayed, is still depending, but Mr. Scales cannot have the same remedy in that action as he may in one brought for a false return to the present mandamus. The question is not the same. Even on that ground alone, I think the mandamus ought to go. I am of opinion, also, that the affidavits do not so fully disclose that everything has been done that ought to have been done, as to make a return unnecessary. The court of mayor and aldermen will state in their return what they have done on the second election, and then the prosecutor will have an opportunity of demurring, or taking issue upon any fact returned. Rule absolute for a mandamus.

The return was in similar terms to that in 3 B. & Ad. from p. 255 to 257, stating that the ancient custom there *set out, and the by-laws in the reigns of Richard Second and Queen Anne. It then stated that a court of wardmote was holden on Tuesday, the 5th of December, 1831, and by adjournment on other subsequent days, in and for the said ward of Portsoken, before the then mayor of the said city, by virtue of a precept for that purpose before then duly issued according to the custom of the city, for the election of an alderman of the ward in the room of Sir J. Shaw, resigned, the said M. Scales, who had been returned to the court of lord mayor and aldermen to be alderman of the said ward, having been adjudged not to be a fit and proper person to support the dignity and discharge the duties of the said place or office; at which court of wardmote divers persons, being then present, voted for Scales as alderman, and he, by reason thereof, claimed to be duly elected into the said office, and a return to the said precept was afterwards, on the 3d of January, in the year of our Lord 1832, made into the court of mayor and aldermen then duly holden in the Guildhall of the said city, according to the said custom, stating to the said court, that so far as the majority of votes or polls was concerned, the said M. Scales was elected alderman of the said ward. [*239]

The return then, after stating the petition of several freemen against the admission of Scales, in nearly the same terms as in the affidavit against the rule, proceeded as follows:—

“Whereupon the said court of mayor and aldermen, being then and there duly holden in the Guildhall of the said city, according to the said custom, took the said petition into consideration, and having heard the petitioners by themselves and their agents, in the presence and hearing of the said M. Scales, and also having heard *the said M. Scales touching the merits of the said election and his qualification and fitness to be such alderman as afore- [*240] said, and having heard all that was alleged or offered, as well by and on behalf of the said petitioners as of the said M. Scales, did, according to the said ancient custom, examine, determine, and adjudge of and concerning the merits of the said petition, and of and concerning the qualification and fitness of M. Scales to be admitted and sworn into the office of alderman of the ward of Portsoken; and due deliberation being thereupon had, the said Court did adjudge and determine, according to the discretion and sound consciences of the said mayor and aldermen, that M. Scales was not, at the time of the said supposed election, nor at any time since, a person fit and proper to support the dignity and discharge

the duties of the said office of an alderman of the said city, nor a fit and proper person to entitle him to be admitted and sworn into the place and office of alderman of the said ward; and the said court of mayor and aldermen did further adjudge and determine that the said M. Scales was not, and in truth and in fact the said M. Scales was not, duly elected to be alderman of the said ward of Portsoken, at the election mentioned in the return to the said precept, nor eligible to be a candidate at the said election. And they further certified that for the several causes as aforesaid, and each of them respectively, the said M. Scales is not a fit and proper person to entitle him to be admitted and sworn into the place and office of alderman."

Sir *James Scarlett* now moved to quash the return. The return is inconsistent. It first states an election of Scales by the citizens, and that he was rejected by the court of mayor and aldermen, and then afterwards that [*241] *he was not duly elected. The *Queen v. the Mayor and Alderman of Norwich*, 2 *Ld. Raym.* 1244.

Per Curiam. That case shows that there would be an inconsistency if the return had stated, first, that Scales was elected, and then that he was not elected. That was cited in *Alderman Winchester's case*, 9 B. & C. 1, where the same objection was taken. The answer is, that the return here states certain acts done towards an election, then that the court of mayor and aldermen decided that those acts did not constitute a due election of Scales, and lastly that he was not duly elected; there is no inconsistency, and the Court so decided in *Alderman Winchester's case*, which, therefore, is an authority in point in favor of the present return.

Judgment for the defendants.

BLANEY v. HOLT.

BLANEY v. FARDELL. } Bail of MORGAN.

In a case arising before the New Rules of Hilary term, 2 W. 4, this Court stayed proceedings in an action on a recognisance of bail (where the action against the original defendant was by bill), on payment of double the sum sworn to, and costs of the action against the bail.

THE nature and grounds of the motion in these cases will appear from the judgment, which was delivered in the course of the term by

DENMAN, C. J. An application was made by Mr. *Platt* to set aside an order of my brother LITLEDALE, for staying the proceedings on a recognisance of bail on payment of the sum of 60*l.*, being the amount of the recognisance of the bail in an action of *Blaney v. Morgan*, together with the costs of these actions.

[*242] There is probably some mistake *in saying that 60*l.* is the amount of the recognisance; the order should probably have been double the sum sworn to, because if there was a sum certain mentioned in the recognisance, there would be no ground for Mr. *Platt's* application, which is made on the ground that there is no sum certain mentioned in the recognisance.

The proceedings against the original defendant were by bill; and it was contended, that as the form of the recognisance is that the bail should pay the condemnation money and costs in general terms, the bail could not be relieved but on payment of the sum sworn to and the whole of the costs; but it was admitted, that if the proceedings had been by original, then, as the bail are bound in a sum certain and which is double the sum mentioned, they would not, in any event, be liable beyond that amount.

In the Common Pleas they are each liable to that extent.

We have no distinct account how the difference arose in the form of the recognisance by bill; it might be connected with the old course of the Court as to bail by bill, which was that they are liable to the full extent of the damages in all the actions that should be brought against them by the same plaintiff in the same term. And though the entry in the recognisance of bail is "in placito

prædicto" only, yet by that entry he seems to have been considered to be subject to all actions in the same term, by the same plaintiff, against the same party, though not at the suit of a stranger. This practice was found productive of so much inconvenience that a rule of Trinity term, 22 Car. 2, was made to limit the responsibility of the bail; and by another rule *of Easter, 5 G. 2, [*243] the bail shall be liable for so much as is endorsed on the process, or for any lesser sum which the plaintiff may recover; the last rule itself is silent as to costs; but in a note to the rule of the edition of 1742 (and the notes to that edition are considered authority as to the practice) there is added, "together with costs of suit."

Several cases have occurred since to the same effect, not necessary to notice, up to Jacob v. Bowes, 6 East, 312, where what we have just mentioned is stated as the practice as to the sum sworn to, and the extension of the rule as to costs. That, however, was by original; but the Court say there is no difference in practice between the two modes of proceeding. And the question is, what is to be the amount of the costs; whether the whole costs, however great, or whether they are to be limited so as that, upon the whole, the bail shall not be liable to more than double the sum sworn to. And we think that it is to be limited so as that the bail shall not be liable to more than double the sum sworn to.

It would be singular that the bail should incur a greater or less degree of liability according as the action was commenced by bill or by original; the bail, if opposed, justify in both cases in double the sum sworn to; and they can never contemplate a different degree of liability in the two cases.

The plaintiff looks for the same sum in each case; and he cannot require that they should justify in a greater sum in one case than the other.

The bail to the sheriff are not liable to more than the penalty of the bail-bond, whether the proceedings be by *bill or by original; their obligation is [*244] for the appearance of the defendant, which is not his personal appearance, but putting in and justifying special bail; the liability of these bail ought to be the same as the bail to the sheriff, who undertook to put them in; if the bail to the sheriff themselves become the special bail, it cannot be supposed that they incur a greater liability than that which they contracted with the sheriff.

In Goss v. Drakeford, bail of William Harrison, 2 Smith's Reports, 354, the reporter's abstract of the case is, "semble, where the bail are let in upon terms to try the cause of the principal, the money levied to abide the event, and the bail-bond to stand as a security, the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security when the bail was first let in to try upon terms."

We think that case rightly decided, and that the abstract of it would be correct even without the intervention of the semble: the reason for which semble must have been the particular undertaking of the bail; for if an action was brought on the bail-bond itself, the bail could not be liable beyond the amount of the penalty.

We, however, advert to a case of the Duke of York v. Pilkington, Skinn. 70, in 34 Car. 2, where it was held that the bail above might be liable to a greater amount than the bail to the sheriff. That might be so according to the ancient practice of the Court—that, in a proceeding by bill, the bail were liable to any extent; but this case does not appear to have been rightly decided, as it was *after the rule of Trinity, 22 Car. 2, which was probably not brought [*245] to the attention of the Court.

If the sheriff has to put in special bail, his bail, in the same manner as the bail to the sheriff, relieves him by justifying in double the sum sworn to; and if an attachment be obtained against the sheriff for not bringing in the body, or, in other words, not justifying special bail, he is not liable beyond the penalty of the bail-bond and the costs of the attachment, The King v. The Sheriff of Middlesex, 3 East, 604. That, indeed, was a proceeding by original;

but the Court, who had taken time to consider, do not put it upon that distinction; and in *Jacob v. Bowes*, 6 East, 312, above cited, the Court said that there was no difference in practice, whether the proceedings were by bill or by original. That was not the same case as the present; but we refer to it as containing the general opinion as to the practice. We do not advert to any cases decided in the Common Pleas, because there the bail are bound in a sum certain.

We are, therefore, of opinion that no rule should be granted.

This case arises upon an action commenced before Easter Term, 2 W. 4. But the twenty-first of the new rules of Hilary Term of that year, and which rules are directed to commence on the first day of Easter Term following, directs that bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognisance; and probably, therefore, a question like the present may never arise again.

Rule, for setting aside the order, refused.

[*246] *The Mayor, Bailiffs, and Burgesses of the Borough of LEICESTER
v. BURGESS. *June 4.*

The statute 11 G. 4, and 1 W. 4, c. 64, for permitting the general sale of beer by retail in England, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgess.

CASE. The declaration stated that the borough of Leicester was an ancient borough, in which there had been, from time immemorial, a body corporate known by divers names of incorporation, and that Queen Elizabeth, by her letters patent, constituted and created the burgesses of the said borough a body corporate, by the name of the mayor, bailiffs, and burgesses of the borough of Leicester, and that there is, and from time whereof, &c., hath been, an ancient custom in the said borough, "that no person, not being a burgess, nor the widow of a burgess of the said borough, should carry on the trade of an alehouse-keeper within the limits of the said borough; yet the defendant, well knowing, &c., and not being a burgess of the said borough, nor having any lawful right or excuse in that behalf, but contriving, &c., heretofore, to wit, on the 30th day of March, 1831, and on other days, &c., carried on the trade of an alehouse-keeper within the limits of the said borough, contrary to the said custom, and against the will of the plaintiffs." The second count stated the custom to be, that no person, not being a burgess, &c., nor a person licensed by the mayor, bailiffs, and burgesses, should carry on the said trade within the borough. There were other counts, stating the custom with some variations, and charging the defendant with selling ale and beer by retail within the

[*247] borough, and occupying a house, and trading for *that purpose within the borough, contrary to the custom.

Pleas, 1. Not guilty. 2. That after the 10th day of October, in the year of our Lord 1830, mentioned in a certain act of parliament made, &c. (1 W. 4), entitled "An Act to permit the general sale of Beer and Cyder by retail in England," and before either of the said times when, &c., in the declaration mentioned, that is to say, on, &c., the defendant, then and there being a householder, holding and occupying the said house in the said declaration mentioned to have been occupied by the said defendant, and being then and there assessed to the poor-rates in the said parish in which the said house was situated, and in which he, the said defendant, was licensed to sell beer by retail, as hereinafter mentioned, and not then and there being a sheriff's officer, or officer executing the legal process of any court of justice, under or by virtue and in pursuance of the provisions of the said last-mentioned act of parliament, duly applied for and obtained from certain persons, to wit, John Tanfield and Gervase Ford, the said G. F., then and there being supervisor of excise, and the said J. T. then

and there being collector of excise for the district and collection within which the house after-mentioned was and is situate, a license under the hands and seals of the said J. T. and G. F., to sell beer, ale and porter by retail in the said district, in a certain house and premises specified in the said license, being a house and premises situate within the limits of the said borough and district and collection, and being the said house in the said declaration and in this plea mentioned to have been occupied by the said defendant, the said district, collection, and borough not being *within the limits of the chief office of excise in London; and that before and at the said times when, &c., the [*248] said license was and still is in full force and effect, and that at the said times when, &c., he, the said defendant, by virtue of the said license, did sell beer, ale, and porter by retail in the said house, but not elsewhere in the said borough; and for that purpose, and in so doing, but not otherwise or elsewhere, did carry on the said trade of an alehouse-keeper and victualler, and then and there occupied the said house for the purpose of selling beer, ale, and porter by retail therein, and therein carried on the said trade of selling beer, ale, and porter as the defendant lawfully might for the cause aforesaid. 3. As to selling ale and beer by retail, and occupying a house, and trading for that purpose, within the borough: That the defendant at the said times when, &c., sold ale and beer within the said borough, and for that purpose occupied a house and traded within the said borough, to wit, in a certain house situate therein, under and by virtue of a certain license before then, to wit, on the said 29th day of October, &c., duly obtained by him for that purpose under the provisions of the said act of parliament, &c., the said last-mentioned house being specified in the last-mentioned license in that behalf, and such license being at the said times when, &c., in full force. General demurrer to the second and third pleas. Joinder. The demurrer was now argued by

Amos for the plaintiffs. The local custom is not superseded by the act 11 G. 4, and 1 W. 4, c. 64. The preamble of that statute only recites, that it is expedient to give greater facilities for the sale of beer "than are *at present afforded by licenses to keepers of inns," &c. If the intention [*249] had been to relax the custom of particular towns and corporations, the legislature would have expressed it by a recital to that effect, as is done, for example, in 3 G. 3, c. 8, s. 1: but the first section of the present act, which makes it lawful for any person licensed as therein is mentioned to sell beer, &c., by retail in any part of England, in any house or premises specified in such license, concludes, "anything in the act or acts heretofore made, or in force at the time of the passing of this act, to the contrary notwithstanding;" not mentioning customs. Affirmative words in an act do not take away a former custom, *Co. Litt.* 115, a, *Com. Dig.* Parliament (R), 24. And without supposing such a relaxation as will be contended for on the other side, this statute does afford much greater facilities for the carrying on of the beer trade in cities and elsewhere than were before enjoyed. In *Simson v. Moss*, 2 B. & Ad. 543, it was held that a hawker's license, under the statute 50 G. 3, c. 41, did not give the privilege of selling goods in a borough where, by custom and by law, strangers were forbidden to trade. There is no reason for contending that beer licenses, under the present act, have a more extensive effect. No intention appears, either in the act of 11 G. 4, and 1 W. 4, c. 64, or in 9 G. 4, c. 61, which consolidates the previous statutes, to give this peculiar advantage to the trade in beer.

The Solicitor-General, *contra*. Looking at the whole statute 11 G. 4, and 1 W. 4, c. 64, it is plain the legislature *intended to take away restrictive local customs as to the beer trade. Sect. 1 enables the persons licensed under [*250] this act to sell in any part of England, in any house specified in such license. Sect. 2 makes it lawful for every and any person, being a householder (except

¹ Enabling persons who have been in the land or sea service since the 29th of November, 1748, to exercise trades.

such persons as are after specially excepted), to obtain a license for that purpose ; and the exception is, "that no such license shall be granted to any person being a sheriff's officer, or officer executing the legal process of any court of justice, nor to any person, not being a householder assessed to the poor rates in the parish or place in which he shall be licensed to sell." The Court will not engraft other exceptions on these, nor introduce the qualification that the party shall, in particular places, be a freeman. The act is entitled, "An Act to permit the general Sale of Beer and Cyder by Retail in England." The title may be referred to in construing a statute: that of 27 G. 3, c. 44, was relied upon in argument on both sides, in *Free v. Burgoyne*, 5 B. & C. 400, and was also referred to by the Lord Chancellor in the same case before the House of Lords, 2 Bligh's Rep. 78, N. S. The preamble, here is not confined by the terms used to mere defects in the system of licenses; and, if it were, it would not necessarily restrain the enacting clauses. *Rex v. Pierce*, 3 M. & S. 62. The preamble is only to be referred to for elucidation where the clauses are not sufficiently explained aliunde. The twenty-ninth section saves the rights and privileges of the Universities of Oxford and Cambridge, and the powers and authorities vested by charter or otherwise in the chancellors, masters, and scholars of the [*251] said Universities, and their *successors: or in the master, wardens, freemen, and commonalty of the vintners of the city of London. These reservations, according to the argument for the plaintiffs, would be needless; but they show that, without such a reservation, the effect of the statute would have been to supersede those particular rights. The rule is, that, where general words are followed by words of exception, "all that is not within the particular shall be within the general." *Lord Zouch v. Moor*, 2 Roll. Rep. 280, 14 Vin. Abr. Grants, H. 13, pl. 61; *Wiltshire v. James*, Dyer, 58, b. The policy of this act was to extend the trade in beer, and open it generally to all such householders as are there mentioned, who could give the required sureties. *Simson v. Moss*, 2 B. & Ad. 543, was decided on slight consideration, and differs from the present case, inasmuch as that turned upon a restraining, this on an enabling statute.

Amos, in reply. Section 29, does not refer to the customs of cities and boroughs; and it is borrowed from the thirty-sixth section of 9 G. 4, c. 61, which clearly was not intended to abrogate any local customs. As to the title of the present act, the title is no part of a statute, according to many authorities, cited in 2 Dwaris on Statutes, 653; and if it were so, in this case it is favorable to the plaintiffs. The words "in any part of England" have reference merely to the limited operation of the statute, which extends to England only; and the exceptions in sect. 2, are only restrictions upon the power previously given of taking out licenses in places where they might have been granted before the act.

[*252] *DENMAN, C. J. I must say that, on looking to the general language used in this act, the words "in any part of England," and the twenty-ninth section, it struck me, at first, that the privilege given by the statute extended to all places but those excepted. But, on further consideration, both of the general purport of the act, and of the first, which is the operating clause, I am of opinion it cannot apply to places where, by local custom, the trade is restricted. It is true the second section empowers any person (with the exceptions there mentioned) to apply for and obtain a license; but, by the preceding section, that license only gives power to sell, anything "in any act or acts" of parliament to the contrary notwithstanding: it does not supersede customs. The twenty-ninth section does not relate to exclusive rights of selling, as exercised in particular places, but to the power of licensing which existed in certain jurisdictions, and which is preserved to them, although the like powers are abolished elsewhere.

LITTLEDALE, J. The words of this statute, in the clause enabling parties to take out licenses, are, "anything in any act or acts heretofore made, or in force at the time of the passing of this act, to the contrary in anywise notwithstanding:" there is no reference to local customs; where, therefore, such existed,

this clause does not alter them. The act does nothing more in this respect than was done by former statutes: it only gives greater facilities in the case of persons not precluded by local custom from obtaining licenses. The second section, with the exceptions there laid down, is only a continuation of the first. As to the twenty-ninth, its object is only that the Universities and the [*253] *Vintners' Company should retain the privileges they before enjoyed, in regulating licenses within their respective jurisdictions. A distinction has been taken between this case and *Simpson v. Moss*, 2 B. & Ad. 543, because that arose upon a restraining statute; but there is nothing to show that the present act was meant to have an enabling operation as to selling in particular places.

PARKE, J. I have had a strong opinion on this case from the first. Looking both to the preamble and the body of the act, I think the defendant's pleas cannot be supported. The preamble states, that "it is expedient for the better supplying the public with beer in England, to give greater facilities for the sale thereof than are at present afforded by licenses to keepers of inns, ale-houses, and victualling-houses;" and then the enacting part of the section makes it lawful for any and every person who shall obtain a license for that purpose under the act, to sell beer by retail in any part of England, in any house specified in such license, "any act or acts heretofore made to the contrary notwithstanding." That shows that the restriction which the legislature meant to take away was the parliamentary restriction imposed by former statutes; and this is consistent with the preamble and the title. The powers of the Universities and of the Vintners' Company, mentioned in the twenty-ninth section, are merely the jurisdiction, and privilege of licensing enjoyed by those bodies: they are not powers of the same kind as the right of exclusively selling, which exists by custom in certain boroughs.

*PATTESON, J. I am of the same opinion. It appears to me that this statute has nothing to do with the customs of particular places. If it had [*254] been intended to take away these customs, they might have been expressly noticed. The powers saved by sect. 29, are of a different nature. The first section enables any person licensed under the act to sell beer by retail in any part of England, in any house or premises specified in such license. The argument for the defendant would go the length of showing, that a covenant in a lease not to sell beer on the premises, would be superseded by the statute.

Judgment for the plaintiffs.

The KING v. Dame JANE ST. JOHN MILDMAY, Lady of the Manor of MARVELL, in the County of SOUTHAMPTON, and WILLIAM BRAY, Esquire, her Steward of the said Manor.

A copyholder in fee surrendered to the use of another person, and afterwards, and before the admittance of the surrenderee committed and was convicted of simple felony: there being a custom in the manor that any tenant of customary tenements, who should commit and be convicted, of felony, should forfeit his said tenements to the lord. Held, that the surrenderor, before admittance, was still tenant for the purpose of forfeiture; and that his estate was forfeited to the lord, and the surrenderee not entitled to be admitted.

MANDAMUS, reciting that the manor of Marvell, from time immemorial, had been an ancient manor, within which there were various copyhold tenements granted by and held of the lord or lady of the manor, according to the custom of the manor, and demised and demisable by copy of court roll, according to the custom of the manor, and that the lord or lady, and the steward for the time being, held customary courts for the manor, and accepted, and of right ought to accept, all such surrenders of any of the said customary *tenements as have been and are duly tendered for acceptance, according to the [*255] custom; and also of right ought to make re-grants of, and admittance to,

such customary tenements as have been surrendered for that purpose, to persons entitled thereto, and to such intents as they might have required, and may require, according to the custom. It then stated that John Boyes, on or about the 4th of August, 1830, then being one of the copyhold and customary tenants, in fee of certain tenements of the manor according to the custom, did duly make a surrender in fee of the said tenements into the hands of the lady of the manor, to the use and behoof of H. Southwell and his heirs for ever, according to the custom of the manor, upon condition that, if Boyes should pay to Southwell the full sum of 500*l.* with 4½ per cent. interest on the 4th of February then next, the surrender was to be void; that the surrender was taken out of court by the deputy steward, and duly enrolled at the next general court holden on the 26th of October, 1830, and that Boyes did not pay to Southwell the sum of 500*l.* with interest, by reason whereof the same surrender remained in full force, and Southwell was entitled in pursuance thereof to be admitted as tenant in fee of the premises mentioned in the surrender; that application had been made to the defendants by Southwell to admit him, and that the defendants refused. It then commanded the defendants to admit him. The defendants by their return conceded generally the right of admission as stated in the mandamus, but alleged an immemorial custom within the manor "that, if any customary tenant of the said manor holding customary tenements in fee or [*256] otherwise, parcel of the manor, at the will of the lord or lady of *the said manor, according to the custom of the manor, should commit felony, and should be convicted thereof, he should forfeit his said customary tenements within the said manor to the use and benefit of the lord or lady of the said manor for the time being, and his or her heirs or successors for ever; that Boyes on the 4th of August, 1830, duly made the surrender, and the same was presented; that after the said surrender and presentment thereof, Boyes committed and was convicted of felony, which conviction remained of record, and was not since reversed or set aside." It then set out the record of the conviction for feloniously stealing, taking and carrying away five sovereigns, and that the judgment of the Court was, that Boyes should be transported for seven years; that by reason of the commission of the felony aforesaid, and of the said conviction, the said copyhold tenements had escheated to the lady of the manor according to the custom, and, therefore, she seized into her hands the same, and could not admit Southwell to the same, as by the writ she was commanded. A rule nisi was obtained for quashing this return as insufficient, and for issuing a peremptory mandamus. The Court ordered the case to be set down in the special paper for argument, and it was argued¹ in last Hilary term by

Dampier, for the crown. The lord cannot take advantage of a forfeiture between surrender and admittance, and a peremptory mandamus ought to issue. The surrenderor was possessed of an estate in fee. The return admits that the [*257] surrender was enrolled regularly, *and made for valuable consideration. It was irrevocable by the surrenderor: it was an actual conveyance or the property, not a mere agreement to convey: and, that being so, the surrenderer, who was always ready to be admitted, has a right to call on the lord to perfect the conveyance. The lord's claim to forfeiture accrued after the surrender, by escheat. No case is to be found of an escheat intermediate between surrender and admittance.

There is one case, however, which may direct the Court. Suppose a testator, seized in fee, surrenders to the use of his will: he dies without heirs, and with a will. The lord must admit the appointee. He cannot set up the escheat intermediate by the death of the tenant without heirs. It is true that, in that case, he might again surrender the estate in fee, if he chose, and it would pass by such surrender: *Fitch v. Hookley*, Cro. Eliz. 442; 4 Rep. 23, a; *Southcote v. Adams*, 1 Roll. Rep. 256. The testator, in this supposed case, having surrendered to the use of his will, might, during his life, forfeit or re-surrender:

¹ Before LITLEDALE, TAUNTON, and PATTERSON, Js.

the reason is, because the cestui que use is unknown; but, as soon as he is known, his right to admission enures, and cannot be defeated by escheat. The knowledge and the valuable consideration of and by the cestui que use are important. In the present case, at the time of the surrender, both existed. The appointee's claim is weaker than the cestui que use's; for to the former is required a will and an admittance; to the latter only admittance. It is necessary, in the absence of all precedents as to copyholds, to refer to analogous cases as to freeholds. A devise, though it takes effect *after the testator's death, will prevent an escheat, Co. Litt. 236, a, n (1); and see 3 Cruise Dig. 456. In Goodcheap's case, 49 Ed. 3, fo. 16, abridged in Brooke's Abr. tit. Devise, pl. 10, a feme covert, seised of lands in London, devised them to be sold by her executors, and died without heirs; and the question was, if the land should escheat, or if the executors might sell. But it seems the executors might sell, for the land is bound by this devise, and cannot escheat. There, the testatrix dying without heirs, the king, as lord, would have taken by escheat, had not the vendee of the executor taken by a species of relation; for an immediate devise has a sufficient inception in the lifetime of the testator to prevent an escheat. Thus, in 31 H. 8, 45, b, it is said, if a man devise land to another, and die without heir, the land will not escheat, because the devise prevents the escheat by inception in his life, cited in 1 Rolle, 214. So the judgment in this case ought to be against the lord, on the ground of relation, which has a very wide operation in cases of copyhold. The admittance relates to the surrender, and the surrenderee's title begins from the date of it. Several instances of relation are put in a note to *Grantham v. Copley*, 2 Saund. 422, c. n. 2. One is from Co. Litt. 59, b. :—"If two joint tenants be of copyhold lands in fee, and the one out of court, according to the custom, surrender his part to the lord's hands to the use of his last will, and by his will deviseth his part to a stranger in fee, and dieth, and at the next court the surrender is presented, by the surrender and presentment the jointure was severed, and the devisee ought to be admitted to the moiety of the lands; for *now by relation the state of the land was bound by the surrender." After the surrenderee has been admitted, he may lay his demise in ejectment to recover the copyhold premises, on the day of the surrender, or any day between that and the admittance; *Holdfast v. Clapham*, 1 T. R. 600. *Carr v. Singer*, 2 Ves. sen. 603, shows that, where there is no custom prescribing the mode of barring an entail of copyhold, it may be barred by surrender to the use of a will. In that case, WILLES, C. J. says,—“When there is a will and admittance, that has a retrospect to the surrender to all intents, and it is therefore a bar from the time of the surrender, not from the death of the testator.” But it will be said, that the doctrine of relation applies only as between the parties, or those claiming under them, and that here the lord is a stranger to the surrenderor, and as he claims an interest, and is not merely an instrument of conveyance, he is not barred. First, it is a universal rule, in all conveyances where there are several times and acts, that there should be a relation of all the subordinate parts to the most essential part. Secondly, a joint tenant, by whose surrender the right of survivor is barred, Co. Litt. 59, b, and an issue in tail, whose estate is barred, *Carr v. Singer*, 2 Ves. sen. 603, are strangers to the surrenderor. Thirdly, the lord did not at one time (i. e. before the forfeiture) claim an interest, the interest was then in the surrenderee, *Vaughan v. Atkins*, 5 Burr. 2764, and one who has undertaken to hold as depositary to the use of the surrenderee, cannot afterwards claim in interest. The lord was only an instrument, and no change of circumstances could divest him of that character, though it might cause an alteration in the conveyance, Litt. § 352. *The words of ASHURST, J., in *Holdfast v. Clapham*, 1 T. R. 630, will be cited to show that it is only “as against all persons but the lord, that the title of the surrenderee, after admittance, is perfect as from the time of the surrender, and shall relate back to it.” But that is a mere obiter dictum, and no authority is cited in support of it; and the

report in that respect may probably be incorrect. A MS. note of this part of the judgment by Mr. (afterwards C. J.) GIBBS, is as follows :—"An ejectment may be maintained even without admittance, for the title is good against every one but the lord : admittance is required for his sake." That passage can only apply to an heir, for he only, before admittance, can maintain ejectment. It is clear the case of an heir and not of a surrenderee was spoken of by the learned Judge : it is, at best, a mere obiter dictum, but it is more probably an inaccuracy of the reporter. But the case put, of surrender to the use of the will when the testator dies without heirs, is an instance where even the title of the surrenderee is good against the lord. So is Goodcheap's case, 49 Ed. 3, fol. 16, which is one of freehold, and is therefore a case *à fortiori* : for a freehold is not so easily divested and transposed ; but an estate at will is a creature of the will, and is not necessarily conveyed by external symbols. It may be said that, as the lord is not benefited by the surrenderee's escheat, according to *Roe d. Jeffery v. Hick*, 2 Wils. 13, he must be benefited by the surrenderor's, else he would have no forfeiting tenant. But the answer to that is given by the Master of the Rolls in *Burgess v. Wheate*, 1 W. Blackst. 144 :—"It is not every [*261] argument in *law or logic that holds *à converso*. There should be a reciprocal right to have a reciprocal equity." The right of the lord is to have a serviceable tenant, either by substitution or continuance. Thus, if a mortgagor dies without heirs, the lord cannot redeem, Co. Litt. 206, a ; if the mortgagee die without heirs, the mortgagor may redeem and enter against the lord ; *Pawlett v. The Attorney-General*, Hard. 465. If disseisor die without heirs, the disseisee may enter against the lord who has entered for the disseisor's escheat, Co. Litt. 268, b ; if the disseisee die without heirs, the lord will not take if the tenant have title, Co. Litt. 268, b. If a vendee die without heirs before conveyance, the lord takes nothing ; if the vendor die, the lord must make a title to the vendee, and must hold the purchase-money as trustee for the vendor's personal representative, *Burgess v. Wheate*, 1 W. Black. 150. It has been said that a lord *pro tempore* might admit in fee, because it was for the succeeding lord's benefit that he should have a tenant, in respect of the service to be rendered, *Gilbert's Tenures*, 205. The reciprocity is, not to have a forfeiting tenant, but a tenant to do the service. There are many cases where the lord will not have a forfeiting tenant. An heir before admittance cannot forfeit ; if so, the lord has there no forfeiting tenant. If the surrenderee on condition be admitted, and forfeits, the surrenderor can claim against the lord on performance of the condition ; if so, the lord has no forfeiting tenant. Between the death of a testator without heirs and admittance of appointee, there is no forfeiting tenant. But, conceding the argument from reciprocity, then because [*262] alienation and *escheat are convertible terms, and he who can alienate can cause escheat, and vice versa, as here the surrenderor could not alienate, he cannot cause escheat. Again, by forfeiture for felony, all estates made after the felony are avoided, Co. Litt. 390, b. Here a surrender after the felony would have been bad ; consequently, by reciprocity, a surrender before the felony must be good.

A surrender is an alienation : it is at least a charge, and more than a possibility. But possibilities and contingencies bind freehold estates in the hands of the lord claiming by escheat, *Nichols v. Nichols*, Plowd. 481. Lease for life conditioned that lessee should have a fee if lessor should die without issue. Lessor being attainted of treason by act of parliament, whereby all his lands were forfeited, died without issue ; and it was adjudged that the lessee had the fee against the crown ; "for the lessor's escheat, nor any cause whatever, shall prejudice the lessee ; but when the condition is performed, the fee vests in the lessee, discharged of all incumbrances made by the lessor, or under felony or treason done by him," Plowd. 486. Lord COKE says of a lease for life conditioned to have fee, that the fee passes not before the performance of the condition ; and he adds afterwards, "This enures as an executory grant," Co. Litt. 217, b.

But Plowden, 486, 487, of the case before cited, says, "The condition is an agreement real, with which the land is charged, into whatsoever hands it comes," so that no act between the grant and the day shall prejudice the lessee. No fee passed, yet it was bound. In Co. Litt. 218, a, it is said, "If the condition be *to increase an estate, that is to say (that the lessee is) to have fee upon payment of money to the lessor or his heirs at a certain day, and before the day the lessor is attained of treason or felony, and also before the day is executed, now is the condition become impossible by the act and offence of the lessor; and yet the lessee shall not have fee, because a precedent condition to increase an estate must be performed, and, if it become impossible, no estate shall arise." The execution of the attained person there, was the only reason why it became impossible to perform the condition; payment to the attained person before execution would have taken the fee from the lord by relation, for an attained person is not, to all purposes, dead in law. It will be said, that Pawlett v. The Attorney-General, Hardr. 465, shows merely that the surrenderor or mortgagor may redeem against the lord who takes on escheat of the admitted surrenderee; but it proves also, that, where a perfect tenant forfeits, the lord shall not retain: why, then, should he retain on forfeiture of a tenant who has surrendered, who, when he surrendered, had full dominion over the estate? Giles v. Grover, 9 Bing. 139, 161. Such a person may so affect it, that, into whatsoever hands it comes by forfeiture, it shall be bound; Walsingham's case, Plowd. 559. The lord, by escheat, is assignee and privy in law; Co. Litt. 215, b. 352, a. He takes, therefore, subject to lien. The estate or the land is bound. Co. Litt. 338, b, shows that, in certain cases, although as between two parties, the estate of a surrenderor may have vanished, yet, as to a third person, *it shall remain. [*263] The estate may be freed from a trust, but not from a charge; Walsingham's case, Plowd. 559. Even if the estate be gone, still the land is charged, Litt. s. 289, Co. Litt. 349, a, and the lord cannot retain it.

Assuming that the doctrine of relation does not apply in this case, still the lord may be bound; for it may be contended that the lord is owner in demesne, so that the custom does not apply. The surrenderor after surrender is not tenant to every intent; he continues tenant merely for the preservation of the tenancy, and not to cause escheat; Co. Litt. 62, a; 4 Co. 23, a. In Co. Litt. 62, a, it is said, "By surrender out of court the copyhold estate passes to the lord under a secret condition that it be presented at the next court according to the custom of the manor;" and in Co. Copyholder, s. 39, it is said, "Till admittance, the lord takes notice of the grantor as tenant;" not that he is really tenant. "The interest is in him but *secundum quid*, and not absolutely. The grantee cannot be deluded of the effects of his surrender." In Rex v. Boughy, 1 B. & C. 573, HOLROYD, J., says that, "until admittance, the estate is not completely taken out of the surrenderor." But he who forfeits must not be simply *secundum quid* a tenant: the estate must be completely in him, forfeiture being *strictissimi juris*. In early times both surrender and admittance were real conveyances. Surrender was one conveyance, admittance of the party recommended by the surrenderor was another. The admittance, then, was of grace and favor, now it is of right, 2 Wils. 401, and when custom had bound the lord to admit, both were parts of one conveyance; the latter formal and governed *by the former, which is the essential part. In the one view, [*265] "the surrenderee is in by grant of the lord," Rigden v. Vallier, 2 Ves. sen. 257; Crouter v. Oldfield, 1 Salk. 865, and so is the title pleaded. And in that view the lord must be considered as in by the surrender. In the other, relation must operate. But suppose the cestui que use did not seek admittance. The lord had no right to or wish for the land; he required a *serviceable* tenant. Hence the surrenderor, being the lord's villain, must by the lord's will have continued tenant. But the will of the lord so continuing him tenant ought not to operate against the cestui qui use for the purpose of forfeiture; for "the estate is really in the lord, though the surrenderor shall have the profits;" Allen

v. Nash, Noy. 152; *Rigden v. Vallier*, 2 Ves. sen. 257. It is said in *Taverner v. Cromwell*, 4 Rep. 27 a, that the party admitted is in by the surrenderor, but that has reference to the proposition which follows, that the lord cannot affect the estate with any charges in its transit through him.

The surrenderor has a usufruct to allow him to perform service, but to give him more would prejudice the lord, for by escheat the service is destroyed. "Tenancy is the fruit; escheat is the tree itself." (Spelman.) After surrender he remains tenant by fiction, to preserve the tenancy, but not so that, by fiction, the tenancy may be destroyed. Tenancies are often for certain and not all purposes. *Butler and Baker's case*, 3 Co. 29 b; See *Plowd.* 486; *Co. Litt.* 2 b.

This forfeiture is by custom, and which, to be valid, must have commenced before the time of legal memory. The lord had full power over the estate before the *tenant had gained an estate according to the custom, for [*266] otherwise the lord could not have imposed the condition now relied upon, it being solely for his benefit. But at that time a surrender was an actual conveyance of the estate to the lord, and he actually regranted the estate by admittance. The surrenderor was no tenant after the surrender and before admittance. His felony, therefore, could not have been contemplated by the custom; he could not forfeit to the lord what the lord had already. The felony contemplated was that of the then actual tenants, those unaffected by surrender. The custom now, no more than then, applies; it is a private custom, it causes forfeiture, and is to be strictly construed. A grant of consuance does not include subsequently created actions. (14 H. 4, 20; see also 4 Inst. 205; *Davis's Rep.* 63 a; *Bro. Abr.* "Consuance," pl. 56.) So grant of consuance within a manor, gives none over land subsequently escheated; *Plowd.* 130.

It may be said that the lord will be defrauded if the estate be neither in the surrenderor nor the surrenderee for the purpose of forfeiture, for by universal practice the mortgagee is never admitted. Now, if such be the practice, the argument *primæ impressionis* becomes the stronger, for some case ought to have been found which would be an authority on the other side. It is enough, however, to say that the mortgagee would be defrauded if the surrenderor did forfeit, for he would lose his pledge, the lord only shifts his tenant. Fraud must be alleged; it will not be presumed in a case of mandamus. The lord will lose no fruit of tenure, he is triply secured, by the continuing tenancy of the surrenderor, *relation of admittance, and necessity of admittance. Admit- [*267] tance is either sought for or not. If it be sought for, no question arises. If it be not sought for, the surrenderor's interest is gone, and the lord may proclaim and seize quousque, &c. In case of a surrender to will and no heir, the lord seizes till the appointee comes in.

It will also be objected, that the surrender may forfeit by waste, which is a real mischief to the lord. But that is remote, and will not be presumed. An admitted surrenderee in mortgage might so forfeit, but the surrenderor might redeem.

A surrender in these times is a conveyance to the lord. If not, why insist on admittance by the lord? Hence a man may convey to his wife and to future uses. A surrender is different from a grant at common law, because, in a grant nothing can pass if the grantee be non-existing, *Co. Copyhr.* s. 41. But a surrenderee may be non-existing, therefore, by surrender something does pass; "no more passeth to the lord but to serve the limitation," *Co. Litt.* 59 b. A surrender to the lord operates by transmutation, see *Co. Litt.* 271 b. It resembles a feoffment to uses. If the uses be future, the feoffor has a right to the profits, and must therefore do the services, *Litt.* s. 462; but he is not tenant to cause escheat, though he is tenant to serve on juries. Because he takes the profits, he is bound to do the services; not because he is simply a tenant to the lord, for the feoffee is tenant.

It may be said, that on a covenant to stand seised to future uses, the lord shall take on the covenantor's escheat. But that is doubtful; *Broke's Abr.* tit.

"Feoffment to *Uses," pl. 50, is contrā; and again, the covenantor is simply tenant: there is no conveyance, only a covenant which equity [*268] will not enforce against the lord. *Burgaine v. Spurling*, Cro. Car. 273, 283, which seems contrary, may be so explained, for in that case there was a surrender out of court, on condition to be void on repayment, &c.; before presentment or repayment there was a second surrender, then repayment, then a third surrender. The second surrender was held good, "for the estate was not out of the surrenderor by the first surrender." Now in that case it must be observed that the contest was between the second and third surrenderees; the surrenderor would be bound by the second surrender, and the third surrenderee claiming under him would be also bound. But suppose there had been no repayment, could the second or third surrenderee, or the lord by escheat, have taken against the first surrenderee? Lord HALE, Co. Litt. 62 a, note 411, speaking of this case, says, "the interest is bound by the first surrender, though the estate does not pass till presentment." So that the want of presentment, not of admittance, was the ground of the decision. It appears not only from what HALE says, but from the report in Croke, that if the first surrender had been duly presented, that would have bound the land. That case, therefore, is nothing more than a mortgage without delivery of title deeds, and a second mortgage with delivery, or a sale without register, and a second sale with register, the second conveyance being *bonâ fide*.

It may be objected that a surrender is, in the books, likened to a feoffment within the view without livery *where nothing passes till the entry, Co. Litt. 49 b.; but it may be answered, that a feoffment with livery is so [*269] peculiar that no conveyance is like it, not even a fine, though it acknowledges a previous feoffment. And that objection proves too much. The feoffor's heir (there being no entry) takes unbound; not so the surrenderor's heir. The feoffee's heir in like case takes nothing. The unadmitted surrenderee's heir will take by descent. Besides, as against feoffor and those claiming by his act, the feoffment within view has operation, an interest passes which cannot be countermanded: *Parsons v. Perus*, 1 Vent. 186. It may also be argued, that the lord after escheat would be bound on the death of such feoffor without heir, for it is an inchoate conveyance. So an equitable mortgage is good against the crown: *Casberd v. Ward*, 6 Price, 411. So the lord is bound in the case before referred to from *Burgess v. Wheate*, 1 W. Bl. 150. In a surrender the lord is privy, the surrenderee has a right for which he has given valuable consideration, a conveyance is in progress, the part gone by is binding, the future is certain, therefore the lord is bound: *Rector of Chedington's case*, 1 Co. 155 b.

The return may be set aside on another ground. The enrolment of the surrender binds the lord; and, as said in Sir W. Black. 167, "If the lord consent to a condition or trust on the court roll, he is bound by it." Tenant for life of a copyhold suffers a recovery in fee in the lord's court, there is no forfeiture, for the lord is a party. *Keen v. Kirby*, 1 Mod. 199. Could Dame Mildmay have taken a second surrender to herself from *Boyes? No, because she was privy to the first. If privy in one case she is so in all. [*270] She knows and has acknowledged the condition, and cannot now set up a claim of interest.

There are two cases which appear adverse to this application; *Doe v. Wroot*, 5 East, 138, shows that till admittance of the surrenderee of a copyhold upon mortgage, the surrenderor continues the legal tenant, and cannot devise the equity of redemption even after the surrender made, without a new surrender to the use of his will. Undoubtedly, between him and the lord, he continues tenant for the purpose of service. But there is another answer. On repayment of the mortgage debt, satisfaction is entered on the roll, and the mortgagor is not readmitted. If he before repayment were not obliged to surrender to the use of the will, the appointee would claim admittance where there was no surrender to the use of the will, which would be absurd. Besides, what has been

said of *Burgaine v. Spurling*, Cro. Car. 273, 283, applies to *Doe v. Wroot* in principle. The other case is *Peachey v. The Duke of Somerset*, 1 Str. 447; Prec. in Chanc. 568; tenant of inheritance of copyhold surrendered in strict settlement; he having an infant son committed forfeiture; there was no admittance on the surrender, and Lord MACCLESFIELD thought the whole inheritance was forfeited. His opinion, however, was obiter, the infant's case was not before the Court. The grounds of the Chancellor's opinion are from the forfeiting and escheating of trustees at common law, and from the necessity of the lord having a forfeiting tenant. But trustees at common law are very tenants; and [*271] it seems *from what has been said, that a forfeiting tenant is not necessary in freeholds, much less in copyholds.

For these reasons the return is no answer, and a peremptory mandamus must go.

Philip Williams, contra. The question in this case depends upon two points: first, could Boyes's conviction have created a forfeiture if he had not made the surrender? and, secondly, does the surrender to Southwell prevent the forfeiture before his admission; in other words, was Southwell or Boyes the tenant at the time when the forfeiture accrued?

As to the first point, it is clear, the custom being uncontradicted, that Boyes's conviction would have created a forfeiture if he had not made a surrender.

As to the second point, the several authorities cited on the other side as to the doctrine of relation only show that that doctrine applies as between the parties to the surrender, and that the effect of it is, as between them, that the surrenderee's title begins from the date of it; but they do not in any degree establish that the surrenderee has any title as against the lord before admittance; and if he has not, it follows, that if the surrenderer, who still continues the lord's tenant, before the admittance of the surrenderee commits felony, the land escheats to the lord. The surrender does not vest anything in the lord in any case, but where the surrender is absolute without the expression of any use or condition, and then only when no other intention can be collected. The surrenderor is trustee for the surrenderee, and the trust lives are all that the lord will look to. There are numerous authorities to show that the surrenderor continues tenant till the admittance of the surrenderee. In [*272] *Berry v. Greene*, Cro. Eliz. 349, a copyholder surrendered to the use of J. S.: the lord without reasonable cause refused to admit him. The question was, if he might enter without admittance? The Court held that he could not, for after the surrender, and before admittance, he who maketh the surrender continueth in possession, and not the lord or cestui que use. So in *Fitch v. Hockley*, Cro. Eliz. 442, where a copyholder surrendered to certain uses, and then to the use of his will, it was held that the fee remained in the surrenderor, so that he continued tenant to the lord. In *Smith v. Triggs*, Str. 487, PRATT, C. J., said, "We all know the surrender was only an instrument by which the lord took nothing, and the estate notwithstanding remained in the surrenderor. This is said from Cro. Elizabeth, 441." In Viner's Abr. tit. Copyhold, P. a. 2, it is said a surrenderee can have no title before admittance, for which *Barker v. Denham*, Styles, 145, is cited. That case is stated in Viner's Abr. Copyhold, B. b, 5, and is as follows: "Custom, &c., that a copyholder might surrender out of Court into the hands of two customary tenants to the use of another, and that, at the next Court, the surrenderee used to be admitted; a surrender was made into the hands of the steward out of the Court, but the party to whose use it was made died before the next Court; and the supplement to Coke's Complete Copyholder, s. 4, citing the same case, says it was resolved that he was not a copyholder within the custom; for by the surrender before admittance the surrenderee hath no possession, and the heir is in by descent, and holds by the [*273] copy of his ancestor, and so the cestui que use is not a perfect nor *complete copyholder: and it may be compared to the case where a man makes a feoffment in fee of lands, and makes livery within the view; it is no

perfect livery till he doth enter into the lands, but the feoffor may punish a trespass there done in the interim, for it is but inchoatum till he enter; and so it is in the case of a copyholder, the surrender is but quasi inchoatum, as before, till he be admitted to the copyhold." And in *Vin. Abr.* title Copyholder, B. b, it is said (citing *Show. 87*) that a surrenderee, before admittance, has neither jus in re nor ad rem, nor has he any remedy if the lord refuses to admit. And, further, "that a surrenderor of copyhold land continued seised until admittance of the surrenderee;" and *Fisher v. Wigg*, 1 P. Wms. 17, is cited. In the same work, title Copyholder, D. b, 8, it is said, "if copyholder surrenders to B., and the steward will not admit him, and B. enters and occupies the land, and the lord brings ejectment; B., though not admitted, may plead not guilty, and shall have a verdict; quære rationem, for, in respect of the possession, it seems the lord's title is eldest; for his title to the freehold is good and lawful, and, consequently, to the profits of the freehold, unless another can make title to the profits, which, in this case, seems difficult without an admittance. Quære, if the reason is not that the lord is particeps criminis, supposing him not to suffer the steward to admit B." *Arnold v. George*, *Yelv.* 16. And then there is a note, that in the supplement to *Co. Comp. Copyh. s. 5*, which cites the same case, it is said that it shall be found against the lord, because he is particeps criminis, because it shall be intended that the lord would not suffer the steward *to admit him, and Lord COKE makes no quære of it. But it is added, that [*274] Lord Chief Baron GILBERT, in his *Treatise on Tenures*, p. 273, says, it seems to him "that the reason of the case was, that after the surrender the estate continued in the surrenderor, and not in the lord; and so the possession of the surrenderee was illegal against the surrenderor, yet it was good against everybody else, and so against the lord's lessee."

In the great case of *Roe dem. Jeffereys v. Hicks*, 2 Wils. 13, where the question arose on a surrender to one who was convicted of felony and hanged without admittance, it was held, after full consideration, that the lands were not forfeited to the lord but descended to the heir of the surrenderor, and that upon the principle that by the surrender nothing vests in the surrenderee, nor in the lord; but until admittance, the estate in law is in the surrenderor. In *Com. Dig. Copyhold, G. 3*, it is laid down, "if a copyholder surrenders to A. for life, who dies, the copyholder shall have it again without readmittance;" "nothing passes to A., but what is sufficient to supply the estate for life." *Ibid. F. 14*. So if copyhold lands be surrendered to the use of mortgagee, but mortgagee is never admitted, the mortgagor on devising them must surrender them to the use of his will: *Kenebel v. Scrafton*, 8 Ves. 30. But if the lord refuse admittance, the copyholder shall have all actions as if he was admitted, *Com. Dig. tit. Copyholder, G. 1*.

On the death of the surrenderor a heriot will be due, and therefore if he die before admittance of the surrenderee, the latter not being the lord's tenant, who is to give the heriot? The surrenderor till admittance *does all suits and services, he sits on the homage, but the surrenderee cannot. The re- [*275] sult then is this: in the language of Lord HARDWICKE in *Hurst v. Morgan*, *Serjt. Hill's MS.*, in Chancery, "a surrender does not operate by way of transmutation of the possession; the estate continues in the possessor." If the surrenderee had no right to be admitted, cadit questio. If he had, it was by his own laches and wilful neglect to avoid the payment of the fine, that he was not admitted before the forfeiture. In *Tredway v. Fotherly*, 2 Vernon, 367; *Vin. Abr. Copyholder, 222, O. e, 3*, a copyholder made a conditional surrender for securing money at the end of six months. The money not being paid, and the mortgagee willing to continue his money, they desired the lord that the old surrender might be taken up and a new one made for six months longer, but the lord insisted that the mortgagee should be admitted on the old surrender and fine; and the Court of Chancery would not relieve against the lord. If the estate is not held by the surrenderor, there is no tenant. It is then the

lord's for defect of tenants. In *George dem. Thornbury v. Jew*, Ambler, 628, 9, Lord C. J. WILLES, says, "The land which is surrendered to the lord is not vested in him as a trustee, but he is only an instrument or conduit pipe, by or through whom the lands must be conveyed according to the surrender. The lord can never be considered as a trustee, in whom the land is to vest for the benefit of the devisee, for it appears plainly by *Popham*, 174, 4 Co. 23, a, and *Cro. Eliz.* 442, that whenever the fee simple of a copyhold is by surrender limited [*276] to the use of a will, the fee simple remains in the copyholder, *and is not vested in the lord. Therefore, he cannot be considered as a trustee, having no estate vested in him for that purpose." These authorities show that the surrenderor continued tenant to the lord after the surrender, and at the time when he was convicted of felony; that being so, the estate by the custom escheated to the lord. As to the authorities cited on the other side, the lord is expressly excepted in the dictum of *ASHHURST, J.*, in *Holdfast v. Clapham*, 1 T. R. 600. In *Burgess v. Wheat*, 1 W. B. 123, the question arose in a Court of Equity, and that court refused to give relief where the law would not; and that was the only point decided. The same observation applies to *Taylor v. Wheeler*, 2 Salk. 448, where the Chancellor thought, that though the surrender was void, yet it bound the land in equity. The passages cited from *Co. Litt.* and *Plowden* do not apply, unless it be made out that the property, between the surrender and admittance, vested in the lord, and did not remain in the surrenderor, and the authorities are all the other way. *Crouther v. Oldfield*, 1 Salk. 365, shows that the surrenderee is in by the grant of the lord; but he is not tenant till he is admitted: in this view admittance and grant are convertible terms. *Taverner v. Cromwell*, 4 Rep. 27 a, establishes that if a copyholder surrenders to the use of another, and the lord admits him, he is in by the surrenderor. In *Peachy v. The Duke of Somerset*, 1 Str. 454, Lord MACCLESFIELD said, "that the lord must always have such a tenant on his lands as may be sufficient to answer all demands, and capable of committing forfeitures." *Doe v. Wroot*, 5 East, 132, *is an express authority to show, [*277] that until admittance of the surrenderee of a copyhold on mortgage, the surrenderor continues the legal tenant.

Dampier, in reply. Southwell was not guilty of laches; he would not, were he to apply, as he might, to equity, be unassisted. Equity will assist a mortgagor who has let pass the day of repayment: The argument for the lord must go all lengths. It must extend to this: that as some interval must take place between surrender and admittance, an act of the surrenderor, in that interval, shall prejudice the surrenderee. A surrender is a charge in this Court as well as in equity. Many cases cited show that this Court notices real liens; and the cases of vendor and vendee, mortgagor and mortgagee, disseisor and disseisee, apply, as they show that a tenant may be substituted, on the lord claiming by escheat. No argument arises from illusory surrenders. The lord may refuse admittance on such; and no Court, either by injunction or mandamus, will compel him. A heriot, it is true, is due on Boyes's death; for a heriot is a fruit of service, and he is a tenant for service. Suppose Southwell had been admitted, and died; a heriot would have been due from him, yet Boyes (supposing he had committed no felony) could claim from the lord: in truth, all the inconveniences that can be suggested on the part of the defendant apply in cases where the mortgagee has been admitted; but that does not hinder the mortgagor's claim to admittance, on payment of the mortgage-money. They are nothing in comparison with the inconveniences set up by the defendant's claim, viz. that in every mortgage, in order to secure the mortgagee, there must be two [*278] admittances *where none are now made, two fines where now none are due. The dictum in *Hurst v. Morgan*, *Sergt. Hill's MS.*, "that the estate does not pass by the surrender," means only that it does not pass to the surrenderee. The question now is, whether, to some purpose, it does not pass from the surrenderor? The surrenderor's estate at will does pass, but he has

a new resulting estate at will till the admittance. The surrenderee claims the first estate surrendered to the lord. The latter estate is created by the lord's will for a limited and temporary purpose; it vanishes on admittance, and the admitted is in of the old estate at will, unaffected by any intermediate act of the surrenderor done while he held the new and temporary estate. The surrenderor cannot contradict such acts, but the surrenderee can.

If the surrender and admittance be two conveyances, then the first has taken the estate from the surrenderor; he cannot affect it—he is a stranger. If they be one conveyance, there must be relation, else there will be a division of what is one and entire.

Cur. adv. vult.

LITTLEDALE, J., in the course of this term, delivered the judgment of the Court. After stating the mandamus and return, his Lordship proceeded as follows:—

The question is, Whether if a copyhold tenant surrender his estate to the use of another, and afterwards commits and is convicted of felony before admittance of the surrenderee, the estate is by the custom forfeited to the lord?

The case was argued before us very elaborately, and *all the authorities were fully entered into. The Court did not at the time feel greatly [*279] pressed by the weight of those authorities; but, as they were numerous, and the argument was chiefly from analogy, we wished to look into them. After a careful examination of them, we are of opinion that the estate is by the custom forfeited to the lord, and that a peremptory mandamus ought not to issue. It is conceded that as between the surrenderor and surrenderee, the latter cannot be prejudiced by any act done by the former subsequent to the surrender, but is entitled to be admitted to the estate free from all mesne incumbrances. It is conceded also, that the surrenderor, until the admittance of the surrenderee, continues tenant to the lord for all purposes of service. The estate, therefore, does not by the surrender vest in the lord. It is conceded also, that the surrenderee before admittance takes nothing, but that on admittance he is in by relation from the time of the surrender, as between him and the surrenderor, yet he has not been tenant in the mean time; for it is distinctly held, in *Doe dem. Jefferies v. Hicks*, 2 Wils. 13, that if he be attainted in the mean time, the lord will not take by forfeiture.

If, then, no act of the surrenderee before admittance will work a forfeiture, and if it were held that the surrenderor after surrender, although he be tenant, cannot by any act of his work a forfeiture, it would follow that a considerable time might elapse, during which the lord's right of escheat is suspended, and that not by any act of his own, but by the acts of others, which he cannot prevent; for he can neither refuse to accept a *surrender, nor compel a surrenderee to come in and be admitted. We do not find any authority [*280] for such a proposition. On the contrary, it is laid down by Lord Chancellor MACCLESFIELD, in *Peachey v. Duke of Somerset*, 1 Str. 454, that the lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of committing forfeitures.

There are many authorities relating to freehold estates, and some relating to copyholds, which show that the tenant shall forfeit only that which he has; and therefore, in *Pawlett v. The Attorney-General*, Hardr. 465 (which was a case of freehold), it was held, that a mortgagor had a right to redeem against the crown, where the mortgagee in possession had been attainted; but it is plain that, in that case, Lord C. B. HALE sitting in equity treated the mortgagee's interest in the land as a mere pledge and security for money. It is no authority whatever for saying, that the estate was not forfeited to the lord at law.

It was argued that the Court, in cases of mandamus to admit copyhold estates, frequently looks to equitable interests; but, without at all denying that this may be so in some instances, it seems clear that this Court cannot, in such a case as the present, enter into a question of trust or adjust the equitable rights of the parties.

Upon the whole, without minutely examining all the cases cited by the learned counsel for the surrenderee, we are of opinion, that as the surrenderor is conceded to be tenant for all purposes of service until the admittance of the surrenderee, so he is also tenant for the purpose of forfeiting.

[*281] *One point more remains. Mr. *Dampier* argued, that the custom here stated could not apply to such a case as the present, because the custom, to be valid, must have existed before time of legal memory, at which remote period, the surrender and admittance were not one conveyance as now, but by the surrender the estate vested in the lord, and was regranted by him at the time of admittance; so that, in the interval between surrender and admittance, there was then no tenant at all, but the estate was in the lord. But this argument proves too much; for it shows, that whenever there was a tenant, such tenant might by the custom commit a forfeiture, and as soon as ever a surrenderor before admittance came to be considered as tenant, and the estate was no longer held to vest in the lord, the custom as to forfeiture immediately attached on such tenant. If it did not, neither would any other of the customs, and the lord would, at this day, have no tenant at all between surrender and admittance. It is conceded, however, that he has a tenant for the purpose of services, why not also for the purpose of forfeiture? The consequence is, that this rule must be discharged. Rule discharged.

[*282] *EDWARDS and Others, Assignees of MAXWELL HYSLOP, v. VERE and Others.

V. and Co., bankers, were assignees of a judgment obtained in Scotland against M. H. for 4100*l*. In 1829, M. H. deposited with V. and Co. 4100*l*., and by a memorandum in writing it was agreed that that sum should be deposited in their hands for safe custody, on account of M. H., and that from the time such deposit should be made, and during its continuance, V. and Co. were not to pay any interest thereon, and all interest should cease in respect of the amount due upon the judgment. M. H. afterwards became bankrupt, and his assignees on the 12th of Nov. 1831, demanded from V. and Co. the 4100*l*., which they refused to pay: Held, that they were not liable to pay interest on that sum from the time when payment of the principal was demanded.

ASSUMPSIT for money lent, money paid, and on an account stated. Plea, general issue. At the trial before DENMAN, C. J., at the London sittings after Michaelmas Term, 1832, the following appeared to be the facts of the case:—

In 1826, one Gordon obtained a final judgment in Scotland against W. Hyslop and Maxwell Hyslop, the bankrupt, for 4100*l*. Gordon, on the 30th of July, 1827, assigned the judgment to the defendants. In October, 1829, Maxwell Hyslop and T. G. Edwards deposited with the defendants, who were bankers, 4100*l*.; upon which occasion the latter signed the following memorandum:—"It is agreed that a sum of 4100*l*. shall be deposited by Maxwell Hyslop and T. G. Edwards in the hands of Vere, Ward, and Co., for safe custody on account of Maxwell Hyslop and T. G. Edwards; and from the time such deposit shall be made, and during its continuance, Vere, Ward, and Co. shall not pay any interest thereon; and also that all interest shall cease and not be payable upon or in respect of the amount due from Maxwell Hyslop and W. Hyslop to D. Gordon upon the judgment recovered against them, which has been assigned to Vere, Ward and Co., which, with interest, is now ascertained and settled at 4100*l*.; and such deposit or forbearance of interest shall [*283] not give *Vere, Ward, and Co. any right or claim to the sum so to be deposited; nor shall the said deposit or this memorandum prejudice or affect such right or claim in any manner except as to the payment of interest as above."

By another memorandum signed by the defendants, they agreed that if Maxwell Hyslop, T. G. Edwards, T. Kinder the younger, and A. Saltmarsh, or any

two of them, of whom Maxwell Hyslop, if then living, to be one, should at any time thereafter consider and declare that the whole or any part of the sum of 4100*l.*, which had been that day deposited in the defendants' hands in the joint names of Maxwell Hyslop and T. G. Edwards, ought to be treated as a total or partial payment of a debt due by Maxwell Hyslop and W. Hyslop to one D. Gordon, and which had been assigned to the defendants as a security for a debt due to them by the said D. Gordon, then and in such case the 4100*l.*, as to the whole or so much thereof as aforesaid, should be and be considered as an actual payment on account of the debt due by Maxwell Hyslop and W. Hyslop from the time of making such deposit with the defendants as aforesaid.

Maxwell Hyslop afterwards became bankrupt, and the plaintiffs were appointed his assignees, and they on the 12th of November, 1831, demanded the 4100*l.* of the defendants, which they refused to pay. It was contended that the plaintiffs were entitled both to the 4100*l.* and to interest from the day when the demand was made. The learned Judge directed the jury to find a verdict for 4100*l.*, reserving liberty to the plaintiffs to move to increase the damages by adding the amount of interest. A rule nisi having been obtained for that purpose,

*Sir *J. Scarlett* and *Follett* now showed cause. The general rule as to interest is correctly stated in Selwyn's *Nisi Prius*, 8th edit., p. 376, viz. : [*284] "That interest ought to be allowed in those cases only where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that interest has been actually made of the money." The present case does not fall within that rule. Here a sum of money was deposited in the hands of bankers, to continue as a security against a judgment obtained against M. Hyslop by Gordon, and assigned to the bankers. As soon as the deposit was determined by the demand made by the plaintiffs, it became money had and received to their use. There was no contract by the defendants to pay any interest to the plaintiffs or the bankrupt.

The Solicitor-General and *Kelly*, contra. From the terms of the agreement, a promise by the defendants must be implied to pay interest from the time the money was demanded, for they stipulate "that from the time such deposit shall be made, and during its continuance, they shall not pay any interest thereon." They must therefore have intended that as soon as the deposit was determined they should pay interest; and it ceased to be a deposit as soon as it was demanded by the plaintiffs. In *Randall v. Lynch*, 12 East, 179, where a ship was let to freight by charter-party from the plaintiff to *the defendant, [*285] the usual clause in the deed, whereby it was covenanted and agreed between the parties that a specified number of days should be allowed for loading and unloading, and that it should be lawful for the freighter to detain the vessel for those purposes a further specified time, on payment of a daily sum, was held to raise an implied covenant on the part of the freighter that he would not detain the ship for those purposes beyond the two designated periods; and Lord ELLENBOROUGH there said, "A covenant is nothing more than an agreement of the parties under seal, and if they covenant together that it shall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if then, he detain it beyond the time, it is a breach of the covenant." In *Marshall v. Poole*, 13 East, 98, it was held that where goods are to be paid for by a bill, interest is recoverable from the time when the bill, if given, would have become due, even in an action for goods sold and delivered; and that upon the ground that as the agreement was to give a security which would carry interest, and as the performance of the contract would have entitled the plaintiffs to interest upon the bill, they ought not to be prejudiced by the breach of it.

DENMAN, C. J. Generally speaking, money deposited with a banker does not carry interest. The only question is, whether it can be clearly collected here, from the terms of the agreement between the parties, that it ^[*286] was their intention that interest should be paid from the time when the authority of the bankers to retain the money was countermanded? Now, I think that does not clearly appear; for although, by the agreement, interest is not to be paid during the continuance of the deposit, non constat but that the parties may have considered the deposit as continuing so long as the money actually remained in the hands of the bankers. I therefore think that it does not clearly appear from the agreement, that the intention of the parties was that interest should be payable by the bankers from the time the authority to retain the money was countermanded.

LITLEDALE, J. I also think that interest is not payable in this case. The money paid to the bankers was not intended to be called for by the plaintiffs from time to time, as money belonging to a customer usually is, but was to remain there as a deposit and a security against the judgment for an indefinite period; and the bankers expressly stipulate that interest shall not be payable "from the time the deposit shall be made, and during its continuance." No contract by the defendants to pay interest is thence to be implied, because as soon as the money ceased to be a deposit, it became applicable to the general purposes of the plaintiffs, in the same way as if it had been paid on their general account into the bankers'; and then it is quite clear that no interest would have been payable by law. It is too much to say, that because the parties expressly stipulated that during the continuance of the deposit no interest should be payable, therefore as soon as the money ceased to be a deposit, interest was ^[*287] payable. *In *Marshall v. Poole*, 13 East, 98, the agreement being to give a security which would carry interest from the time it became due, the law implied from that circumstance and agreement by the vendee, on breach of his contract by not giving the security, to pay interest from that time.

PARKE, J. I also think that the plaintiffs are not entitled to interest. They can only be so entitled by the special terms of the agreement. To make out that claim, they must show that the intention of the parties was, that from the time of determining the deposit, either the money should remain at interest, or interest be paid by the defendants if they did not pay the plaintiffs' checks. No such intention can be collected from the terms of the agreement. As the money was not to be drawn out by checks, to be paid from time to time, but was to continue for a certain period as a deposit in the defendants' hands, they guarded against the possibility of being called upon to pay interest during that period, by expressly stipulating "that they should not be so liable during the continuance of the deposit." As soon as the demand was made, the money ceased to be a continuing deposit; it became, like any other money in a banker's hands, applicable to the general purposes of his customer; and on that he is not liable to pay interest. In *Marshall v. Poole*, 13 East, 98, there was an agreement to pay interest from a specified period; for the vendee agreed to pay for the goods by a bill at a certain date, and that would carry interest from the time ^[*288] when it became due. In *Randall v. Lynch*, 12 East, 179, *the ship was let to freight for a specific voyage; and it was agreed that forty days should be allowed for loading and unloading; so that it appeared clearly to be the intention of the parties that the freighter should quit the ship at the end of a certain time; and that was held to raise an implied covenant on his part not to detain her for loading and unloading beyond that period. So if there were a lease for a specified number of years, and a covenant by the lessor that the lessee should hold during that period, but no express covenant by the latter to quit at the end of the term, the law would raise an implied covenant by the lessee to quit the premises at the end of the term; and if he did not so quit, the lessor's remedy would be in covenant, and not in assumpsit. But the agreement here does not raise the implication contended for.

PATTESON, J. The intention of the parties, to be collected from the agreement, was not that the money should remain at interest at all, but as a mere deposit and security against the judgment. I am not prepared to say that the deposit was determined till the money was paid; for money may be said to be deposited in a banker's hands, though it is due, and payable to the party to whom it belongs. This action is founded on the countermand of the deposit by the plaintiffs; but then, as soon as the money was demanded, it remained in the hands of the defendants as bankers, applicable to the general purposes of the plaintiffs, and consequently they are not entitled to interest. Rule discharged.

*MORGAN and Another, Assignees of T. SHIRLEY, a Bankrupt, v. BRUNDRETT, Gent., one, &c. June 5. [*289]

A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must show, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy.

TROVER for plate. Plea, not guilty. At the trial before DENMAN, C. J., at the London sittings after last Michaelmas term, the following appeared to be the facts of the case:—The bankrupt had carried on business as a wine merchant. In 1821, 1000*l.*, part of the money secured by certain policies of insurance effected on the life of one Kingsley with the Equitable Assurance Company, was, amongst other property, assigned by deed by the father of the bankrupt to the defendant and one Newman, as trustees, for the benefit of Mrs. Miles, a daughter of the settlor and sister of the bankrupt, and her children. The money secured by the policies having become payable by the falling in of the life in 1826, the bankrupt obtained the policies, and received the sums assured by them, amounting to 2669*l.*, from the Insurance Company. In 1830 an application was made by the husband of Mrs. Miles to the defendant to have the 1000*l.* invested according to the settlement, and the bankrupt was applied to by the defendant to refund the 1000*l.*, for the purpose of enabling the defendant and his co-trustee to make the investment. On the 28th of June, 1831, the solicitors of Mrs. Miles, by letter, called upon the defendant and his co-trustee to invest the 1000*l.* for the benefit of Mr. and Mrs. Miles, threatening in default of their so doing, to file a bill in equity against them; and on the 3d of August, 1831, a bill was accordingly filed by Mr. and Mrs. Miles against the bankrupt and the defendant and his co-trustee, calling for an investment pursuant to the terms of the settlement. On the 4th of August, [*290] there was a meeting of the bankrupt's creditors at his own counting-house, and another on the 18th. The defendant was not present at either. On the 10th of August no appearance having been entered for the defendant in the Chancery suit, the solicitors for the plaintiff in that suit wrote to the defendant, stating that they had issued an attachment against the bankrupt for non-appearance. The contents of that letter were communicated the next day to the bankrupt by the defendant, and he told the bankrupt that the costs and 1000*l.* must be paid by him eventually, and urged him to pay the money immediately. Another meeting of the creditors of the bankrupt took place on the 23d of August, at which the defendant attended in the character of solicitor to the bankrupt. The defendant did not then claim to be a creditor, but that the bankrupt intimated that a negotiation for a partnership was in progress between himself and another person, and the meeting of the creditors was adjourned, in order to give the bankrupt an opportunity of completing this partnership, it being at the same time distinctly understood that during the interim no payment or preference should be made. On the morning of the 24th of August the bankrupt sent two boxes of plate (the subject of the present action) from his house to the chambers of the defendant, with the following letter:—MY DEAR SIR,—Anxious to bear

you and Mr. Newman harmless as to the claim for 1000*l.* made by Mr. Miles, and to prevent you and him from being taken on the attachment so often threatened by Mr. Miles's solicitors, I hereby deposit with you a policy of insurance in the Guardian on the life of Solomon Carter for 500*l.*, and my chest of plate, [*291] on *condition you will invest the above amount." The commission issued on the 28th of October, 1831. The bankrupt was examined as a witness at the trial, and stated that, before the deposit, he had been repeatedly and urgently pressed by the defendant for the money, or security: that at the time of the meeting on the 23d of August he expected to get a partner, and had then not the least idea that he was insolvent, and that he expected to pay 20*s.* in the pound; but he admitted that he had dishonored his acceptances in July, and did not pay any in August; and that in those two months the acceptances so dishonored amounted to 1000*l.* His debts were 40,000*l.* Only 4*s.* in the pound had been paid when this action was brought.

It was contended for the assignees that the delivery of the plate was a voluntary transfer made in contemplation of bankruptcy, and therefore void by the 6 G. 4, c. 16, s. 78. For the defendant, on the other hand, it was urged that the bankrupt at the time when he made the deposit, did not contemplate bankruptcy; and even if he did, still the transfer in question was made in consequence of a pressure upon him by the defendant, and therefore was not a voluntary act.

The Lord Chief Justice told the jury to find for the plaintiffs, if they were satisfied by the evidence, first, that the deposit of the plate was made by the bankrupt in contemplation of bankruptcy, and secondly, that it was made voluntarily, and not extorted from him by the defendant; and in considering the first question, his Lordship observed, that if the bankrupt, at the time when he sent the plate to the defendant, knew that he was in insolvent circumstances, that of itself was a strong fact, from which they might infer that he contemplated bankruptcy; and it was for them to judge what credit was *due to his state- [*292] ment that he did not then even contemplate insolvency, when it appeared that in July and August, he had dishonored his acceptances to the amount of 1000*l.*, and that his creditors had hitherto received a dividend of only 4*s.* in the pound. And assuming that they should be of opinion that he did contemplate bankruptcy, they were then to consider, secondly, whether the deposit had been made from a fear of adverse proceedings, or merely in consequence of some collusive arrangement between the bankrupt and the defendant? The jury found for the plaintiffs, and stated that there was an undue preference, and that there was nothing compulsory in the proceedings. A rule nisi having been obtained for a new trial on payment of costs, on the ground that the verdict was against evidence,

F. Pollock and *Martin* now showed cause. The question was properly submitted to the jury: first, whether the deposits were made in contemplation of bankruptcy; and secondly, assuming it to have been so, whether it was made voluntarily, or under fear of compulsion: *Cook v. Rogers*, 7 Bing. 438. Now, first, there was ample evidence to warrant their finding that it was made in contemplation of bankruptcy, for, from the 3d of July, 1831, the bankrupt's bills had been dishonored; his debts were 40,000*l.*, and the dividend was only 4*s.* in the pound. On the 3d, 18th, and 23d of August, meetings of his creditors took place, and on the 24th the deposit was made. Then, surely, the jury might infer, from these facts, that the bankrupt must then have known that he was insolvent, and that he contemplated bankruptcy, which, to a trader, is the probable consequence of *insolvency. It is true that he swore he did not [*293] then even contemplate insolvency; but the jury were not bound to credit his testimony, which was inconsistent with the other facts in the case. *Flook v. Jones*, 4 Bingh. 20, and *Poland v. Glyn*, Ib. p. 22, note, show that a payment made when a bankrupt considers bankruptcy probable, even though not inevitable, is void. Then, assuming that he did contemplate bankruptcy, there

is ample evidence to show that the deposit was made voluntarily by him, and not under the fear of compulsion, for the bill in Chancery was not filed until after his insolvency. In *Cook v. Rogers*, 7 Bing. 449, ALDERSON, J., with reference to the question whether a payment were made voluntarily or not, said, that, "the motives and intentions of the bankrupt may be more or less material, according to the nature of the threat, and the degree and period of urgency by the creditor." It is true, in *Bayley v. Ballard*, 1 Camp. 416, Lord ELLENBOROUGH said, that a payment was not to be considered as voluntary, where the creditor had called upon the bankrupt before the checks (by which the payment was made) were delivered, although they had previously been put into a clerk's hands for the purpose of a voluntary payment; and he observed, that the intermediate demand prevented its being a voluntary preference. [PATESON, J. The authority of that case was much questioned in *Cook v. Rogers*, 7 Bing. 446.] In *Ridley v. Gyde*, 9 Bing. 349, the act of bankruptcy relied on was, the giving a security to Gyde on the 25th of October, by way of fraudulent preference, and in contemplation of bankruptcy; and declarations made by the bankrupt on that day, and the 20th of November, to a creditor who pressed for payment, [*294] were held admissible to show the intention of the bankrupt in giving the security.

Sir *James Scarlett* and *Butt*, contra. The law, as stated in *Cook v. Rogers*, 7 Bing. 438, is not disputed. The same rule had been long before laid down by Lord ELLENBOROUGH, in *Crosby v. Crouch*, 11 East, 256. Now, in this case, first, there was no proof that, at the time when the deposit was made, the bankrupt contemplated bankruptcy. There was evidence that, for some time before, he had not been able to honor his acceptances. That shows that he had stopped payment, but it does not thence follow even that he was insolvent; for a man may stop payment without being insolvent, and may be insolvent without being a bankrupt. Besides, the bankrupt himself swore that he did not even contemplate insolvency, but expected to pay all his creditors in full; and if the jury had actually found that he had delivered the plate in contemplation of insolvency, but not of bankruptcy, the transfer would not have been void. In *Fidgeon v. Sharpe*, 1 Marsh. 198, GIBBS, C. J., told the jury that such delivery, in the expectation of insolvency only, would not be an illegal act, because it is only from the bankrupt laws, the policy of which is, that all the creditors should be paid alike, that the illegality arises; and afterwards, in delivering his judgment in the same case, on the rule nisi for a new trial, he says, 5 Taunt. 545:—"I find in all the cases, from *Faudyce's*, 1 Cowp. 117, to the present, the fact found, that the act was done in fraud of the bankrupt laws; it must be *an act, then, not only that in effect contravenes the bankrupt laws, but [*295] it must be done with intent to contravene them, and in contemplation of bankruptcy. The innocence or guilt of the act depends, then, on the mind of him who did it; and it cannot be in fraud of the bankrupt laws, unless the actor meant it should be so." But, assuming even that he did contemplate bankruptcy, the transfer of the plate was not made voluntarily, but under the fear of compulsion. A bill had been filed in Chancery against the bankrupt, the defendant, and Newman; the bankrupt was bound to refund, and the solicitors of Mr. and Mrs. Miles had pressed him for a long time. An attachment was out for non-appearance to the bill; and the bankrupt, to relieve himself from pressure, and to prevent himself from being taken on that attachment, made the deposit. Now, the general rule upon this subject is stated in 1 Deacon's Bankrupt Law, p. 446:—"Where a trader, under a threat, or an apprehension merely, of legal process, civil or criminal, or from the pressure and importunity of his creditor, delivers property to him, or gives him a power to receive it, the transaction in any of these cases is not considered a fraudulent preference, even though the trader knew himself to be insolvent; for the act on his part is not a voluntary act, but one which proceeds from the effect of fear or apprehension." Thompson v. Freeman, 1 T. R. 155; Whitwell v. Thompson, 1 Esp. N. P. C. 72; Hunt v. Mortimer, 10 B. & C. 44, are authorities on this point.

DENMAN, C. J. We all think the rule for a new trial should be made absolute, on payment of costs.

* LITLEDALE, J. To make the deposit void, two things must concur : [*296] it must have been made by the bankrupt voluntarily, and also in contemplation of bankruptcy. The late cases, with reference to the question whether a payment or delivery of goods has been made in contemplation of bankruptcy, have gone much further than they ought. The evidence that bankruptcy was contemplated in this case was very slight. If any credit was due to the bankrupt's testimony, the weight of evidence was the other way. As to that point, I think the case ought to be submitted to another jury. As to the other point also, I think that there was strong evidence to show that the deposit was made in consequence of pressure ; for it appeared that the defendant had frequently and urgently asked for the money or security, and that a bill had been filed against the bankrupt, on which he was liable to be taken by attachment. That part of the case, also, I think is fit to be considered by another jury.

PARKE, J. I think there ought to be a new trial in this case. In order to render the deposit void, it was incumbent on the plaintiffs to show, first, that it was made in contemplation of bankruptcy ; and, secondly, that it was voluntary. There was very slight evidence that it was made in contemplation of bankruptcy. The meaning of those words I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankrupt. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases, I think, have gone too far. Upon that point [*297] *alone, I think the present case ought to be submitted to another jury. Upon the other point, I think there was much evidence here that the deposit was in consequence of pressure, and upon that ground, also, I am of opinion that the case ought to be reconsidered.

PATTESON, J. The recent cases have gone too great a length. They seem to have proceeded on the principle that if a party be insolvent at the time when he makes a payment or a delivery, and afterwards become bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment, but I think that is not correct, for a man may be insolvent, but yet not contemplate bankruptcy. Upon that point alone I think the case ought to go to a new trial. Then, upon the question of pressure, in order to show that the deposit was made voluntarily, I think it ought to have appeared clearly that the bankrupt took the first step towards making the deposit. Now there was evidence that he had frequently been asked for payment or security. Upon both grounds, therefore, I think there ought to be a new trial, but more particularly with a view that a second jury may reconsider the first question, whether the deposit was made by the bankrupt in contemplation of bankruptcy.

Rule absolute.

[*298] *Doe dem. WILLIAMS and Others v. MATTHEWS and Others.
June 7.

Lands were devised to R. N. for life, with power to lease for lives all but a certain excepted portion, reserving the like rents as were then reserved, or more. The rent of the lands to be demised was then 29*l.* a year. In 1800 R. N. made a lease of the last-mentioned lands to G. M. for three lives, at the yearly rent of 85*l.* In 1818 he made another lease to G. M. of the same premises and part of the excepted lands, for different lives, at the rent of 40*l.* for the whole : Held, that the rent could not be apportioned, and that the last lease, being void for the excepted lands, was void as to all.

EJECTMENT for lands in the parish of Dolgelley, Merionethshire. At the Spring assizes for that county in 1832, the cause was tried before BOSANQUET, J., and a verdict taken for the plaintiff as to all the premises claimed, subject,

however, to be confined to two fields, called *Caer Berthlwyd*, and *Berthlwyd Frythe*, if this Court should so think fit, upon the following case:—

Lewis Nanney, Esq., devised premises, including those in question, to his son Robert for life, and afterwards to trustees, to the use of the first son of the body of Robert, by his then wife, in tail, with remainders to the uses of Robert's other sons and daughters successively, in tail, and divers remainders over. The will contained a power to the testator's son, when and as he should become entitled in possession, to make any lease or leases of such part of the testator's real estates (except his capital messuage, tenement, and lands called *Llwyn*) usually let or then let to farm, to any person or persons, for one, two, or three lives, or for certain other terms; so as upon all and every such lease there should be reserved and made payable "the like rents, services, heriots, and profits as are now reserved and payable for the same, or more," and so as no fine or income should be taken in respect of such lease or leases, and the lessees should execute counterparts, &c. The testator *died, and [*299] Robert, his son, succeeded to the devised estates in 1787.

In 1800, Robert Nanney demised to George Matthews, under whom the defendants claimed, the messuage or tenement, closes, and land called *Cefn-maelen*, and the messuage, &c., closes and land called *Berthlwyd* (part of the devised estates), for three lives (viz. his own, and those of George, his son, and Sarah, his daughter); yielding and paying therefor to the said Robert, his heirs, &c., the yearly rent of 35*l.*, and also such other rents, services, heriots, and profits as, including the said yearly rent, were, at the time of making Lewis Nanney's will, reserved and payable for the same.

By indenture of lease, dated 10th of April, 1813, made between the said Robert Nanney of the one part, and the said George Matthews of the other part, it was witnessed, that in consideration of the yearly rent thereafter reserved, and of the covenants, provisoes, and agreements thereafter contained on the part of the said George Matthews, his executors, &c., he the said R. N. granted, demised, set, and to farm let unto the said G. M., his heirs and assigns, all that messuage or tenement, &c., called *Cefn-maelen* (by the same description as in the lease of 1800). And also all those two fields, pieces or parcels of land formerly called by the several names of *Caer Berthlwyd* and *Berthlwyd Frythe*, situate in the parish of *Dolgelley* aforesaid, and then held with the said tenement called *Berthlwyd*, in the holding of the said G. M., his under-tenants, or assigns. And also all that other messuage or tenement, &c., called *Berthlwyd* (by the same description as in the lease of 1800): habendum for three lives, viz. those of Rebecca, Sarah, and Martha, the daughters of the said G. M.: yielding *and paying therefor, &c., the yearly rent or sum of 40*l.* and [*300] also such other rents, &c. (as in the former lease).

The fields called *Caer Berthlwyd* and *Berthlwyd Frythe* were before and at the time of the testator's death part of the demesne lands called *Llwyn*, and therefore within the exception of the power. The two farms called *Cefn-maelen* and *Berthlwyd*, were let by the testator, the year before his death, at yearly rents amounting together to 29*l.*

The lives in the lease of 1813 were in existence when this action was brought. Robert Nanney died in 1818. The defendants claimed under the demise to George Matthews. The demises to the plaintiff were by parties supposed to be entitled under the will of Lewis Nanney the testator if there were no valid lease subsisting under the power which had vested in Robert.

J. H. Lloyd for the plaintiff. The demise is void as to that part of the premises which is excepted out of the power; and one entire rent being reserved, it is void as to the whole, *Doe dem. Bartlett v. Rendle*, 3 M. & S. 99, *Lord Mountjoy's case*, 5 Rep. 4, a. The reason given in the last-mentioned case, and adverted to by *DAMPIER, J.*, in *Doe dem. Vaughan v. Meyler*, 2 M. & S. 276, applies here, namely, that such a demise tends to destroy the evidence of the ancient rent. It may, perhaps, be contended, that no sufficient ground was

laid for assuming that the lease of 1800 was surrendered; but that was not brought into question at the trial; the former lease was only produced there to show what was the rent reserved on Cefn-maelen and Berthlwyd. At all events, [*301] the facts stated on the case *are not sufficient to raise that point. It is observable, however, that the two leases are granted for different sets of lives.

Welsby, contra. In Doe dem. Bartlett v. Rendle, 3 M. & S. 99, the reservation was to be of the ancient and accustomed yearly rent; here it is "of the like rents as are now reserved and payable, or more." By the lease of 1800, a rent of 35*l.* was reserved in respect of the two farms formerly let by the testator at 29*l.*; and when the same farms are let in 1813, with the addition of the two fields not comprehended in the power, the rent is 40*l.* for the whole; that is, the former rent of 35*l.* is still reserved out of the two farms, and 5*l.* added in respect of the fields. This distinguished the case from Doe v. Rendle, 3 M. & S. 99, and from Lord Mountjoy's case, 5 Rep. 4, a, where the rent was reserved out of lands formerly demised, and lands not leased before, and there was nothing to show that any precise portion of the rent issued out of one or the other. The whole rent here is sufficient in amount. [PARKE, J. It cannot be known, from the data in this case, what would be the proper portion of rent on either part of the demised property, the value of the two closes not being given.] In Doe v. Meyler, 2 M. & S. 276, DAMPIER said, that, in adverting to Lord Mountjoy's case at the trial, he overlooked the distinction, that the grant and render of one entire rent in that case tended to destroy the evidence of the ancient rent; but that was not so in the case then before the Court, because not any rent was necessary to be reserved for the lands in fee simple; and in Co. Litt.

[*302] 148, b, it is laid down that, "if *a man be seised of two acres, one in fee and another in tail, and make a lease for life or for years of both acres, and dieth, and the issue in tail avoideth the lease, the rent shall be apportioned." Why may not the rent here as well be apportioned between the lessee and the issue in tail claiming under the will? [PARKE, J. In Doe v. Meyler, 2 M. & S. 276, there was a good lease of both portions, during the life of the lessor, by estoppel; and after his death the lease continued good as to the freehold part: it would, therefore, be necessary to make an apportionment.] In Sugden on Powers, p. 642 (5th ed.), it is said:—"It frequently happens that lands comprised in a power are demised in the same lease with lands not comprised in the power; or lands are demised, as to some of which the power is duly complied with, and as to others it is not: and in these cases the validity of the lease depends upon the quantum of the rent reserved, and the mode of the reservation." And How v. Whitfield, 1 Vent. 338, 2 Show. 57, is there cited, where the ancient rent of 6*s.* was required to be reserved, and it appeared that the lands within the power *inter alia* were demised, reserving *proinde* 6*s.* per annum, and it was held good. [PARKE, J. The point there taken by the Court was, that there appeared to be a distinct reservation of the 6*s.* rent for the lands comprised in the power. PATTESON, J. In Doe v. Meyler, 2 M. & S. 276, it might have been that the proper rent was reserved upon the lands comprised in the power, for DAMPIER, J., observed that the lands held in fee might have been demised without any rent. PARKE, J., Doe v. Meyler, 2 M. & S. 276, was analogous to the case of a person leasing at an entire rent lands [*303] to which *he has title and others to which he has none, where, on the lessee being evicted of part by title paramount, the rent may be apportioned, see Stevenson v. Lambard, 2 East, 575.]

DENMAN, C. J. Doe dem. Bartlett v. Rendle, 3 M. & S. 99, is a clear authority for the plaintiff as to the first point; and the second (as to the surrender) does not arise upon the case. The plaintiff must have a verdict for the whole of the premises.

LITLEDALE, PARKE, and PATTESON, Js., concurred.

Verdict to be entered as above.

LOCKWOOD and Another v. THOMAS SALTER and SARAH his
Wife. June 7.

To a declaration against husband and wife, for a debt due from the wife before coverture, the husband's discharge under the insolvent act is a good plea.

Quære, Whether it can be replied that the wife had separate property?

COVENANT on an indenture made between the defendant Sarah (while unmarried) of the first part, Matthew Carr of the second part, Sophia George of the third part, and the plaintiffs of the fourth part, whereby in consideration of a marriage about to take place between the said M. C. and S. G., and for making some provision for them and the issue of such marriage, the said Sarah covenanted within six calendar months after such marriage to pay the plaintiffs, their executors, &c., 500*l.*, with interest from the time of the marriage till payment: averment that the marriage took place, and six calendar months elapsed: breach, non-payment by Sarah while sole, or by the two defendants since their marriage. Plea, that, since the declaration, but before *the time for [*304] pleading expired, to wit, on, &c., the defendant Thomas was discharged under the insolvent act, wherefore the defendants prayed judgment if the plaintiffs ought further, &c. General demurrer. Joinder.

Cresswell in support of the demurrer. The plea is no answer. The insolvent act only precludes the plaintiffs from taking the person or property of the husband: it is no bar of proceedings against the wife for a cause of action arising before marriage, *Chalk v. Deacon*, 6 B. M. 128: and execution against her will be enforced by the Court, unless it appears that she has no separate property, *Sparkes v. Bell*, 8 B. & C. 1. In *Pitts v. Meller*, 2 Stra. 1167, and *Finch v. Duddin*, *Ibid.* 1237, the wife being taken in execution in an action against husband and wife, the Court refused to discharge her, no fraud appearing; and, in the latter case, the cause of action seems to have arisen during the coverture. The husband in this action, was liable to be joined, merely for conformity, to obtain a valid judgment against the wife. If the present plea is an effectual bar, the wife, if the husband died, could not be sued again; the action, though substantially against her, is barred for ever. In *Miles v. Williams et Ux*, 1 P. Wms. 249, it was held that debts of the wife, *dum sola*, were discharged by the husband's bankruptcy: that decision, however, proceeded on a fallacy; viz., that debts due to and from the wife were to be considered in the same light, that, as the one passed to the husband's assignees, so the other must be proved under his commission. But although debts due to the wife *dum sola* may be reduced into possession by the husband or by his *assignees for the benefit of the estate, yet, on the other hand, a creditor of the wife before marriage [*305] might have execution against any separate estate which she had; and, as to this, the husband's bankruptcy would make no difference, for the separate estate could not be reached by the assignees, *Bosvil v. Brander*, 1 Wms. 458. [LITTLEDALE, J. The question, as to the discharge of the wife on the ground that she has no separate property, is a matter of equity: the applications in the cases first cited were to the equitable jurisdiction of the Court. PARKE, J. The certificate of bankruptcy is a statutable release of the husband; and, if so, does not it release the wife also?] If the wife is released there can be no right, either legal or equitable, to keep her in custody, whether she has separate property or not. The insolvent act, 7 G. 4, c. 57, s. 46, provides that, by the adjudication there mentioned, the insolvent shall be discharged from custody, and entitled to the benefit of the act, "as to the several debts and sums of money due or claimed to be due, at the time of filing such prisoner's petition, from such prisoner to the several persons named in his schedule as creditors;" and by sect. 61, it is enacted, that after any person shall have become entitled to the benefit of the act by such adjudication, no *fi. fa.* or *elegit* shall issue on any judgment against such prisoner for

any debt with respect to which he shall have so become entitled; and if any action shall be brought against such person for any such debt, it shall be lawful for him to plead generally that he was discharged under the act. It is not meant by this clause that the action shall not be maintainable; still less that it shall be [*306] *barred where the debt was due, not from the insolvent only, but from him and his wife. [LITTLEDALE, J. Would not the creditors of the wife be entitled to a dividend out of the husband's estate?] They might, but they would not be bound to take it. [PARKE, J. An argument like that on section 61, might have been used in *Miles v. Williams*, 1 P. Wms. 249.] That case went on a wrong principle. [PARKE, J. Lord REDESDALE decided in the same way in the Matter of M'Williams, a Bankrupt, 1 Sch. & Lefr. 169.] That only shows that under the circumstances of that case a debt of the wife might be proved under the husband's commission. It does not follow because his estate is liable, that hers is not. In this case it would be necessary to go the length of saying that a remedy against the husband's estate bars any proceeding against that of the wife. [PATTESON, J. Section 72, which enables a married woman to petition and obtain her discharge, is certainly in your favor, because there it is implied that a judgment has gone against the wife, upon which she has been taken in execution. If she were in custody on mesne process she would be entitled to her discharge independently of the act. That clause was introduced in consequence of the decision in *Ex parte Deacon*, 5 B. & A. 759.]

Archbold, *contra*. The plea shows good ground of discharge as to the husband, and also as to the wife, during coverture at least. In *Miles v. Williams*, 1 P. Wms. 257, PARKER, C. J., even intimates an opinion that the wife is discharged for ever. In *Sparks v. Bell*, 8 B. & C. 1, and *Ex parte Deacon*, 5 B. [*307] & A. 759, the question was, whether the *Court would interfere for the purpose of relieving the wife, the husband being insolvent: those cases do not bear on that of an action against husband and wife, where the husband, after being discharged under the insolvent act, and having, on that occasion, included the wife's debt in his schedule, is joined in an action against her for conformity. If the wife had separate property available in satisfaction of the debt, that should have been specially replied. By demurring, it is admitted she had none. [LITTLEDALE, J. The separate estate could only be taken notice of on application to the equitable jurisdiction of the Court.] The discharge by adjudication of the Insolvent Court is analogous to that by certificate under a commission; the pleas are similar, except that, in the latter case, the conclusion is to the country. *Miles v. Williams*, 1 P. Wms. 249, is in point; and is confirmed by M'Williams's case, 1 Sch. & Lef. 169, which shows that, by marriage, the wife's debt becomes that of the husband. [PATTESON, J. But it does not cease to be the wife's.] The reasoning in *Miles v. Williams*, P. Wms. 249, is correct. The debts due to the wife pass with her other property to the assignees, who may realize them after the husband's death if they fail to do so in his lifetime; and it would be hard, if, when she has given up her claims against others for the benefit of her husband's estate, she should still remain liable to demands against herself. The seventy-second section was passed to remove difficulties which had arisen in particular instances from the wife not being able to assign or give a warrant of attorney under the insolvent act; but it has no bearing on the present case.

[*308] **Cresswell*, in reply. As to the hardship suggested, a like complaint might be made in cases where the husband has not been insolvent, and property of the wife has become part of his estate. It would also be a case of hardship if the wife survived the husband, and had property to a large amount; and yet (which would follow from the argument on the other side) a creditor could not then sue her for her own debt, because the husband, in his lifetime, had been insolvent. And, if this be not so, why should a creditor, bringing an action in the husband's lifetime, be in a worse situation than one suing after his death? The principle of the insolvent act is only that the person who gives up

all shall be discharged. [PARKE, J. The husband gives up all wherewith he might pay the wife's debts.] She may have had no property but such as he could not give up; and, on the faith of that, her debts may have been contracted. The plea of discharge under the insolvent act is given by 7 G. 4, c. 57, s. 61, to "such person" only as shall have been discharged under the act, "his heirs, executors or administrators;" not therefore to his wife. [LITTLEDALE, J. There is a technical difficulty; for it is said in Com. Dig. Pleader, 2 A. 3, citing Cro. Jac. 288 (*Tampion v. Newson et Ux.*), and Yelv. 210 (s. 6), that, in assumpsit against husband and wife, upon a promise of the wife *dum sola*, both ought to join in a plea, and, if the wife comes and pleads, there ought to be a replender.] The statute does not authorize her to join in this plea, and she cannot plead alone. [Archbold. In *Miles v. Williams*, 1 P. Wms. 249, the bankruptcy was pleaded by the husband and wife jointly.]

*DENMAN, C. J. I am of opinion that this plea is good: that the debt was that of the husband, and was discharged by his discharge under the insolvent act. *Miles v. Williams*, 1 P. Wms. 249, has never been overruled. As to the cases in which applications have been made to this Court to discharge his wife, they turned merely upon the question of equity; the Court did not enter into the principles of law, but only settled what was just as between the parties in the particular case. The wife's property vests in the husband, and her debt is his during the coverture; therefore his discharge from that debt releases her. I admit the consequence to be (as put by Mr. *Cresswell*) that the discharge is a discharge of the wife for ever. [*309]

LITTLEDALE, J. I am of opinion that this plea is good. It appears from the case of *Tampion v. Newson et Ux.*, Cro. Jac. 288, Yelv. 210, that the plea ought to be pleaded by the husband and wife together, and, if this had not been done, the Court would have ordered a replender, which certainly raises some technical difficulty. It is said to be a hardship on the creditor, if this plea be held good, to lose the chance he might have of recovering against the wife after the husband's death; but this is one of the consequences which must result from the relation of husband and wife: and it would, on the other hand, be hard upon the husband if he were not released from this as well as his other debts, since the creditor might have proved it against his estate. If he can bring an action for it, he was entitled to receive a dividend in respect of it; and it would be a just matter of complaint *if the husband remained liable to be sued, when, by assigning his property, he had left himself no means of satisfying the debt. And I think the wife, as well as the husband, ought to be discharged, inasmuch as he had the opportunity of reducing her property into possession and paying the debt with it. If the husband's discharge were available only as to him, it might follow that a creditor of the wife, though he had received a large dividend out of the husband's estate, might proceed to judgment against her, and, after the husband's death, issue execution against her for the whole. Among the difficulties with which this case is beset, I think the plea is good; and *Miles v. Williams*, 1 P. Wms. 257, is an authority. It is suggested that, if the wife had separate property, that fact might be replied. I do not say how this may be; but I am inclined to think it could not be done, and that such property could only be brought in question by an application to a court of equity. The cases in which motions were made to discharge the wife out of custody do not bear on this point, for the reason already given. [*310]

PARKE, J. I also think this is a good plea, and that the case is decided by *Miles v. Williams*, 1 P. Wms. 257, where a question of this kind was fully considered by the Court, and discussed by Lord MACCLESFIELD in his judgment. The Lord Chief Justice there laid it down that, under a commission of bankrupt against the husband, the wife's debt was to be considered that of the husband: and it is the same in the case of insolvency. In each instance he pays by surrendering all his effects, including *those of the wife. He gives up that, out of which he might otherwise discharge her debt. This appears [*311]

to me consistent with good sense, and the decision is followed up by that of Lord REDESDALE in the Matter of M'Williams, 1 Sch. & Lef. 169. In *Sparkes v. Bell*, 8 B. & C. 1, the Court does not appear to have considered the question, whether the wife was discharged by the discharge of the husband; it was an application on her behalf to the equitable jurisdiction of the Court, which ultimately refused to interfere. If the question had arisen on plea, or *audita querela*, the result might have been different. *Ex parte Deacon*, 5 B. & A. 759, was a case where the husband had not applied to be discharged under the insolvent act, and it was held that the wife alone could not take the benefit of the act; in consequence of which decision the seventy-second section of 7 G. 4, c. 57, was introduced, not with the intention to apply that clause separately to the wife where the husband obtained his discharge, but that where the wife was in prison and the husband not, or where the husband did not apply for relief under the act, the wife might be discharged on doing justice to the creditors by surrendering her property. As for the case of a wife having separate property, the law does not provide for it: what equity would require under such circumstances is not the question here. At law the matter pleaded is as much a discharge of this as of any other debt of the husband; and as effectual as if he had been released. The judgment must be for the defendants.

PATTESON, J. I am of the same opinion, but I found my judgment solely [*312] on the decision in *Miles v. Williams* *et Ux., 1 P. Wms. 249, recognised by Lord REDESDALE in the Matter of M'Williams, 1 Sch. & Lef. 169. I am not satisfied with the reasoning in the former case, but I think we are bound by the decision. It is indeed inconsistent with *Sparkes v. Bell*, 8 B. & C. 1, but there *Miles v. Williams* was not fully considered. Cause was shown there against a rule for superseding an order to discharge the wife out of custody; and the principal ground taken by counsel was, not that the order was right (she being a married woman having separate property), but that it was too late to apply to rescind it, inasmuch as the husband had in the mean time been discharged under the insolvent act. That application was to the equitable jurisdiction of the Court. One argument there used was, that the wife, when taken, could not obtain her discharge under the act, to which effect *Ex parte Deacon*, 5 B. & A. 759, was cited, but without adverting to the seventy-second section of 7 G. 4, c. 57, which had been passed since that case was decided, and under which she might have applied for her discharge, unless that clause be confined to cases where the husband has not been taken in execution, or, being taken, will not apply for the benefit of the act. I do not, however, see any reason for so confining that clause, rather thinking, as at present advised, that it was intended to operate so as to make the separate property of a married woman available to her creditors, and that on that ground the decision in *Sparkes v. Bell* may be supported. I do not say what would be the case if to a plea like this it were replied that the wife had separate property; but upon the present record the defendant is entitled to judgment.

Judgment for the defendant.

[*313] *DIXON and Another v. YATES, KAYE, BOND, and PROCTOR.
June 7.

D. bought of Y. forty-six puncheons of rum, lying in the warehouse of Y., at Liverpool, and sold them to C., who was a clerk of Y., but carried on business for himself. D. gave C. an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum, and the samples which had been taken, remained in Y.'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at Liverpool, is by the vendor's giving a delivery order to the vendee. D. was asked by C. for delivery orders, but declined giving any, except for two or three puncheons, which C. received. C. marked, coopered, and gauged the casks. While the bills were running, C. sold twenty-six of the puncheons to K., who paid him for them, and who, by C.'s permission, without the knowledge of D., gauged and coopered

the casks in the warehouse of Y., and marked them with his initials. C. gave an invoice to K., stating the marks and numbers of the casks, and by whom the rum was bonded. C. also, while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices, and samples; and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by D. They paid C. for the whole. The bills given by C. for the price of the forty-four puncheons were dishonored: Held, upon special case (whereby it was agreed that the Court should be at liberty to draw from the facts any inference that the jury might have drawn), that C. never had acquired the actual possession of the rum, and on his dishonoring his acceptances, D. had a lien on it for the price; and that C.'s sub-vendees could not claim against D. the rum which remained undelivered to them.

THIS was a feigned issue under the interpleader act, 1 & 2 W. 4, c. 58, to try whether the property in, or the right of possession of, forty-four puncheons of rum, then being in a certain warehouse of the defendant Yates, or any part thereof, was in the plaintiffs, on the 18th of November, 1831, when they demanded the same of Yates, and he refused to deliver the same or any part thereof to the plaintiffs. At the trial before PATERSON, J., at the Lancaster Spring assizes, 1832, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case: and it was agreed that the Court should be at liberty to draw from the facts therein stated any inference that the jury might have drawn.

On the 28th of June, 1831, the plaintiffs, spirit merchants at Liverpool, bought of the defendant Yates, 147 puncheons, 10 hogsheads, 2 barrels of rum, which had been bonded by Yates in his own name, and placed by him in his own bonded vaults, in Atherton Street, *Liverpool. At the time of this purchase Yates handed an invoice to the plaintiffs, specifying the marks and numbers of each puncheon or cask, and the name of the vessel which imported it; and at the bottom was written, "Warehoused per J. B. Yates & Co., in Yates's, Atherton Street." The price, 1,812*l.*, was paid by the plaintiffs to Yates, in August and September. On the same 28th of June on which this purchase was made, the plaintiffs resold a part, viz., 35 puncheons, to Collard, who was clerk to Yates, and also carried on business on his own account, as a spirit merchant, with the knowledge of his employer. For the price of this parcel of 35 puncheons, Collard accepted two bills for 240*l.* each; and after the sale, the plaintiffs gave Collard delivery orders on Yates for the whole 35 puncheons. The invariable mode of delivering goods in warehouses at Liverpool, is by handing delivery orders. Yates kept no transfer books. On the 5th of October, 1831, one of the bills given in payment for the parcel of 35 puncheons was dishonored, and was taken up by the plaintiffs. Up to that time Collard had been in good credit with the plaintiffs. When the other bill was nearly at maturity, the plaintiffs, on the 29th of October, 1831, to save their own and Collard's credit, advanced money to take it up. Both bills were in the hands of Moss & Co., the plaintiffs' bankers.

On the 13th of August, 1831, the plaintiffs bought of the defendant Yates another parcel, consisting of 51 puncheons of rum, which had been imported from Jamaica, in the ship *Alecto*, and which were bonded by him in his own name, and placed in his own bonded vaults in Atherton Street. Yates gave an invoice as follows:—"Liverpool, 13th of August, 1831, Messrs. *W. Dixon, jun. & Co. Bought from J. B. Yates & Co., 51 puncheons Jamaica rum. Payment two months and two months." The numbers and marks of the casks were then inserted, and at the bottom there was a memorandum, "Warehoused per J. B. Yates & Co., 29th of July, 1831, in Atherton Street." The price of this lot, 624*l.* 6*s.* 1*d.*, was paid by the plaintiffs on the 5th of November, 1831. On the same day on which this latter purchase was made by the plaintiffs, viz., the 13th of August, 1831, they sold to Collard 46 puncheons; viz., 10 puncheons of the parcel first above-mentioned, of 147 puncheons, 10 hogsheads, and 2 barrels; and 36 of the 51 puncheons last-

mentioned; and they delivered to him an invoice specifying the marks and numbers of each puncheon. For the price, 589*l.* 6*s.* 2*d.*, Collard accepted two bills drawn upon him by the plaintiffs, dated the 13th of August, 1831, payable respectively at three and four months, at Barclay, Trittons & Co., in London. One of these bills the plaintiffs paid away; the other they paid to their bankers as cash.

After the last-mentioned purchase by Collard from the plaintiffs, he applied to them for delivery orders on Yates, which they refused to give; but said that, if he wanted one or two puncheons, they would let him have them. Collard addressed to the plaintiffs two orders in the following form:—"Messrs. W. Dixon & Co., please to deliver one puncheon of rum, J. B. 7, J. F. 33, bought 13th of August, 1831. A. W. Collard." The plaintiffs gave corresponding orders upon Yates, and the two puncheons were delivered to a purchaser from Collard.

[*316] These two puncheons were part of the 46 sold to *Collard, on the 13th of August, and the delivery order for the two puncheons was produced from the possession of Collard's assignees. At the trial, the remaining 44 puncheons sold to Collard, on the 13th of August, were the subject-matter of the issue.

On the 16th of November, 1831, the first of the two bills accepted by Collard for the 46 puncheons became due in London, and was dishonored. It was returned to and taken up by the plaintiffs, on the 19th of November; and the other bill was also dishonored when at maturity, and taken up by the plaintiffs. Collard's insolvency was generally known at Liverpool about the 12th or 14th of November.

On the 18th of November, 1831, the plaintiffs gave notice to the defendant, Yates, not to deliver the rum to any person but themselves. On the 19th, they made a verbal demand, and on the 21st, a written demand, of the rum, which Yates refused to deliver. The plaintiffs had had dealings with Yates often before, for some years back, and had bought of him large quantities of rum, which they left in his cellars; and when they effected resales, they gave delivery orders to the purchasers, and Yates had not delivered any of such rums bought on former occasions by the plaintiffs without delivery orders from them. Yates was not in the habit of accepting general delivery orders; but when the plaintiffs bought of him goods lying in bond, they got orders accepted when they wanted them out. In the mean time, the plaintiffs looked after the casks, sampled them, and coopered them, as occasion required. The plaintiffs did not get a delivery order accepted for either of the parcels bought by them on the 28th of June and the 13th of August, 1831, but resold a part of each parcel to [*317] Collard *on the day of the purchase; to which resale the want of a delivery order was no impediment.

The rums which the plaintiffs had bought on the 28th of June and 13th of August, were sampled on the quay when landed, and the samples taken to Yates's sale-room. The plaintiffs received the samples of those which they did not sell to Collard, but none of those which they did. Collard kept the remainder at Yates's. It is the custom for purchasers of rum always to take the samples, and to cooper the casks. Collard, soon after the purchase, had the puncheons which he bought coopered in Yates's warehouse, and marked with the letter C. The plaintiffs never touched those puncheons, or sampled them, but left Collard to look after them until the 21st of November, when they had them sampled.

On the 28th of October, after the negotiation of the bills given by Collard, and before they had arrived at maturity, Collard sold 26 puncheons, part of the 46 which he had bought of the plaintiffs on the 13th of August, to the defendant, Kaye, who, on the 31st of October, accepted bills for the price, which were duly honored. Collard got those acceptances from Kaye, between ten and twelve in the morning of the 31st of October. An invoice, containing the marks and numbers of the casks, and stating where and by whom the rum was bonded, was made out and delivered by Collard to Kaye.

On the 31st of October, the cooper employed by the defendant Kaye, applied at the counting-house of Yates for permission to have the 26 puncheons coopered and gauged, on behalf of Kaye, and about nine o'clock of that morning, Yates's warehouseman accompanied the *cooper to the warehouse of the defendant, Yates, when the cooper prepared the casks for the gauger, [*318] and marked them J. A. K. On the same day the gauger attended and gauged the puncheons on behalf of Kaye; and on that and the following day the cooper coopered the casks on his behalf. The warehouseman of the defendant, Yates, was present nearly all the time of gauging and coopering the puncheons. If the cooper had met with any impediment at Yates's at nine o'clock that morning, there would have been time to inform Kaye before he had accepted the bills of Collard. When the persons came from the defendant Kaye to gauge the rums, they were refused three times by a clerk of Yates; then Collard came and had it done. The coopering and marking were also done with Collard's knowledge, and by his permission. On the 19th of November, Kaye presented to the plaintiffs, for their acceptance, a delivery order for the 26 puncheons bought of them by Collard, which the plaintiffs refused to accept.

The remaining 18 puncheons were sold by Collard, on the 7th of September, to the defendants, Bond and Proctor, and he made out and delivered to them an invoice specifying the marks and numbers of the puncheons, and where and by whom the same was bonded. On the 9th of September, Bond and Proctor settled with Collard for these rums; partly by cash, partly by brandies which had been bought before, partly by wines bought then, and partly by a bill for 39*l.*, which was afterwards paid. The samples of these 18 puncheons, and which were part of the samples which Collard kept at Yates's counting-house, were taken to Bond and Proctor, after the sale to them; out of this lot of *18 puncheons, Yates delivered three to the defendants, Bond and Proctor, [*319] with the assent of Collard, viz. one on the 15th of October, one on the 1st of November, and one on the 8th of November, upon separate delivery orders, signed by Bond and Proctor, and without any delivery order from the plaintiffs.

On the 19th of November, Bond and Proctor presented to the plaintiffs for acceptance, a delivery order for the remainder of the rums sold to them by Collard, which the plaintiffs refused to accept.

On the 21st of November, after the demand made on Yates by the plaintiffs, they, by his permission, sampled the 41 puncheons then remaining in his warehouse.

In October, 1830, the plaintiffs bought a quantity of rum from Yates at two and three months' credit, which they resold on the same day to Collard.

Cresswell, for the plaintiffs. The plaintiffs bought the rum of Yates, paid for it, and were thereupon entitled to the possession. As between Yates and them, if no *jus tertii* can be set up, they are clearly entitled to recover. Yates was never authorized by the plaintiffs to deliver the rum to any other person; and the plaintiffs cannot be affected by that which was done between Collard and the other defendants. Collard bargained for the rum, and gave bills in payment: and it may be said, that as he purchased on credit, while the bills were running, he might have claimed to have possession. But, first, there is evidence of a contract, or condition, that the plaintiffs should not part with the possession till the bills were paid. Collard asked for a general delivery order; the plaintiffs refused to give it: they offered an order for one or two puncheons, *and that order Collard accepted. There was, therefore, an assent on his [*320] part to the residue of the rum remaining in the plaintiffs' hands, and he could not then confer a right on a third person. Secondly, as Collard did not, in fact, insist upon possession while the bills were running, the plaintiffs, after the bills were dishonored, had a right to retain the rum; and Collard's right of possession was defeated by his subsequent insolvency: *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 B. & C. 951. For though the property in goods sold upon credit vests in the vendee, it is liable to be divested if the contract is

not performed by the purchaser, *Langfort v. Tiler*, 1 Salk. 113, *Anonymous*, Dyer, 29 b. An attorney having a lien on papers, loses it by taking a bill for his demand, but if that is dishonored, his lien revives, *Stevenson v. Blakelock*, 1 M. & S. 535; and where goods are in transitu, insolvency of the purchaser before delivery authorizes the consignor to resume possession: *Clay v. Harrison*, 10 B. & C. 99. The acts of Collard in marking, gauging, and cooperating, were not sufficient to deprive the plaintiffs of their lien; for even although those acts might be considered as done with the plaintiff's consent, they were not, as between the parties, sufficient to constitute a delivery or taking possession. The custom as to delivery orders was well known to Collard; and there is no case to show that the lien was determined by such acts, unless they were intended by the parties to have such effect; and here the vendors had no such intention. A consignor's right to stop in transitu is not taken away by the consignee's having [*321] partly paid for the goods, *nor by his putting his initials on them, that not being done by way of taking possession, *Hodgson v. Loy*, 7 T. R. 440. Such marking by a vendee does not amount to an acceptance within the statute of frauds, *Baldey v. Parker*, 2 B. & C. 37. And where goods were bonded in the vendor's name, partly in his own and partly in the warehouses of other persons, and he resold to A., who took samples out of the bulk and marked the casks with his initials, but he did not get any delivery order, or give notice to the owners of the warehouses, it was held that the goods remained in the order and disposition of the vendor, who afterwards became bankrupt, and passed to his assignees: *Knowles v. Horsfall*, 5 B. & A. 134.

It may be said that, by the delivery of part, the whole vested in Collard. But the answer to that is, that a delivery of part can only operate as a constructive delivery of the whole, when so intended. In *Slubey v. Hayward*, 2 H. Bl. 504, where the delivery of part was held to destroy the right of stopping the remainder in transitu, there appeared to be no intention, either previous to or at the time of delivery, to separate that part of the cargo from the rest. In *Hinde v. Whitehouse*, 7 East, 558, the samples were delivered as part of the things purchased, to make up the quantity. In *Bloxam v. Sanders*, 4 B. & C. 947, samples and invoices were delivered; but it was held that there was no delivery of the article purchased; and in *Cooper v. Elston*, 7 T. R. 14, where a sample of wheat was delivered, but it was no part of the quantity sold, that was held to be no delivery to take *the case out of the statute of frauds. So far as to [*322] Collard.

Then the subvendees cannot be in a better situation. First, as to Kaye; on the 28th of October, he bought 26 puncheons of Collard, accepted bills on the 31st of October, and received an invoice, showing where the rum was bonded, and by whom. Kaye sent the gauger and cooper to gauge and mark the casks; but Yates's clerk refused to let them do it; Collard then came and had it done. A prudent purchaser would have inquired whose property it was: he would have learned the circumstances, and that there could be no valid transfer without a delivery order.

Then as to Bond and Proctor. Collard sold the 18 puncheons on the 7th of September, and on the 9th they paid him for them, partly by cash and bills, partly by writing off an old debt. The samples were taken to their counting-house from Yates's, where they had previously been left. Bond and Proctor presented delivery orders to the plaintiffs for acceptance. If the taking of the samples at first by Collard did not operate as a delivery to him, no more would the taking of them be a delivery to Bond and Proctor. They showed they had knowledge of the custom of trade by producing delivery orders. In *Stoveld v. Hughes*, 14 East, 308, there was an assent by the first vendor to the sub-sale. In *Chaplin v. Rogers*, 1 East, 192, there was evidence of a delivery of the whole to the first vendee. In *Hammond v. Anderson*, 1 New R. 69, there was an order for delivery of the whole to the vendee. It may be said that the giving of [*323] an invoice to Collard enabled him to go into the market *and sell the goods; but there was no act done by the plaintiffs which enabled Collard

to deceive a cautious purchaser. The custom of Liverpool was well known, and no delivery order was given. The invoices delivered by Collard to the sub-vendees stated where the goods were bonded, and in whose name; and therefore they might inquire. It does not appear that the invoice held by Collard was ever seen by them.

Wightman for *Kaye*. *Kaye* is entitled to recover against *Yates* the 26 puncheons of which he was the purchaser. If Collard had the property in him at one time, *Kaye* now has it. The only difference is, that Collard, after having dishonored his bills, would not have been able to enforce his claim against the plaintiffs; but he, before the dishonor of the bills, having transferred the goods to *Kaye*, who paid for them, the right of property is in the latter. All acts of ownership were exercised by Collard and *Kaye*; Collard took samples and he and *Kaye* marked and coopered the casks. Collard's bills were immediately negotiated by the plaintiffs; they then became, and continued at the time of the sale by Collard to *Kaye* paid vendees, and had no lien: *Horncastle v. Farran*, 3 B. & A. 497. It is true no delivery order was given by the plaintiffs; but that is not usual till goods are wanted. The plaintiffs themselves had no delivery order, but they had paid: so had *Kaye*. If either party is to sustain a loss, it should be that person whose conduct, in giving credit to a second party, has enabled the latter to sell to a third party, by whom he has been actually paid. Here the plaintiffs were in *fault, by suffering [*324] Collard to appear to third persons as a vendor having title. The plaintiffs never exercised any acts of ownership: they never touched the property. [PARKE, J. They touched it as much as if they had bought it from a third person, and had paid for it and delivered it to *Yates* as a warehouseman. He was their agent; the goods were ascertained, their right to them was ascertained; they had put their marks upon the casks, and there was a valid contract as between them and *Yates*, by which the property vested in them.] There was an equally valid contract to pass the property as between the plaintiffs and Collard. The plaintiffs had not refused to give Collard any delivery order, they only said if Collard wanted one or two he should have them; but they could not have absolutely refused to give him a general order while his bills were outstanding without subjecting themselves to an action. Then Collard, having the property in the rums, sold 26 puncheons to *Kaye*. It is not found that the invoice held by Collard was ever shown to *Kaye*; but the plaintiffs, by giving Collard such a document, might have misled purchasers, and were therefore in fault. It is said that *Kaye* ought to have inquired whether the rums had been actually delivered to Collard. If he had done so, Collard would have showed him the invoice, by which he would have appeared as the purchaser. *Davis v. Reynolds*, 4 Campb. 267, 1 Stark. 115, shows that a vendor who takes the vendee's acceptance in payment cannot stop the goods in transitu. [PATTESON, J. Unless the bill has been dishonored.] If the original vendor give credit, by taking the vendee's acceptance in payment, he thereby gives the vendee a *jus disponendi*. *Kaye* is entitled as against **Yates*, because he, by Collard, his [*325] clerk and agent, allowed *Kaye* to put his marks on the casks, and thereby induced him to give Collard bills in payment. Collard, who is both the vendor and purchaser of these goods, has the management of *Yates's* cellar, and is permitted by him to appear as if he had the disposal of them. It is not, therefore, for *Yates* now to set up a *jus tertii* against a purchaser from Collard. He must take the consequences of Collard's acts. [PARKE, J. Collard was the vendor, as between him and *Kaye*, and must be considered as a third party, unconnected with *Yates*. PATTESON, J. In *Craven v. Rider*, 6 Taunt. 438, 2 Marsh. 127, the goods were sold under a contract to deliver them free on board a vessel named by the buyer. The vendors delivered them on board such vessel, and took a receipt which purported that the goods sold were received on their (the vendors') account. The vendee accepted bills for the amount, but, before they became due, stopped payment; and there, although the master of

the vessel had executed a bill of lading to a subsequent purchaser, it was held that the first vendors retained their property in the goods by keeping the receipt for them; and that so long as they kept the receipt in their own hands, there was not a complete delivery to the buyer.] In the present case it appeared that delivery notes were only taken as wanted. The goods remained in the hands of the warehouse-keeper as the agent of the purchaser; and the right of property passed to the subsequent vendees in the same manner as it did to the first.

Roscoe for Bond and Proctor. It cannot be disputed, that at the time of the [*326] sale by Collard to Brown and *Proctor (which was before Collard's insolvency), the right of property and possession had passed to Collard. The original vendor could not then have refused to deliver to a purchaser or a sub-purchaser. Then did Collard's subsequent insolvency divest that right? The plaintiffs' right, which revived on the non-payment of the bills by Collard, was merely an equitable lien. It is similar in principle to the right of stopping in transitu, which is an equitable right only. This is laid down by BULLER, J., in *Lickbarrow v. Mason*, 6 East, 27, note, and *Ellis v. Hunt*, 3 T. R. 469, and by Lord KENYON in *Hodgson v. Loy*, 7 T. R. 445, and Mr. Bell in his Commentaries on the Laws of Scotland, p. 209, where all the cases were collected, says that the right is founded entirely on equity. If the right of stopping in transitu be only an equitable lien, it is clear that it cannot be exercised by the plaintiffs (who enabled Collard to go into the market with an apparent title) against Bond and Proctor, who are purchasers for value, and without notice of any defect of title in the vendee. In *Lempriere v. Pasley*, 2 T. R. 490, ASHURST, J. says, "As between a person who has an equitable lien, and a third person who purchases the thing for a valuable consideration, and without notice, the prior equitable lien shall not overreach the title of the vendee." So in *Snee v. Prescott*, reported in 1 Atkyns, 245, but more accurately stated in the judgment of BULLER, J., in *Lickbarrow v. Mason*, 6 East, 28, note, Lord HARDWICKE says, "where goods have been negotiated and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon [*327] the goods for the price; *for then no dealer would know when he purchased goods safely." In *Kinlock v. Craig*, 3 T. R. 787, EYRE, C. B., says, that "the right of stopping goods in transitu never occurs but as between the vendor and vendee;" and BULLER, J., in *Lickbarrow v. Mason*, 6 East, 31, note, considers the terms vendor and vendee, as used by EYRE, C. B., to apply to the persons who buy of and sell to each other. BAYLEY, J., in *Hawes v. Watson*, 2 B. & C. 542, speaking of the ordinary case of a vendor and vendee, says, "In such cases, justice requires that the vendee shall not have the goods unless he pays the price. If he cannot pay the price, the vendor ought to have his goods back; but if the question arises, not between the original vendor and the original vendee, but between the original vendor and a purchaser from the vendee, that purchaser having paid the full price for the goods, what is the honesty and justice of the case? surely that the vendee, who has paid the price, shall be entitled to the possession of the goods."

The present case must be governed in principle by *Lickbarrow v. Mason*, 2 T. R. 63, 1 H. Bl. 357, 6 East, 20 n. (a), which was decided upon the ground, that the property was transferred by the endorsement of the bill of lading; which, in fact, is no more than a declaration by the consignee, that the endorsee of the bill of lading is the owner of the goods. Now, an invoice is a declaration by the vendor that the purchaser is the owner of the goods, and it ought to have the same effect. In *Green v. Haythorne*, 1 Stark. 447, there had been an invoice and samples given to the purchasers, who resold, and the vendors had delivered (as here) [*328] parcels of the goods to different sub-purchasers; and Lord ELLENBOROUGH says, "I am of opinion that this was an executed contract. Here was a sale of 68 bags, which were delivered out by the vendors from time to time, according to the order of the vendees, who were furnished with an invoice and samples to enable them to go into the market." A new trial was moved for,

and refused, on the ground that the vendors, who had received a delivery order from the sub-purchasers before the insolvency of the purchasers, should have repudiated it in order to retain their lien. Here, it appears, that the first bill given by Collard for the 35 puncheons, purchased by him from the plaintiffs on the 28th of June, was dishonored on the 5th of October, and taken up by the plaintiffs; on that day, therefore, they knew of his insolvency. Yet, subsequently, on the 15th of October, and the 1st and 7th of November, their agent, Yates, delivered three puncheons to the order of the defendants, Bond and Proctor. The plaintiffs cannot, after a recognition of Bond and Proctor's title, with notice of Collard's insolvency, turn round upon Bond and Proctor, and insist upon their lien. They should, at least, when the delivery order of Bond and Proctor was presented, on the 15th of October, have informed them that Collard was insolvent, and that they insisted upon their lien. And the delivery of two puncheons to the order of Collard, and of three to the order of Bond and Proctor, was such a delivery of part as amounted to a constructive delivery of the whole, and put an end to the right of the plaintiffs to retain the remainder: *Slubey v. Hayward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 New R. 69. It is true, that a part delivery, where some act remains to be done before *the property in the whole can vest [*329] in the vendee, will not vest the whole in him; and upon that ground it was decided, in *Hanson v. Myer*, 6 East, 614, that a part delivery of goods did not divest the right of the vendors to stop the remainder in transitu. [Per Lord ELLENBOROUGH, in *Stoveld v. Hughes*, 14 East, 313, and *LITTLEDALE, J.*, in *Simmons v. Swift*, 5 B. & C. 864.] But "whenever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder:" per *BAYLEY, J.*, in *Crawshay v. Eades*, 1 B. & C. 183. Supposing the plaintiffs, notwithstanding the sale by Collard to Bond and Proctor, would have had a right to stop the goods, that right has been divested. The right to stop in transitu is defeated, if the goods have come to the possession of the vendee: but where they are in the possession of an agent or warehouseman (even the vendor's), the lien may be defeated by circumstances which are evidence of delivery; as the transfer of the goods in the warehouseman's books from the vendor's into the vendee's name, *Harman v. Anderson*, 2 Campb. 243; or the receipt of warehouse rent from the vendee, *Hurry v. Mangles*, 1 Campb. 452; or any act of ownership exercised upon the goods by him, such as the marking, or the packing or unpacking the goods by him: *Ellis v. Hunt*, 3 T. R. 464; *Stoveld v. Hughes*, 14 East, 313; *Wright v. Lawes*, 4 Esp. N. P. C. 84. Here Yates became the agent or servant to Collard as soon as the latter marked and coopered the casks, and had samples. The fact of the plaintiffs having omitted to give a delivery order is immaterial, because their suffering Collard to deal with the *pro- [*330] perty as his own is stronger than any delivery order. In *Foster v. Frampton*, 6 B. & C. 107, the purchaser went to the warehouse of the carrier and took away part of the goods, and desired that the rest might remain in the warehouse, and it was held that the transitus was thereby at an end. As to the question whether the plaintiffs by giving a receipt enabled Collard to commit a fraud, and so are precluded from recovering, *BAYLEY, J.*, in *Hawes v. Watson*, 2 B. & C. 543, says, "There are many cases in which it has been held that if the first vendor does anything which can be considered as sanctioning the sale by his vendee, that destroys all right of the former to stop in transitu." [*PARKE, J.*, Bond and Proctor took no possession.] Collard, their vendor, had taken such possession as divests the original vendor's right to stop. *Craven v. Rider*, 6 Taunt. 343, 2 Marsh 127, *Holt, N. P. C. 100*, turned on very particular circumstances, and was decided on the ground that the person holding the lighterman's receipt had control over the goods till he had exchanged it for the bill of lading.

Couling for Yates. First, assuming that Yates is to be considered responsible for the acts of his clerk Collard, those acts were, under the circumstances,

justifiable: But, secondly, Yates is not responsible for Collard's acts, either to the plaintiffs or to his co-defendants, because those acts all passed among those parties behind the back of Yates. Everything was the act of Collard; Yates was in ignorance of all until the 18th of November. Even the delivery of the three puncheons was Collard's act. It is clear that the property in the goods was changed by the sale. The custom referred to is confined *merely to [*331] the *delivery* of goods, and the want of the delivery order is no impediment to a resale. The first question will be, whether the plaintiffs ever transferred away the right of possession. If the rum had been in their own possession, they would, by their sale to Collard on credit, have passed away both their right of property and possession: *Bloxam v. Saunders*, 4 B. & C. 948; per BAYLEY, J., citing *Tooke v. Hollingsworth*, 5 T. R. 215. The case must be the same where the goods are in the possession of an agent, unless the contrary appear from some general usage or peculiar mode of dealing between the parties; for an agent stands in the place of his principal, *Wilson v. Anderton*, 1 B. & Ad. 450; *Hardman v. Wilcock*, 9 Bing. 382; and although an agent is estopped from setting up the title of third persons unless they make a claim on him, he is not estopped if they do, any more than a tenant is estopped from disputing his landlord's title under the same circumstances: *Pope v. Biggs*, 9 B. & C. 245. It is even doubtful whether a usage between a seller and his warehouseman not to deliver without a delivery order can be good as against the latter, when the seller has parted with his right of property and also of possession; for it is clear that an agent is justifiable in delivering goods to the person entitled to them, although contrary to the directions of his principal, and his own express promise to him: *Syeds v. Hay*, 4 T. R. 260; per Lord TENTERDEN in *Howard v. Tucker*, 1 B. & Ad. 713; and per PARKE, J., in *Brandt v. Bowlby*, 2 B. & Ad. 937, 938. But the usage proved has really no application to the case. If the plaintiffs had placed their own goods in *Yates's warehouse [*332] it would have applied, but that was not the case; and therefore the usage rather tends to show that the plaintiffs never obtained the right of possession, but only had the right of having a delivery order accepted by Yates; and there is nothing in the usage to show that they might not pass away that right without a delivery order. The usage, too, if construed as extensively as contended for, is bad in itself, as being contrary to a general principle of law, because it would put the agent in a different position, as regards the world, from his principal: *Todd v. Reid*, 4 B. & A. 210. Customs encouraging trade, and merely contradicting technical rules of law, may be good; but the custom here should have been more strictly proved; it should have been expressly made out that the goods are never considered in the trade as delivered until a delivery order is accepted; or that the goods cannot be delivered without a delivery order; whereas the proof is confined to the mere mode of delivery, to the practice actually followed by warehousemen in delivering. A delivery order is not like a dock warrant, which is the symbol of property, and passes the property mentioned in it, like bills of lading or exchange. A delivery order is not a negotiable instrument; the want of it will not prevent a sale; it only passes between the owner of the goods and the warehouseman. It is never used before the goods are wanted out. It is not preserved in the warehouseman's office as a record of the title to the property. Suppose the plaintiffs had verbally authorized Yates to deliver the rum, and he had done so, could trover afterwards have been maintained on the ground that they had given [*333] *him no written delivery order? In *Knowles v. Horsfall*, 5 B. & A. 134, where the custom relative to delivery orders was more fully proved than in the present case, Lord TENTERDEN said, 5 B. & A. 139, that if the plaintiff (the vendee) had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering the goods to any other order than that of the plaintiff. In fact, delivery orders seem to have been introduced to obviate the difficulty which the warehouseman might be under in

knowing to whom he should deliver. Such an order, signed by the person in whose name the goods stood, would naturally be the best evidence of a right to a delivery. This is solely for the convenience and advantage of the warehouseman; but if he obtains by any other means the knowledge that the buyer is entitled to the right of possession, he will be justified in delivering to him. The invoice is sufficient evidence; and the case is the same in the present instance as if the invoice had been shown to Yates; for if Yates is to be responsible for Collard's acts, Collard's knowledge must be taken to be his.

If, then, Yates may set up the rights of others, the plaintiff's right of stoppage in transitu is extinguished by Collard's resale while the bills given by him were outstanding: *Davis v. Reynolds*, 1 Stark. 115; 4 Camp. 267. *Craven v. Ryder*, 6 Taunt. 433, 2 Marsh. 127, is distinguishable: the reason of that decision is shown by the judgment of Lord TENTERDEN in *Ruck v. Hatfield*, 5 B. & A. 632. The delivery also of the samples by the plaintiffs to Collard extinguished the right of stoppage; for the delivery of part is a delivery of the whole. (On *this point he referred to cases which have been already mentioned.) This is more particularly the case when the part delivered consists of [*334] samples, as in the present instance, which are intended to be carried to market, and exhibited as part of a larger quantity supposed to be in the power of the holder of them: *Hind v. Whitehouse*, 7 East, 558; *Foster v. Frampton*, 2 Car. & P. 470; S. C. 6 B. & C. 107. In *Cooper v. Elston*, 7 T. R. 14, and *Bloxam v. Morley*, 4 B. & C. 951, the samples were not parcel of the bulk. (He also relied upon the marking of the casks, as showing a delivery, and extinguishing the right to stop in transitu.) Besides, the plaintiffs are estopped from claiming the rum as against Yates, by suffering Collard to cooper and mark the casks, and act as the owner: they have put it in his power to commit a fraud on Yates and the world; and, although the master is generally responsible for the acts of his servant, he is not so responsible to another person by whose improper conduct those acts are produced. The plaintiffs contend that Yates is liable for allowing Collard to deal on his own account; but it is not found that he allowed Collard to use his, Yates's, warehouse as his own. The plaintiffs should have informed Yates of the sale to Collard. They knew Collard was his clerk, and had the control over the warehouse, and might commit a fraud on his master; and they put it in his power to do so by delivering the invoice, samples, &c. The plaintiffs sold to Collard on the same days they purchased of Yates, at increased profit. They, in effect, bought for Collard on commission. They gave him vouchers and samples, and *allowed him to cooper, in order that he [*335] might go into the market and obtain purchasers; and, if he failed in that, they intended to reserve to themselves the power of coming on Yates, by keeping back the delivery orders. They never informed Yates of the application made by Collard to them for such orders, even after the 5th of October, when the first bill was dishonored. The right of stoppage ought to have been exercised within a reasonable time after they were aware of Collard's insolvent situation: *Green v. Haythorne*, 1 Stark. 447.

But if the plaintiffs are entitled to recover any portion, then Yates's co-defendants ought, as to so much, to be barred of their claims against him. They were guilty of negligence, at least, in not inquiring into Collard's title to the rums. The circumstances ought to have excited their suspicion, and they should have made inquiries of Yates, and of the custom-house officer who superintended the bonded warehouse, and who, by 6 G. 4, c. 112, s. 9, is bound to keep a transfer book, open to the public. After dealing with Collard as a principal, they have no right to fall back on Yates, who is to be considered, as far as they are concerned, as unconnected with Collard. Bond and Proctor merely received the samples which the plaintiffs had left in Collard's possession, and which the latter had kept concealed from Yates. If the taking of samples, the marking, &c., are not to be considered as amounting to a delivery, and barring the right of stoppage in transitu, then neither of the co-defendants ever obtained the pos-

session, and it is clear that they never acquired the reputed ownership: Knowles v. Horsfall, 5 B. & A. 134.

[*336] *DENMAN, C. J. In this case it appears that the plaintiffs purchased 46 puncheons of rum lying in the warehouse of the defendant Yates, and paid for them, and thus became the owners. They sold a part of the rum to Collard, a clerk in the service of Yates, and he paid for that part by bills, which were afterwards, but before the plaintiffs had demanded possession of the rum, dishonored. The right of property and possession thereby reverted in the plaintiffs, unless something had been done in the interval to divest them of their right of possession. While the bills were running, Collard had the power to take the rum into his possession, and to dispose of and sell it, but he did not exercise that power by any sufficient means. The invariable mode of delivering goods sold while in warehouses in Liverpool, is found to be by the vendors handing to the vendees delivery orders; and here Collard obtained no delivery orders except for two puncheons. It is said that the delivery of a part operates in law as a constructive delivery of the whole; but that is so only where the delivery of part is intended to be a delivery of the whole. Here that was not so; for the plaintiffs, by refusing to deliver more than the two puncheons, gave notice to Collard that they meant to retain possession of the rest.

The taking of samples and cooping are circumstances from which a jury might infer an actual delivery of the whole; but that is not found as a fact in the case, and I think the circumstances do not make it incumbent on the court to say there was such a delivery of the whole. If I had been on the jury, I should have found that there was no such actual delivery. It has been con-
[*337] tended that the plaintiffs, after *having received notice of the dishonor of the bills by Collard, were bound to take some steps to enforce their lien; but it seems to me that nothing short of an actual delivery could divest a vendor of the right to stop in transitu, which is admitted to be analogous to the right of retaining. That being so, Yates, then, is not able to set up as against the plaintiffs the act of any third party, and therefore is not entitled to retain the possession of the rum. It has been said that the plaintiffs cannot recover, because they have given Collard the means of going into the market with an apparent title to the property: the answer to that is, he had not that evidence of a transfer to him, without which any purchaser's title would have been imperfect. Under all the circumstances, I think the right of property and possession as to the 44 puncheons remained in the plaintiffs, and that they are entitled to recover.

LITLEDALE, J. I think the property and right to the possession of the 44 puncheons of rum are in the plaintiffs. They sold to Collard a parcel of goods in June, and another parcel in August. The first parcel was paid for by two bills of exchange, which were dishonored, and taken up by the plaintiffs to save their own credit; and those goods not having been paid for by Collard, he has clearly no right of property in them.

As to the second parcel; Collard became insolvent in November; the bills given by him for the goods were dishonored. The plaintiffs, therefore (unless something had been done to prevent it, in the interval between the purchase by Collard and the dishonor of his bills), might resume possession and prevent the
[*338] delivery. *The only question is, whether, in the interval, anything of that nature was done by Collard. The invariable mode of delivering goods sold while they are lying in warehouses at Liverpool, is by the vendor handing delivery orders to the vendee. The plaintiffs had not given to Collard orders for the rum in question, therefore there had not been a delivery to him in the usual mode. Had he, then, acquired the possession (as he undoubtedly might) in any other way? An invoice was delivered. In the case of any sale of goods, the common course is for the vendor to deliver to the vendee an invoice, but that does not vest the actual possession of the goods in the vendee. The delivering of the invoice, therefore, did not give Collard any colorable title. Then, after receiving the invoice, Collard coopered and marked the casks. The

coopering was an act which might be done in order to ascertain that the casks were in proper order. The marking of the casks with his initials is an act which looks much more like taking possession. But Collard knew at the time that he had no delivery order. He was a clerk to Yates, and had the management of his cellar, and full power to mark and guage the casks as he pleased. If that act had been done with the approbation of Yates, the latter knowing that Collard had bought the rum, it might have been sufficient to vest the actual possession in the latter. But that was not so. It seems, therefore, to me that Collard had not done sufficient to take the possession: and then, the bills having been dishonored on the 1st of September, the plaintiffs were entitled to retain.

It remains to be considered whether the fact of Collard having sold part of the rums to Kaye, and to Bond and Proctor, and the acts done by [*339] them, make any difference. It is a general principle of law, that a man who has not the property and right of possession in goods cannot transfer them to a vendee; and, therefore, if the original vendor chooses to retain or stop in transitu, a second vendee is in no better situation than the first. Then it is said there was a part delivery here, and that that, in point of law, operated as a constructive delivery of the whole. But that rule is confined to cases where the delivery of part is intended to be a delivery of the whole: *Bunney v. Poyntz*, 4 B. & Ad. 568, not reported when this case was argued; *Simmons v. Swift*, 5 B. & C. 857. On the contrary, there was in this case an express refusal to deliver the whole.

There are two general principles of law which must decide the present case; the one is, that so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them; and if they remain in the possession of his agent, i. e. a warehouseman or carrier, he may stop them. The other is, that a second vendee of a chattel cannot stand in a better situation than his vendor.

PARKE, J. I am of the same opinion. No doubtful principle of law is involved in this case. The question is, what inferences ought to be drawn from the facts given in evidence; and, particularly, whether there has been a delivery of the 44 puncheons of rum to Collard, or of 18 puncheons to Bond and Proctor, or 26 to Kaye? Those are questions of fact. The issue is, whether the plaintiffs are entitled to the property in, or to the right of possession of 44 puncheons of rum marked and numbered as stated in the issue, and being in the warehouse of the defendant Yates. Collard purchased of the plaintiffs. [*340] Kaye, Bond and Proctor, are sub-purchasers. It is clear that the plaintiffs were, originally, entitled to the goods. An invoice was made out to them, and the price was paid by them. I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in *Bailey v. Culverwell*, see *Com. Dig. Biens, D. 3*; 2 Mann. & Ry. 566, in a note by the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.

The defendant Yates is a warehouseman, and therefore may set up the *jus tertii*; then the question is, whether any third persons are entitled? The plain-

[*341] tiffs parted *with the property in the goods. They sold to Collard, but he did not take the actual possession. There was no delivery order, nor was the rum delivered to him. The whole quantity sold to him in June and August was paid for by bills, three of which were dishonored before the plaintiffs demanded the possession, and one bill afterwards; and Collard had become generally insolvent before the demand was made. It is said that Collard is entitled to the property in the goods; but the plaintiffs were vendors retaining the possession, and every vendor has a lien until he is paid. It is true that their lien was suspended as long as the bills were running; but it revived as soon as they were dishonored. On the 16th of November Collard had dishonored three bills, and had become insolvent, and was known to be so. The lien of the vendors then revived. If they had parted with the actual possession, and the goods had remained in the hands of a carrier, they would have been entitled to stop them in transitu, unless the sub-purchasers from Collard had taken actual possession, and not having parted with the possession at all, they have a right to retain it under the same circumstances.

If, indeed, Collard had taken possession of these goods, then the plaintiff's right was at an end. It is true he had taken samples; but they were not part of the bulk of the commodity to be delivered. Then it is said that by taking possession of the two puncheons, he took possession of the whole; but it is clearly established, that if part be delivered with an intent to separate that part from the rest, it is not an inchoate delivery of the whole, so as to divest the right of property out of the vendor. Here the vendors, on being *asked

[*342] to give a delivery order for the whole, said they would give an order for one or two puncheons only; thereby separating that part distinctly from the rest. As to the marking; that is an equivocal act: it may be for the purpose of taking possession, or merely for that of identifying the property. Besides, here it is proved that the invariable mode of delivering goods sold while they are in warehouses at Liverpool, is by giving the vendee a delivery order. I agree that, notwithstanding such custom, there may be a delivery by some other mode. The absence of a customary order, however, is a strong circumstance to show that possession was not intended to be delivered, where the acts relied upon to show that possession was taken, are equivocal. These are all the facts of the case, as far as they relate to Collard. Then it is said that Collard sold 26 puncheons to Kaye, and 18 to Bond and Proctor, that possession has been taken by them, and the lien of the plaintiffs was thereby divested. Kaye coopered and gauged the casks. Now, gauging is an equivocal act; it might be done to ascertain the quantity contained in them, before he paid for them. Coopering is an act much more like taking possession; and it is the only part of the case upon which I have entertained any doubt. But when we consider that it was objected to at first, and until Collard interfered; and that a delivery order, which is the usual mode of transferring property from vendor to vendee, at Liverpool, was wanting in this instance,—I think we ought not to come to the conclusion that Kaye took possession, merely because he coopered and gauged the casks. As to Bond and Proctor, the case is less strong, for they never coopered or gauged. Then there was no *delivery to the sub-vendees; and the

[*343] rule is clear that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee under whom he claims. He gets the title defeasible on non-payment of the price by the first vendee: *Craven v. Ryder*, 6 Taunt. 433, 2 Marsh. 127. There is no question on these propositions of law. The only difficulty is one of fact,—whether there was a delivery or not. It being thus established that Yates is liable to the plaintiffs, another point arises; and that is, whether he has made himself liable by his own conduct to the sub-purchasers also. If he had undertaken to deliver to them, or represented to them that they were the goods of Collard, and they had acted on the faith of that engagement or representation, he might be liable to them; but there is nothing to show that. As to Bond and Proctor,

nothing of the sort took place; and, with regard to Kaye, the only circumstance is, that he was allowed to gauge the casks: but it would be going very far to say, considering the circumstances under which it took place, that this was an admission by Yates that Kaye might have full possession whenever he pleased; nor does it appear that Kaye was induced to alter his condition in consequence. Therefore he, as well as Bond and Proctor, is without remedy against Yates.

PATTESON, J. The question to be decided in this case is one rather of fact than of law. The only doubtful point is, whether possession of the goods has been taken by Collard or his sub-vendees. We are empowered by the case to draw from the facts the same *inference which a jury might. Now it appears that Yates sold the goods to the plaintiffs, and they paid for them. The property thereby was transferred to them, and when they sold, it was in like manner transferred to the sub-vendee, subject to the right of stoppage in transitu. The sale to the plaintiffs placed Yates in the situation of warehouseman to them. It is found to be the invariable mode of delivering goods sold, while lying in warehouses at Liverpool, for the vendor to give the vendee a delivery order on the warehouseman. The difficulty in this case arises from that circumstance, and also from Collard's filling two characters, that of clerk to Yates, and that of purchaser. If there had been transfer books, and the transfer had been into Collard's name, he might have made a good title to the sub-purchasers; but here the goods remain with the warehouseman in the name of the first purchasers, although there may be twenty different changes of property. The acts relied on to show that Collard took possession are, that he took samples, and that he coopered and gauged the casks; but the rums were sampled on the quay when landed, and the samples were clearly no part of the bulk sold. If the coopering had been by a purchaser from the plaintiffs, who was wholly unconnected with Yates, and who had been suffered by Yates to cooper the casks in the warehouse, I am not prepared to say that that would not have been an act of ownership from which I should have inferred a delivery to, and an actual possession by Collard. But he was Yates's clerk, and had the control over his cellar, and coopered the casks immediately after he had made the purchase. The plaintiffs refused to give him a general delivery order; they could not do a more deliberate act to show that they did not intend to give him *the actual possession. The coopering was referable rather to his character of clerk to Yates, than to that of a purchaser from the plaintiffs; [*345] and, if so, it was not a taking possession by him. Then, it is said, the resale to Bond and Proctor, and to Kaye, alters the case, because they have paid Collard; but that is immaterial, except so far as it would prevent Collard (as against them) from stopping in transitu. But it does not divest the original vendor of his right to stop in transitu: *Craven v. Ryder*, 6 Taunt. 433, 2 Marsh. 127. Collard's bills having been dishonored, the plaintiffs were clearly entitled to retain: *Davis v. Reynolds*, 1 Stark. 116, 4 Camp. 267. The act of coopering by Kaye, therefore, as against the plaintiffs, can have no greater effect than the act of coopering by Collard. Then, as between Yates and Kaye, a question arises whether the property was vested in Kaye, the sub-purchaser, as against Yates. It appears that Kaye, after Yates's other clerk had refused to allow him to cooper the puncheons, obtained permission of Collard to do so. Now, here again, the difficulty arises from the fact of Collard being both seller of the rums to Kaye, and servant to Yates. If he had been a person wholly unconnected with Yates, the act done by him would only have been referable to his character of seller. And if Collard had not been the seller, and Kaye had been suffered by Collard, as the clerk of Yates, to cooper the casks, Yates might have been bound by his act. But here Kaye knew Collard to be the seller of the rums, and, knowing also that the other clerk of Yates would not allow him to cooper the casks, he applied for and obtained permission of Collard. The latter, therefore, must be considered as *having acted in his character of purchaser and seller, and not of clerk to Yates. Yates, therefore, is not bound by his [*346]

act as the act of an agent, but Kaye must take the consequences of the acts of Collard; and, consequently, the property was not in Kaye as against Yates. The plaintiffs are therefore entitled to judgment.

The judgment was given generally for the plaintiffs; but, on application afterwards made, it was referred to PARKE, J., to order specially at chambers how the judgment should be drawn up.

By a rule of Court of Hilary term, 1834, reciting the rule for judgment, and an order made by PARKE, J., on the 23d of December, whereby it appeared that the rum claimed by Kaye, Bond, and Proctor, had been delivered to the plaintiffs, and their costs paid by the defendant Yates, it was ordered that Yates should be discharged from all claim by the plaintiffs in respect of the damages and costs in the postea, costs, and all the other matters in issue. And, after reciting further, that the Master had been, by the above order, directed to tax the costs of the defendant Yates for preparing the brief or briefs (as he might think fit) for the trial, and of one witness, such brief or briefs to be such as ought to have been prepared and given for the purpose of making out Yates's defence as to the three puncheons of rum, and as to the alleged acts by which it was contended that he would be personally liable to the plaintiffs though the other defendants should not be, and also the costs of Yates appearing by counsel, and arguing the special case, on the like principle; and reciting the Master's allocatur for 34*l.* 13*s.* 8*d.*, it was ordered, that the said costs should be [347] *paid by the plaintiffs to Yates. And, after reciting also, that the Master, by the said order, was further directed to tax the costs of the defendant Yates of the action brought against him, of his application to interplead, and of this cause, and that it appeared by the Master's allocatur that he had taxed them at 163*l.* 16*s.* 4*d.*, it was further ordered that the defendants, Kaye, Bond, and Proctor, should pay the same, together with the costs paid by the defendant Yates to the plaintiffs (after giving credit for the said costs to be paid by the plaintiffs, when received, to Yates), upon a pro rata according to the value of the goods respectively claimed by them (but not including the three puncheons of rum delivered to the defendants Bond and Proctor), to be settled by the Master in case of difference; and in case the said moneys should not be received from the plaintiffs at the time when the respective amounts to be paid by the other defendants should be ascertained, that the same when received by the defendant Yates should be paid over to the other defendants in like proportion, to be settled in like manner in case of difference.

The KING v. HOLDEN and Another. June 8.

An indictment found at the Suffolk Lent assizes, 1833, on a charge of felony preferred in September, 1832, was removed into K. B. by certiorari, and a motion made to award a venire into another county, on a suggestion that a fair trial could not be had in Suffolk; in support of which application many affidavits were put in, sworn in the autumn of 1832, showing that a strong prejudice existed in Suffolk against the defendants, on the subject of this charge.

The Court held, that there were not sufficient grounds laid for removing an indictment from the body of a large county, and discharged the rule.

THE defendants in September, 1832, were charged before two justices with an unnatural crime, said to have been committed within the liberty of Bury St. Edmund's, Suffolk. They were discharged on giving *bail for their ap- [348] pearance at the Suffolk Lent assizes, 1833, at Bury. In Michaelmas term, 1832, Sir James Scarlett obtained a rule absolute in the first instance, for a certiorari to the justices of oyer and terminer for the county of Suffolk, to remove into this Court any indictment that might be found against the defendants, or either of them, at the next assizes for the said county. A bill was found against the defendant at the late assizes for a capital felony. Before the bill was returned, or the certiorari served, an application had been made to the

learned Judge sitting on the crown side at the assizes, to call the defendants on their recognisances, which was done and their recognisances estreated. The certiorari being afterwards served, the defendants put in fresh bail in this Court before a Judge at chambers, and the estreated recognisances were then discharged, the prosecutor making no opposition. The defendants pleaded to the indictment in this Court; and, in Easter term, Sir *James Scarlett* moved for a rule to show cause why a suggestion should not be entered upon the roll, that a fair and impartial trial of the issue joined in this prosecution could not be had by a jury of the county of Suffolk, and why the said issue should not be tried by a jury of the county of Kent, or of such other county as this Court should direct. It was stated that the liberty of Bury St. Edmund's comprehends nearly half the county; and that, by the ordinary practice, the defendants, being indicted for an offence committed within the liberty, would be tried by a jury from thence. In support of the present application many affidavits were referred to (sworn in the autumn of 1832, and used upon the application for a certiorari), showing that a strong prejudice existed in the county against the defendants on the subject of this charge, and stating the belief of the deponents that it could not be fairly and [*349] impartially tried in Suffolk.

Byles now showed cause. It is admitted that the court has power to award a venire into a foreign county on a proper suggestion. On the removal of an indictment by certiorari, and plea of the general issue, the trial, at common law would be at bar, by a jury of the county. A writ of nisi prius may indeed issue, by consent of the Attorney-General (2 Inst. 424); but still it must go into the proper county, unless there be a suggestion of the nature here applied for, which estops both parties. Yet, although the court may award a venire into a foreign county by means of a suggestion, no instance can be found in which such a power has been exercised at the defendant's instance in a case of capital felony, where the trial would be by a jury of the county at large before a Judge of one of the superior courts. Many inconveniencies would attend such a proceeding. The removal by certiorari from the court below, where the party is on bail, discharges the defendant's recognisances, *Rex v. Richardson*, 2 Leach's C. C. 560, and those of their bail: and that would have been the case here, if the parties had not been called on their recognisances before the writ was served. It also discharges the recognisances of the prosecutor and witnesses. The prosecutor cannot claim costs from the county under 7 G. 4, c. 64, ss. 22, 23, *Rex v. The Exeter County Treasurer*, 5 M. & R. 167; *Rex v. Richards*, 8 B. & C. 420; *Rex v. Johnson*, 1 Ry. & M. 173, 616; and the removal to another county must *necessarily increase expense, as well as delay the proceedings. There is no provision by law for the expense of reconveying the defendants, if [*350] convicted, to the original county. The statute 27 G. 2, c. 3, does not apply. As to the prejudice apprehended, that must have now abated; and, since the indictment has been removed into this Court, the jury will be taken from the county at large (6 G. 4, c. 50, s. 13), and not from the liberty, to which the allegations of prejudice in the affidavits chiefly apply. In *Rex v. Mead*, 3 D. & R. 301, an application for a certiorari to remove an indictment for murder, in order that it might be tried in a different county from that in which the bill had been found, was rejected by this Court. The same appears to have been done in *Rex v. Elford*, 2 Str. 877. In *Rex v. Thomas*, 4 M. & S. 442, an indictment for murder was removed into this Court, on application made on behalf of the defendant, but that was from the sessions for the city of Rochester, an inferior and comparatively limited jurisdiction. And so in *Rex v. Fawle*, 2 Ld. Ray. 1452, where a certiorari was granted, the removal was from the sessions, and the felony does not appear to have been capital. An application of this kind for a suggestion was made without success, in *Rex v. Penprase and Others*, 4 B. & Ad. 575, in last Hilary term. [LITTLEDALE, J. That case was tried at Nisi Prius. So also was *Rex v. Ellis*, 6 B. & C. 145, where the bill had been found at the goal delivery for the city of Exeter, and was removed into this

Court by certiorari. PATTESON, J. There was a similar case at Maidstone, last assizes.] The prosecutor might further contend that he was entitled to [*351] have the certiorari quashed, as having *been obtained without any rule to show cause, and without notice to him, contrary to the usual practice, *Rex v. Fawle*, 2 *Ld. Ray.* 1452; *Rex v. The Duchess of Kingston*, *Cowp.* 283; *Rex v. Thomas*, 4 *M. & S.* 442; *Rex v. Hunt*, 3 *B. & A.* 444; *Hawk. P. C.* book ii. c. 27, s. 27. But it is not desired to quash the certiorari, or discharge the present rule, if the defendants be put under such terms as to costs as will leave the prosecutor in no worse situation than if the case had been proceeded upon in the ordinary way. There is no legislative enactment on the subject, but an analogy may be drawn from the statutes 5 & 6 *W. & M.* c. 11, s. 3, and 38 *G. 3*, c. 52, s. 8, and terms of this kind were imposed on the defendants in *Rex v. Hunt*, Hilary term, 1820, and in the late case of *Rex v. Hodgson*,¹ where the place of trial was changed, by suggestion, upon indictments for misdemeanor. The reasonable costs to be paid to the prosecutor in this case, would be those already incurred; the costs of the trial in any event, with the addition of those occasioned by the removal; the costs in this Court, including those of the present application; the costs of reconveying the defendants, if convicted, to the original county; and any others which the prosecutor may incur after the judgment. [DENMAN, C. J. The costs of the trial must be in the discretion of the Judge who tries the indictment; and they are not payable by the defendant, but by the county.] Supposing that the terms required by the prosecutor were granted, many inconveniencies might still arise if the court were [*352] to remove the case to a different circuit; as, for instance, *in case a witness were to die, the difficulty of obtaining the depositions, which are now in the legal custody of the clerk of assize of the Norfolk circuit.

Sir *James Scarlett* and *B. Andrews*, contra. With respect to costs, the defendants will accede to any terms the court may think proper; and the depositions may, without difficulty, be removed into this Court. There is nothing new in the trial of felonies at nisi prius. The statute 14 *Hen. 6*, c. 1, enabling justices of nisi prius to give judgment of a man attainted or acquitted of felony, conferred upon them no new jurisdiction as to trying, but was only passed in order that they might give judgment as well as try, which before they could not do; and that statute shows that they might even try cases of treason. The power of removing cases of felony exists at common law, and is part of the supreme jurisdiction belonging to this Court, though not exercised unless under very special circumstances. But it has been exercised, even at the instance of defendants. *Rex v. Thomas*, 4 *M. & S.* 442, is a decisive authority on this case. No difference can be shown in principle between removing a case of felony and one of misdemeanor: in the discretion of the Court, they may not be viewed alike, but there is no rule of law confining the trial of felonies to the proper county, which would not equally extend to misdemeanors. A case of felony was lately removed from the sessions for the town and county of Southampton, *Rex v. Russell*, 4 *B. & Ad.* 576, note (a). [PATTESON, J. An application was there made before me in the bail court for a certiorari, and I thought I could [*353] not grant it, as the case arose in a *town which was a county of itself, and therefore a particular course of proceeding was directed by 38 *G. 3*, c. 52. But the prosecutor undertook, upon terms, to try in the county at large.] The indictment in *Rex v. Ellis*, 6 *B. & C.* 145, was removed by certiorari from the city of Exeter into the county of Devon. [DENMAN, C. J. There is a provision in 38 *G. 3*, c. 52, s. 10, that the statute shall not extend to the criminal jurisdiction of Exeter, unless in cases of indictment removed from thence into the King's Bench by certiorari.] That leaves the jurisdiction of the King's Bench as it stood at common law, and by that jurisdiction the indictment in *Rex v. Ellis* was removed; the ground being that an impartial trial

¹ Hilary term, 1831. Indictment for misdemeanor. Suggestion, for trying the issue in London instead of Yorkshire.

could not be had in the city. In *Rex v. Thomas*, 4 M. & S. 442, the place of trial was changed from the town of Rochester to the county of Kent. In *Rex v. Mead*, 3 D. & R. 301, the Court would have removed the indictment (which was for murder), or granted a trial at bar, but for the special circumstances. And on principle, if an indictment for misdemeanor may be removed on the ground of prejudice, & fortiori, a case of felony ought to be so removable, where even the life of the party may be at stake. The Court has, from the earliest times, exercised a power of removing civil causes into counties where the ground of action did not arise, and this, not because such cases are, for this purpose, distinguishable from others, but by reason of the general jurisdiction which the Court possesses, to dispense justice throughout the country. The form of suggestion, in a case of misdemeanor, is given in *Rex v. Hunt*, 3 B. & A. 444 : the county to which the removal is made, is stated to be the county *next adjoining. [DENMAN, C. J. In a case from Nottingham (W. Sache- [354] verell's case, 10 Howell's State Trials, 30), Kent was suggested, by consent, to be the next adjoining county. The Solicitor-General, *amicus curiæ*; in the Bristol case, *Rex v. Pinney*, 3 B. & Ad. 947, Berkshire was suggested to be the next adjoining county.] On the suggestion here offered, a trial at bar might be ordered, if necessary. The argument of inconvenience was urged in *Farewether's case*, Cro. Car. 348, where a certiorari had been awarded to the justices of assize of Suffolk, to remove an indictment against a justice of that county for common barratry; and upon discussion as to a rule for a trial at bar, and motion made on behalf of the crown that it should be tried in the county, Keeling, clerk of the crown, said, "That divers precedents have been of such trials, upon indictments in banco, without any consent of the parties, and against the will of the prosecutors, and in more remote counties;" which appears to be approved of by the Court.

DENMAN, C. J. I apprehend that the power of changing the place of trial whenever it is necessary for the purpose of securing, as far as possible, a fair investigation, is a part of the jurisdiction of this Court; and that that power may be exercised, where it is absolutely necessary, in cases of felony. Instances have occurred in which this has been done for the purpose of removing the trial from limited jurisdiction; but there does not appear to be any in which it has been done with respect to a county at large: and I should think such a proceeding could not be necessary where the removal must be from one great county to another. Where it *has happened on indictments for misdemeanor, [355] the circumstances have almost amounted to a necessity. In the Nottingham and Bristol cases, the inhabitants themselves were parties, or had a strong interest. In *Rex v. Hunt*, 3 B. & A. 444, the magistracy and yeomanry of the county of Lancaster were affected; and, in *Waddington's case*, see 1 East, 167, and 3 B. & A. 446, the misdemeanor, which was the subject of indictment, had prevailed extensively in the county of Kent. But here, upon full consideration, I think no such case of necessity appears, even if the indictment were for misdemeanor only. It seems, indeed, that some of the magistrates have committed themselves upon the subject; but there is nothing to show that the great body of freeholders and others, out of whom the jury would be formed, are likely to be prejudiced, except by those feelings which arise from the nature of the offence, and which are common to all counties. When men are summoned into a jury-box to decide upon a case of felony, such prejudice is very apt to die away: it is a kind of feeling which juries are learning more and more to lay aside; and we should rather relax that disposition by being too ready to suppose that they would be influenced by unjust impressions. Objections have been suggested in point of form; and it is true that the Court might, by granting such a rule as this, expose itself to frequent solicitations of the same kind: still, if I thought it necessary for the purpose of securing a fair trial, I should certainly be disposed to grant this application. But, considering the time which has now been afforded for prejudice to die away, and feeling a perfect persuasion

[*356] that, with the right of challenge and the benefit of *selection from so large a county, the defendants may find an unprejudiced jury in Suffolk, I am of opinion that the balance of convenience is against this application; and I do not apprehend the least real danger of any prepossession in those, who, by the natural course of the constitution, are appointed to try this indictment. The rule will therefore be discharged.

LITLEDALE, PARKE, and PATTESON, Js., concurred.

The following rule was drawn up as to costs:—"That the rule be discharged with costs, to be paid by the defendants to the prosecutor or his attorney, such costs to be taxed by the coroner and attorney of this Court. And it is further ordered, by consent of counsel on both sides, that the said defendants pay to the prosecutor or his attorney his costs in this court, to be taxed; and do, within a week next following, give security to the satisfaction of the coroner and attorney of this Court, for the payment of such costs to the said prosecutor, as the Judge, before whom the issue joined in this prosecution shall be tried, shall think the said prosecutor entitled to receive."

The defendants were tried at Nisi Prius at the next assizes for Suffolk, by a jury of the county, who returned a verdict of Not Guilty.

[*357] *FIELD v. BEZANT, Gent., one, &c. June 8.

Where an attorney, defendant in assumpsit, sets off the amount of his bill, the plaintiff cannot deduct from the set-off, costs of taxation allowed against the attorney, pursuant to 2 G. 4, c. 28, s. 28.

ASSUMPSIT on promissory notes, &c. Plea, general issue, and notice of set-off. At the trial before DENMAN, C. J., at the London sittings after last Michaelmas term, the plaintiff proved a debt due to him upon several promissory notes, amounting to 333*l.* 6*s.* 8*d.* The defendant claimed to set off his bill of costs. It appeared that this originally amounted to 775*l.* 1*s.* 9*d.*; but on reference to a Master in Chancery for taxation, was reduced to 422*l.* 7*s.* 2*d.*, being less than five-sixths of its original amount: the plaintiff then applied to the Master of the Rolls for a taxation of his costs of taxing the defendant's bill, and the Master of the Rolls thereupon ordered that the bill should be referred back to the same Master in Chancery, to tax the last-mentioned costs, and that the defendant should allow and give credit to the plaintiff for the amount of such costs, when taxed, against and in reduction of the sum of 422*l.* 7*s.* 2*d.*, certified to be due to him. The Master taxed the plaintiff's costs of taxation at 118*l.* 7*s.* 10*d.*, which, if it could be deducted in this action from the sum of 422*l.* 7*s.* 2*d.*, would reduce the defendant's claim to 303*l.* 19*s.* 4*d.* The Lord Chief Justice was of opinion, that the defendant could set off the latter sum only, and a verdict was entered for the plaintiff for 29*l.* 7*s.* 4*d.* A rule nisi had been obtained for setting aside this verdict, and entering a verdict for the defendant, on the ground [*358] *that the costs of such taxation could not be made the subject of an action or of set-off.

Platt and *W. H. Watson* now showed cause. The defendant was not entitled to set off the whole amount of his bill. [PARKE, J. The only question is, whether the costs of taxation constituted a debt, which alone is the subject of an action or set-off.] It is part of the order of the Master of the Rolls that the defendant should allow and give credit to the plaintiff for the amount of the costs when taxed. Those costs thereby became a debt due to the plaintiff.

LITLEDALE, J. A party can set off only such sums as can be made the subject of an action. Here the plaintiff could not have brought an action to recover his costs of the taxation of the defendant's bill; he could only enforce his claim by an attachment.

PARKE and PATTESON, Js., concurred.

Rule absolute.¹

¹ See *Fry v. Malcolm*, 4 Taunt. 705; *Emerson v. Lashley*, 2 H. Bl. 248.

*STOW v. DAVENPORT. June 10.

[*359]

Lands were devised, to the use among others, that M. A. F. should take from and out of the same premises, an annuity or yearly rent charge of 500*l.* a year, to be paid clear of all taxes and deductions, remainder to S. for life, subject to the annuity:

Held, that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently that S., who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity, pursuant to 45 G. 3, c. 28, s. 6, could not recover it again from the annuitant.

ASSUMPSIT for money paid by the plaintiff for legacy duty in respect of an annuity of 500*l.* bequeathed to the defendant's wife. At the trial, before Lord TENTERDEN, C. J., at the sittings in London, after Trinity term, 1832, the plaintiff had a verdict for 1000*l.*, subject to the opinion of this Court upon a special case, which was stated in substance as follows.

In 1811 Thomas Frisby devised all his real estate to trustees, in trust to convey the same to the use of his son, T. F. the younger, for life, remainder to themselves, to preserve contingent uses, &c.; and, after his death, in case Mary Ann Frisby, his then wife, should survive him, to the use that she should take from and out of the same premises such annuity, or yearly rent-charge, not exceeding 500*l.* a year for her life, as T. F., jun., should by will appoint, the same annuity to be paid her, clear of all taxes and deductions whatsoever, by four quarterly payments; remainder, in default of issue of T. F., jun., to the plaintiff for life, charged with the annuity above mentioned. He also bequeathed all his personal estate to his executors, upon trust to convert the whole into ready money, and lay it out in the purchase of real property, to be conveyed to the uses above stated, with power to them to place out such personal estate in the public funds, &c., till such purchase could be effected; the dividends to go to the same persons for whose benefit the purchase was to be made.

The testator died in 1811. In 1813, T. F., jun., and the plaintiff joined in the conveyance of the devised lands to a trustee, his heirs and [*360] assigns, to the use of T. F., jun., for life, and to the use that after his decease, his said wife, if she should survive him, might receive out of the same premises such annuity, or yearly rent charge, not exceeding 500*l.* a year, clear of all taxes and deductions whatsoever, as the said T. F., jun., should by will appoint. He by his will appointed that the annuity should be of the full annual amount of 500*l.*; and he died in 1820. The plaintiff entered into possession of the lands, and into the receipt of the dividends arising from the personal estate, paying the annuity to the widow of T. F., jun. In 1830, an information, of which the defendant had notice, was filed by the Attorney-General against the plaintiff for non-payment of the legacy duty on the said annuity; and judgment was thereupon entered up for the crown for 709*l.* 15*s.*, the amount of duty, and 38*l.* 9*s.* 8*d.*, costs of the crown. The present action was brought to recover this sum of 748*l.* 4*s.* 8*d.* from the defendant, who had married the widow, Mary Ann Frisby. The estates upon which the annuity was charged were subject to land-tax and other charges. This case was argued in Easter term.¹

Kelly for the plaintiff. The questions are, first, whether or not this annuity was subject to the legacy duty; and secondly, if it was, whether the duty ought to be paid by the annuitant, or by the devisee of the land? On the first point, *The Attorney-General v. Jackson* (2 Cro. & Jer. 101, 2 Tyr. 50), is decisive. With respect to the second, the cases in equity which have turned upon the question, whether or not the legatee was exempt from legacy duty, do not *apply here, the dispute in this case being between a tenant of the land [*361] who has paid his legacy duty, and the legatee upon whose legacy it is chargeable. If the latter is free from the duty, the legacy to him is of a

¹ Before DENMAN, C. J., LITLEDAL and PARKER, Js.

larger sum than the amount of the annuity, and he is entitled to the additional sum out of the surplus of the estate. If there be no surplus, he must pay it. In the mean time, by the statutes 36 G. 3, c. 52, and 45 G. 3, c. 28, the tenant, in a case like the present, is liable in the first instance; but it is a debt to the crown, payable by the legatee; and the tenant, having been obliged to pay [362] it, may recover against the legatee, who, if the legacy be free from duty, may in his turn file a bill against the executors for the amount which he has been so compelled to pay. If this were not so, the tenant would be without remedy: he could not sue the executors; and he could not recover against them by bill in equity, unless there were a residue. The reasoning of DALLAS, C. J., upon the statutes, in *Hales v. Freeman*, 1 B. & B. 391, applies to this case. It must be contended, on the other side, that, in addition to the land-tax, sewers' rate, and other such burdens, which properly fall upon the tenant, he is also liable to the legacy duty on any personal annuity charged upon the land. The bequest of an annuity, "clear of all taxes and deductions," is a bequest of the annuity and legacy duty; but it does not follow that the duty is to be charged on the land, in addition to the annuity. [LITTLEDALE, J. Suppose there is no residue in the hands of the executors?] The legatee is debtor to the crown, and the legacy must be reduced so as to provide for the duty. It would be like the ordinary case of a proportionate reduction where there are not sufficient assets to pay every legacy.

Thesiger, contra. It must be admitted that the present case does not materially differ from *The Attorney-General v. Jackson*, 2 Cro. & Jer. 101; 2 Tyr. 50, but the object of the defendant is to have that case reviewed. The 500l. [363] a year, upon which this duty is claimed, is not a "legacy out of or charged upon the real estate" within 55 G. 3, c. 184, sched. part iii., nor an annuity "charged upon or made payable out of" the real estate, within 45 G. 3, c. 28, s. 4; but it is a rent-charge executed in the party from whom the duty is now demanded. It is a portion of the real estate. A rent-charge issues out of the land. An annuity, properly so called, charges the person of the grantor only; Co. Litt. 144, b. Here no person is charged; the land only is looked to.

36 G. 3, c. 52, s. 6, enacts, That the duties imposed by this act shall (where it is not otherwise provided) be paid by the executor or administrator, upon retainer, for his own benefit or that of others, of any legacy, residue, &c., which he shall be entitled so to retain in his own right, or that of others, and also upon payment or other satisfaction of any legacy, &c., to which any other person shall be entitled; and if such executor or administrator shall so retain any legacy, &c., not having first paid the duty, or shall pay such legacy, &c., having received or deducted the duty chargeable thereupon, such duty, being unpaid to His Majesty, shall be a debt of such executor or administrator to His Majesty:—"And in case any such person, so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to His Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to His Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made."

By 45 G. 3, c. 28, s. 5, it is enacted, "That the duties hereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any moneys to arise by the sale of any real estate, or upon residues, or parts or shares of residues, of any such moneys, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy; or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in an act passed," &c. (36 G. 3, c. 52).

[PARKE, J. Is not this within the words of 55 G. 3, c. 184, sched. part iii., "all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate," &c. ?] After the decision in *The Attorney-General v. Jackson*, 2 Cro. & Jer. 101 ; 2 Tyr. 50, it is certainly difficult to say that the legacy duty did not attach in this case. [DENMAN, C. J. I think the two cases cannot be distinguished.] Then the next question is, whether, by the words "clear of all taxes and deductions whatsoever," the annuity is given to the legatee free from legacy duty. On this point *Barksdale v. Gilliat*, 1 Swanst. 562, *Dawkins v. Tatham*, 2 Sim. 492, and *Smith v. Anderson*, 4 Russ. 352, are direct authorities for the defendant. The argument used in the last of these cases, that if the legacy duty were not referred to by the words "without any deduction," there appeared nothing else to satisfy those words, will apply more strongly here. In *Hales v. Freeman*, 1 B. & B. 391, where the annuity was left "clear of all deductions," it was certainly taken for granted that the *legatee was liable to the duty; but (as the Master of the Rolls observes in *Smith v. Anderson*, 4 Russ. 352), "it appeared that these words [*364] were not noticed by either the bar or the bench, and that the argument and decision in that case proceeded upon a totally distinct ground." Then, thirdly, the question is, if the legacy be free from duty, by whom the duty must be paid? Whether by the plaintiff, or whether he, having paid it, may resort to the legatee? Now, this kind of charge upon the devised lands is not within the meaning of 45 G. 3, c. 28, s. 5: it is not a legacy for which the tenant could "retain" the duty, according to that statute. The party interested might either have received it from the tenant, or distrained upon the land for it, by 4 G. 2, c. 28, s. 5: the plaintiff, therefore, was not a person "paying or satisfying" such legacy within the first-mentioned act. It is urged that the devisee cannot have been intended to pay this duty; but there is no reason that the testator should not have meant to charge this on the land, as well as the 500*l.* annuity. It is said that the legatee must pay the tenant of the land, and then take his remedy in equity against the executor. But the legislature cannot have contemplated this circuitous course, when it directed, by 45 G. 3, c. 28, s. 5, that the duty on legacies charged upon land should be paid by the devisee; and, in a case like the present, if the tenant himself be not liable, his remedy must be by proceeding directly against the executor for reimbursement out of the residue.

Kelly in reply. It is not necessary to dispute the cases in equity where the question was between parties *entitled to legacies, and the executor or residuary legatee. But *Hales v. Freeman*, 1 B. & B. 391, so far as it [*365] can be an authority on a point not expressly raised, shows that the rule would be different as between a legatee and a devisee of the land having paid the duty. It must be maintained, on the other side, that the legacy duty is a charge on the land itself. The act 45 G. 3, c. 28, s. 5, requires, in the case of legacies charged on land, that the duty shall, in the first instance, be paid by the trustee or devisee, and then retained by him, as is there directed. In the case of an annuity the duty is not taken as a deduction of so much from the annual sum payable, but is a gross sum, charged upon the calculated value of the annuity, to be paid by four instalments. Now, supposing the annuity to equal the full annual value of the land, if the devisee cannot retain or recover against the legatee, how is the duty to be repaid him? If he is to look to the executor, the question must arise, in every case where a legacy like this is to be paid, —whether there are sufficient assets to pay the duty? [LITLEDAL, J. In the case of a legacy on personalty, the course would be, not to pay the whole down, but only so much as would leave enough in the executor's hands to make up the duty on what he paid.] In this case, as in *Hales v. Freeman*, 1 B. & B. 391, the legacy has been paid in full before the duty. Supposing, then, that the legacy is left free from duty; the only consequence is, that the executor must pay the amount of such duty to the legatee out of the residue; but, in the

mean time, till the assets are marshalled, that amount is a debt from the legatee to the tenant, by reason of the latter having been called *upon by the [*366] Crown to pay it. If it is chargeable upon the land, the sufficiency of the land is a question of equity, which cannot be raised here.

Cur. adv. vult.

The judgment of the Court was now delivered by

DENMAN, C. J., who, after stating the facts of the case, proceeded as follows:—The first objection to the plaintiff's right to recover was, that such an annuity, so issuing out of land, was not subject to the legacy duty. The contrary, however, was decided in the case of *The Attorney-General v. Jackson*, 1 Cro. & Jerv. 101; 2 Tyr. 50, after full argument and time taken to consider. The authority of that decision was questioned in the argument before us, but it appears to us to be correct.

It follows, from the 36 G. 3, c. 52, s. 6, and the 45 G. 3, c. 28, s. 5, that the plaintiff, who was in possession of the lands, was compellable to pay the legacy duty upon this annuity; and from the case of *Hales v. Freeman*, 2 Brod. & B. 391, that he might recover the amount so paid against the annuitant in this form of action, if the annuitant were chargeable with this duty.

But a second point was then made, that this annuity was devised clear of all taxes and deductions, and that the annuitant was therefore entitled to receive it without any deduction of the legacy duty.

It is a very probable conjecture, that the testator had not the legacy duty in his contemplation at all, and that he may not even have known that the annuity was by law liable to the payment of it. But we must understand the words of the will in their plain and ordinary sense, unless such a construction would be at variance *with the intention of the testator, to be collected from the [*367] context. The will provides that the annuity is to be paid "clear of all taxes and deductions whatsoever;" that is, that the net sum of 500*l.* is annually to come into the annuitant's hands; and this cannot be unless the legacy duty is deducted. No other part of the will leads us to a different construction. This decision is in conformity with those cited in argument, *Barksdale v. Gilliatt*, 1 Swanst. 562; *Dawkins v. Tatham*, 2 Sim. 492; *Smith v. Anderson*, 4 Russ. 352; in none of which, however, were the legacies provided to be paid clear of taxes; and in that respect they are not so strong as the present case. The legacy duty is clearly a tax; and, unless it be deducted, the annuity will not be paid clear of taxes. If the testator had intended to exempt it from the proportion of the taxes affecting the land, as the land tax, or other future taxes of the like nature, he ought to have used some qualifying expression. As he has not done so, we must take his meaning to have been, that no tax of any description should reduce the amount to be paid to the legatee.

By whom then, is the duty to be paid? There is no charge upon any other fund than the land. The land is devised to the use that the legatee should take from and out of the premises an annuity to be paid clear of all taxes and deductions. The burthen of paying the annuity clear of all taxes and deductions is thrown upon the land, that is, the land is subject both to the annuity and the tax; and it is the same as if the amount of the tax were directly charged upon the land; consequently the plaintiff took the land subject to that charge; *and [*368] when he paid the duty, he released the land from it, leaving it still liable to the net annuity. He cannot, therefore, be considered as having paid a sum of money to which the annuitant was liable; and, therefore, cannot be permitted to recover it from her. It is no hardship on the plaintiff, for if the value of the land had not been adequate to the payment of both the tax and the annuity, he might have renounced the devise. In the case of *Hales v. Freeman*, 1 Brod. & B. 391, the question as to the meaning of the word deduction, used in the will by which the annuity was granted, was never raised, and therefore it is no authority in this respect.

The judgment must be for the defendant.

SOPHIA NOWELL *v.* DAVIES and Another, Executors of RICHARD HEAVEN. *June 10.*

In an action against executors for a debt of the testator, a person entitled to an annuity under the will is not disqualified by interest from giving evidence for the defendants.

ASSUMPSIT for wages due from the testator, in his lifetime, to the plaintiff. Plea, the general issue. At the trial, before DENMAN, C. J., at the Middlesex sittings, after Michaelmas term, 1832, a witness named Sarah Heaven, was called on behalf of the defendants, and being examined upon the voir dire, admitted that her husband was entitled to an annuity of 26*l.* under the testator's will. It was thereupon objected that she was incompetent, having an interest in preventing the diminution of the funds; and upon this objection the Lord Chief Justice refused to admit her evidence. It was not expressly proved that the funds would or would not be sufficient to pay the annuity *if the plaintiff recovered. The jury having found for the plaintiff, a rule nisi for [*369] a new trial was obtained in the ensuing term, on the ground that the witness had been improperly rejected.

Sir James Scarlett and *R. V. Richards*, in this term, showed cause. The witness stood in the same predicament with her husband, who was entitled to 26*l.* a year if the funds were sufficient. If they were sufficient, perhaps the objection of interest is removed; but the onus of proving that lay upon those who called the witness, as in the case of any other *prima facie* disqualification. Here the onus probandi could not justly be thrown upon the plaintiff, the state of the funds being a matter peculiarly within the knowledge of the executors. The principle is precisely the same as where a creditor is precluded from giving evidence on behalf of assignees, to increase the fund out of which he expects to be paid. If the funds are already sufficient, it lies upon the assignee to prove that in answer; evidence is never given of the insufficiency. That a creditor is, *prima facie* at least, not a competent witness for an executor, to increase the estate, appears from *Craig v. Cundell*, 1 Camb. 381, cited to this point in 1 Stark. on Ev. 137. It has, indeed, been said that a creditor may as well give this evidence for the representatives after the testator's death, as for the testator himself (which he clearly may), during his life; *Paull v. Brown*, 6 Esp. 34. But, after the testator's death, the estate is a specific, limited fund, and the creditor has nothing further to look to. It is different while the testator is alive. And in *Clarke v. Gannon*, Ry. & M., N. P. C. 31, it was *held, that a [*370] paid legatee was a competent witness for the executors, which implies that an unpaid one would not. [PATTERSON, J. The case was not put on that ground.]

The Solicitor-General, *contra*. The point in question was properly decided at the trial, upon the broad ground of incompetency by reason of an interest, and not upon any question as to the probable solvency or insolvency of the estate. [PARKE, J. It is difficult to see how the solvency of the estate could make any alteration as to the competency of the witness. That depended on the legal result of the suit as to him.] The proposition on the other side must be, that in every case a legatee is incompetent, however small the legacy may be, unless evidence be given that the estate is solvent. But the onus of proof ought to lie on those who seek to disqualify. The case of a creditor offering evidence for the assignees of a bankrupt is different; there the insolvency is apparent, and the creditor is one of the very parties on whose behalf the action is brought. But in other cases a man may be a witness to increase the estate of his debtor during the debtor's lifetime; upon what principle may he not be so for the debtor's executor? [PARKE, J. It may be said that the executor is only liable to the extent of the assets, and that procuring a verdict for the executor is a step to increase them; though it does not necessarily follow that the creditor would obtain judgment to recover out of those assets.] In *Paull v. Brown*, 6 Esp. N. P. C.

34, it was held, that in an action by an executor for a debt due to the intestate, a creditor of the intestate is a good witness to prove it. In a case before PARKE, J., *Davies v. Davies*, 1 M. & M. 345, the unsatisfied creditor of an intestate was held a good witness for the administratrix, on a plea of plene administravit. And if such testimony were not admissible for the executor or administrator when defendant, neither ought it to be received when he is plaintiff. Nor is there any distinction in this respect between a creditor and a legatee. The utmost that can be said is, that a verdict for the executor may facilitate the paying of the legacy. [PARKE, J. In *Baker v. Tyrwhitt*, 4 Campb. 27, a residuary legatee was held incompetent; but on the ground that if the executrix, for whom the witness appeared, had to pay her own costs, they would be allowed out of the estate, and the residue lessened by so much.]

Cur. adv. vult.

DENMAN, C. J., now delivered the judgment of the Court. The rest of the Court think, and I agree in the opinion, that the witnesses ought to have been received. There is no distinguishing this case from *Paull v. Brown*, 6 Esp. N. P. C. 34. The rule must, therefore, be absolute.

Rule absolute.

[*372]

*CLEMENTS v. LANGLEY. June 10.

R. C. borrowed a sum of money, and gave the lenders a bond, by which he and four others bound themselves jointly and severally in a penalty, for the regular payment of interest, and for the discharge of the principal and all interest which might be due at the end of five years, or, if sooner called upon then at twenty-one days after demand. One of the co-obligors of R. C. became bankrupt, and obtained his certificate. At the time of the bankruptcy a forfeiture had accrued by non-payment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate, R. C. was called upon for the principal, but did not pay, and payment was enforced from the four co-obligors who had continued solvent. In an action by one of them against the party who had been bankrupt, for contribution: Held, that they could not have proved under the commission by sect. 52 of the bankrupt act, and, therefore, that the certificate was no answer to the action.

ASSUMPSIT on money counts. Pleas, 1. The general issue. 2. Bankruptcy of the defendant, generally. 3. Bankruptcy and certificate of the defendant specially pleaded; and that before the commission, or any act of bankruptcy, the plaintiff had become and was liable for a debt of the defendant to the chamberlain of London, secured by a writing obligatory of the said defendant, which had been delivered by him to, and was in the hands of, the said chamberlain at the time of the issuing of the commission; that the said debt hath not been proved under the commission: and that the plaintiff, being so liable, after the commission issued, and before any dividend was made, paid the said debt to the chamberlain, the obligee and holder of the said writing obligatory; and that the creditors who had not at the time of the said payment proved their debts under the commission, could, and yet may, receive under the same a dividend in proportion to their respective debts, without disturbing any dividends already made. Replication, denying that the plaintiff had become or was liable for the supposed debt before the issuing of the commission or before any act of bankruptcy. Issue thereon. At the trial before DENMAN, C. J., at the sittings in London after Michaelmas term, 1832, the above-mentioned bond was produced, bearing date the 23d of December, 1826, by [*373] which one Robert Channell, the plaintiff, the defendant, Robert Pullman, and Robert Dennison, were jointly and severally bound to Richard Clark, Esq., and his successors, chamberlains for the time being, in the sum of 200*l.*; and in which, after reciting that Channell had borrowed 100*l.* of the lord mayor, alderman, &c., of London, as trustees under the will of Samuel Wilson, the condition was stated to be that the said Channell, his heirs, executors, or administrators, should pay to the chamberlain, or his successors, the principal

sum, with interest upon the same for so long time as he should be permitted to keep the same, at the rates there specified, by half-yearly payments: and that C., his heirs, &c., should at the expiration of five years, if permitted so long to retain the said sum, pay or cause the same to be repaid in full, with all interest due thereon, to the chamberlain for the time being; and also, that if the trustees for the time being should be minded to call in the said principal, with all interest then due, C., his heirs, &c., should pay or cause the said principal and interest to be paid to the chamberlain within twenty-one days next after demand. The first payment of interest by Channell was made in January, 1828, being for the year ending December 23d, 1827; the second in December, 1828, for another year. No further payment having been made, Channell was required, in May, 1830, to pay the principal and the interest then due. He omitted to do so, and in his default the sureties were called upon in September, 1830; and in October following the principal and interest were paid by the plaintiff, Pullman and Dennison. This action was brought by the plaintiff Clements to recover contribution from the defendant, amounting to 8*l.* 12*s.* 6*d.* The commission *against the defendant issued in August, 1829, and he obtained his certificate in the following November. Upon these facts a [*374] verdict was taken for the plaintiff for 8*l.* 12*s.* 6*d.*, but leave given to move to enter a nonsuit. In the ensuing term, *White* moved accordingly, on the ground that the plaintiff stood in the situation of a person who had become liable for a debt of the bankrupt, and therefore might have proved under the commission, by 6 G. 4, c. 16, s. 52,¹ the bond having been forfeited before the bankruptcy by non-payment of interest.

Platt and W. H. Watson, now showed cause. The section relied upon does not extend to a case between co-sureties: it applies only where the bankrupt is a principal, and a debt would, at all events, be due from him at some time. This is not like the case where bankruptcy discharges a party originally liable under the bond, and who would lose the benefit of his certificate if his surety retained the right of proceeding *against him. Here neither the bankrupt nor the plaintiff might ever have been called upon. The statute [*375] applies, by its terms, to any person who, "shall be surety, or liable for any debt of the bankrupt, or bail for the bankrupt." That evidently means a surety for the principal debtor, not a co-surety. It cannot be said here that the plaintiff was liable for a debt of the bankrupt. What debt could have been proved under the commission? Till 1830, when the sureties were called upon, none existed. It is said the bond was forfeited before; but the sureties had no notice of that. Time was, in fact, given to the principal. If he had paid the first arrear of interest, and made default in paying the next, that, and not the first default, would have been the breach of condition assignable in declaring upon the bond. It would be difficult to say that a party stood in the situation of surety for the bankrupt entitled to prove under the statute, when, perhaps, neither he nor the bankrupt knew of the default in payment. Nor does it appear by the form of the bond to be contemplated that the parties jointly bound with the bankrupt shall be sureties for each other. In *Alsop v. Price*, 1 Doug.

¹ 6 G. 4, c. 16, s. 52. "And be it enacted, That any person who, at the issuing the commission, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor, as to the dividends and all other rights under the said commission, which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

155, which was an action by one of the obligees against a surety on a bond like the present, it was held that the bond not having been forfeited before the bankruptcy of the surety, the debt could not be proved under his commission, and consequently the certificate was no bar to a subsequent action. So here, the forfeiture by non-payment of the principal money, when demanded, had not taken place before the bankruptcy; the default as to the interest had not been [*376] taken advantage of, and *the money had subsequently been paid: the penalty of the bond, therefore, would not have been a debt provable under the commission. [LITLEDALE, J. That would have been a question for the commissioners. There was a forfeiture at law, and although it might not have made the penalty provable as a debt, it would have let in proof as to something.] Wood v. Dodgson, 2 M. & S. 195, which may be cited, was a clear case of principal and sureties, within the act 49 G. 3, c. 121, s. 8, upon which the question in that case turned. The plaintiffs had assigned their interest in the partnership effects to the bankrupt, in consideration of a covenant of indemnity on his part against the partnership debts, to which they still continued liable at law; but in equity he was solely liable, and they only sureties. [PATRERSON, J. They were sureties for him, but not he for them. PARKE, J. The plaintiffs there were held to have been persons "liable for" a debt of the bankrupt.] But in the nature of sureties. In Browne v. Lee, 6 B. & C. 689 (under 49 G. 3, c. 121), it was held that one of three sureties for the payment of an annuity, who had paid money upon it after the bankruptcy of a co-surety, might recover against that party for contribution, notwithstanding his certificate; for there was no debt from the bankrupt to his co-surety, in respect of which the latter could have proved under the commission.¹ The same argument arises here. Yallop v. Ebers, 1 B. & Ad. 698, contains the principle [*377] upon which this case must be decided. There the plaintiff was *acceptor of a bill which the defendant had undertaken to pay, but omitted to do so till he became bankrupt, and obtained his certificate, after which the plaintiff had to take up the bill; and it was held that he could not have proved under the commission, as for a debt, or in the character of a surety. In the present case, too, it is to be observed that this was not a mere debt upon a bond; the original debt arose upon a loan of 100*l.* from the obligee to Channell. There was no debt due from either the plaintiff or the defendant till default was made in repayment of that loan. It must be contended, on the other side, that there were in this case two principal debtors.

White, contra. The demand in this case is for a debt, not payable at the time of the act of bankruptcy committed, but for which the plaintiff might have proved and received dividends, deducting only a rebate of interest, under sect. 51 of the act.² This is treated on the other side as a mere contingent liability. Now, viewing it merely as a debt on a guarantee which had not become absolute before the bankruptcy, it might have been valued under the commission, and [*378] subsequently proved for: *Ex parte Myers*, 1 Mont. & Bligh, 229. But here there was a debt clearly incurred at the time of the bankruptcy, and capable of being ascertained; the principle, *certum est quod certum reddi potest*, applies. In *Affalo v. Fourdrinier*, 6 Bing. 306, 3 M. & Payne,

¹ It did not appear that the annuity was in arrear before the defendant became bankrupt. The payments were made after he obtained his certificate.

² 6 G. 4, c. 16, s. 61. "And be it enacted, that any person who shall have given credit to the bankrupt upon valuable consideration for any money, or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of 5 per cent., to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted."

743, TINDAL, C. J., says, with reference to the case of a person discharging a partnership debt after a commission of bankrupt issued against his partner,—“The solvent partner, if not properly a surety for his partner’s share, because each is originally liable for the whole, yet may, with strict propriety, be called, as to the share belonging to his partner, a person liable for the debt of another, and in that character would be entitled to prove under the commission:” and he cites *Ex parte Young*, 2 Rose, B. C. 40, and *Ex parte Watson*, 4 Madd. Rep. 477, where the Vice-Chancellor said, that “a solvent partner, winding up the partnership concerns, is to be considered as a surety paying the debt after the bankruptcy, in respect of his previous liability.” So, here, if the plaintiff was not strictly a surety, he was within the act as a “person liable.” In *Wood v. Dodgson*, 2 M. & S. 195, also cited by TINDAL, C. J., in *Affalo v. Fourdrinier*, LE BLANC, J., referring to 49 G. 3, c. 121, s. 8 (which corresponded with 6 G. 4, c. 16, s. 52), says:—“Before the act, the original debt would have been barred by the certificate, and the remedy proposed seems to have been, that when any person at the issuing of the commission, should be surety for, or liable for the original debt of the bankrupt, the bankrupt should be relieved in the same manner from all claims of such person *arising out of the original debt, although the cause of action arose after the bankruptcy.” [379]

DENMAN, C. J. The question in this case is, whether the money which the plaintiff was called upon to pay on his liability under the bond, was money paid to the use of the bankrupt, so that the plaintiff could have proved it under his commission. I am of opinion that it was not. The effect of the fifty-second section of the bankrupt act is, that the party who is to prove must be directly surety, or liable, or bail, for the bankrupt. To graft upon this clause the liability of one co-surety for another on default made by the principal, which is attempted in the present case, would be going to a length which, in my opinion, is not warranted. There was no debt which could have been established against the defendant under the commission. The plaintiff’s liability depended on two contingencies; first, whether the original debtor would pay; and, secondly, whether in his default the co-sureties would be called upon. No direct liability arose till after the bankruptcy; and then I do not see that there was such a liability of the bankrupt to his co-surety as could have been proved under the commission.

LITTLEDALE, J. I cannot see how the plaintiff here could be considered a surety, or liable for the debt of the bankrupt. The co-sureties were not so for each other, but for the principal; and I think the statute contemplates the case where the bankrupt is the principal debtor. It is true that in point of form, when the bond was once forfeited, an action was maintainable against all the obligors; but that did not, in my opinion, *constitute a debt of the bankrupt within the statute. The decision in *Wood v. Dodgson*, 2 M. [380] & S. 195 (that solvent partners, who had been compelled after a dissolution to pay the debt of a bankrupt partner, for which they were jointly liable at law, might prove for it against his estate), went a great way, but the doctrine here contended for would go still further. Again, supposing the bond forfeited at the time of the bankruptcy, and that the parties had been sued upon it, and judgment obtained, and that the penalty stood as a security for further breaches, how could this liability be valued as a debt from the bankrupt to the co-sureties? An annuity for life or years may be valued at any time: but here, although the engagement was to pay at the end of five years, the principal and interest might be called in before. It is impossible to form an estimate of such a contingency, and therefore I think the liability was not matter of proof under the commission, as it was not a subject of valuation.

PARKE, J. I am of the same opinion, though I should readily have come to a different conclusion if there had appeared proper grounds for it. The doctrine contended for on the part of the plaintiff is within the reason of the act, and would be convenient, but it is not borne out by the words. The plaintiff cannot be said to have been liable at the time of the commission for a debt of the bankrupt. The debt then subsisting was the principal’s: the bankrupt was

only a co-surety with the plaintiff and others. It is said the forfeiture before [*381] the bankruptcy created a debt to the obligee. *But on this bond, framed as it was, no debt arose that was capable of being ascertained, beyond the interest due in June, 1829, and that is, as between the obligees, the debt of Channell: as to the principal and future interest, there is no ascertainable debt existing. Notice might have been given at any time during the five years, to pay the principal and interest, and until such notice, or the expiration of the time, it was uncertain what the debt would be. No specific part could have been proved for against the defendant's estate. This is not within the cases where the penalty of a forfeited bond has been made use of as a means of working out the fulfilment of an obligation upon equitable principles, as *Ex parte Fisher*, *Buck's Cases in Bankruptcy*, 188; *Sammon v. Miller*, 3 B. & Ad. 596. There it could be ascertained what was the precise liability of the bankrupt; but in *Taylor v. Young*, 3 B. & A. 521, where the liability under the bond was not capable of valuation, the Court held that there could be no proof in respect of the penalty: and the present case comes nearer to that than to the former ones. It was uncertain what would be due at any particular time, and also, whether or not Channell, the debtor, would perform his duty by paying it. In *Ex parte Young*, 2 Rose, B. C. 40, and *Wood v. Dodgson*, 2 M. & S. 195, the bankrupt, as between himself and his partners, was the principal debtor. No case has yet occurred in which a co-surety has been placed in the situation of a surety. In *Ex parte Hunter*, 2 Glyn & Ja. 7, though Reyner and the Jacksons were sureties to the Bank for Joseph and John Corsbie, the principal debtors, they were, as [*382] between themselves, by the giving of cross acceptances, sureties *for each other; and Lord ELDON therefore held, that Reyner, having paid the bill by which he became, as between himself and the Jacksons, surety for them, was entitled to prove on their estate.

PATTESON, J. I was struck with the analogy between this case and *Wood v. Dodgson*, 2 M. & S. 195, which would certainly have been strong if the whole amount claimed for principal and interest had been payable when the commission issued. But here only a small amount of interest was due at that time. Then for what could these parties have proved against their co-surety? There could have been no dividend but for a proportion of that small amount of interest, which has in fact been paid since, and which forms no part of the present demand. *Browne v. Lee*, 6 B. & C. 689, does not apply; that case arose upon an annuity, and came under the seventeenth section of 49 G. 3, c. 121, which enabled annuity creditors to prove. It was held there that a surety who had been obliged to pay arrears of an annuity, was not an annuity creditor of his bankrupt co-surety, within that clause: but the fifty-fifth section of 6 G. 4, c. 16, was introduced on purpose to afford a remedy in that respect. I cannot see in this case how the plaintiff could be considered a surety for the bankrupt, or how the certificate could be a discharge. Rule discharged.

[*383] *The KING v. The Inhabitants of the County of DEVON. June 10.

Before the stat. 43 G. 3, c. 59, there had been a public county bridge, which was of wood, resting on stone abutments. After that statute passed, the wooden part of the bridge was, during a flood, carried some distance down the river, but the stone abutments remained. Part of the wooden materials being afterwards collected together, were, with new materials formed into the upper part of a bridge, which was wider than it had been before the flood, and placed upon the old abutments. This was done at the expense of the parish, and not under the direction of the county surveyor: Held, that this was not a bridge "erected or built" after the passing of 43 G. 3, c. 59, s. 5; and that the inhabitants of the county were bound to repair it.

INDICTMENT for non-repair of Tipton Bridge, in the parish of Ottery St. Mary, in the county of Devon. Plea, not guilty. At the trial before PARK, Sir ALLAN, J., at the Dorsetshire Spring assizes, 1833, it appeared that, before the 24th of June, 1803, when the 43 G. 3, c. 59, was passed, there had been a

bridge over the river Ottery, on the site of the bridge indicted, used by the public as a carriage bridge, and which the county repaired. The abutments on which the bridge rested, on each side of the river, were of stone, but all the other parts were of wood. In 1807, the wooden part of this bridge was, during a flood, carried some distance down the river, but the abutments remained, and such part of the old wooden work as was fit for the purpose was collected, and some new materials were added, and the whole was replaced on the old abutments. The bridge was made about two feet wider than it was before. This was done at the expense of the parish, and not of the county, and the enlarged bridge had been since used by the public. It was objected, that as the bridge so widened had not been erected or built under the direction of the county surveyor, as required by the 43 G. 3, c. 59, s. 5, the inhabitants of the county were not bound to repair it. The learned Judge directed the jury to find a *verdict of guilty, but reserved liberty to the defendants to move to enter a verdict of acquittal, [*384] if this Court should be of opinion that the objection was well founded. A rule nisi for that purpose having been obtained in last Easter term,

The Solicitor-General and *Elliott* now showed cause. The bridge having been adopted by the public, the inhabitants of the county are *prima facie* bound to repair it. It is said they are not, because the bridge was erected or built after the passing of the act 43 G. 3, c. 59, s. 5, which enacts "that no bridge thereafter to be erected or built shall be deemed to be a bridge which the inhabitants of any county shall be compellable to repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction, or to the satisfaction of the county surveyor;" and that here the bridge was not built under the direction of the surveyor of the county of Devon, and the inhabitants of that county are therefore not liable to repair. That reduces the question to this, whether the bridge is not in substance the same as the one which existed before 1807. The materials of which it is composed being to a certain extent different, does not of necessity destroy the identity of the bridge. All the materials of which such a structure is composed may, by frequent repairs and alterations from time to time, be entirely changed; but it will not, therefore, cease to be the same bridge. The principal object of the enactment was to prevent the increase of the number of bridges which counties are liable to repair. By holding that the county is liable in this case, the number of bridges repairable by the county will not be increased. *The bridge was erected on the same site [*385] as the one which existed in 1803, before the statute 43 G. 3, c. 59, passed, and it consisted principally even of the same materials. *Rex v. The Inhabitants of Lancashire*, 2 B. & Ad. 813, shows that this section of the act does not apply to a bridge widened or repaired; and in that case new materials must be added. *TAUNTON, J.*, said there, "that the enlargement of the bridge did not destroy its identity; it was the same bridge, though wider." That observation applies to the present case.

Crowder and Praed, *contra*. This bridge was erected and built after the passing of the 43 G. 3, c. 59, s. 5, the object of which statute, as appears by the preamble, was to point out precisely the bridges which inhabitants of counties should be liable to repair. The enacting part applies to all bridges there described, which shall thereafter be erected or built. After the flood in 1807, Tipton Bridge had ceased to exist. The abutments which then remained did not constitute a bridge. The bridge indicted was then erected or built, and is, therefore, within the very words of the statute. The 22 H. 8, c. 5, s. 4, enables justices to tax inhabitants of counties for such reasonable sums as they may think sufficient for the repairing, re-edifying, and amendment of bridges. The word re-edify is not in the statute 43 G. 3, c. 59, s. 5. The object of that enactment was twofold: first, to relieve counties from the burden of repairing an increased number of bridges, which, before the act, might have been cast on them by any irresponsible persons who chose to build a bridge which was *afterwards [*386] used by the public; secondly, to prevent the building of insecure and in-

sufficient bridges. Now if, after a bridge has been once built, any person may substitute in lieu of it another, not constructed under the superintendence of the county surveyor, one of the mischiefs contemplated by the legislature may occur. The enactment was intended to apply to bridges rebuilt as well as built. [PARKE, J. What exempted the inhabitants from repairing the old bridge?] It no longer existed. [DENMAN, C. J. Before the wooden part of the bridge was replaced on the old abutments, the inhabitants of the county were liable to repair; if that part was carried away in consequence of their neglect to repair, does that exempt them for the future?] Undoubtedly they might have been indicted, if guilty of neglect, but the parish took on themselves to build a new bridge. [LITTLEDALE, J. Suppose judgment were given for the defendants on the ground that this is a new bridge erected since the statute; the inhabitants of the county were liable to be indicted for not repairing the bridge at the time when the wooden part was washed away; and if it was their duty then to repair the old bridge, and the parish has built a new one under a misconception, the inhabitants of the county are still liable to repair the old bridge. If this be not a county bridge, it might be the duty of the county to prostrate it as a nuisance.]

DENMAN, C. J. I am of opinion that this is substantially the same bridge as that which existed before 1807. The stone abutments of the old bridge have always remained. It is a public bridge, which the inhabitants of the county are, *prima facie*, bound to repair. They say they are not so bound, because it was [*387] erected *or built since 1803, not under the directions or to the satisfaction of the county surveyor, as required by the 43 G. 3, c. 59, s. 5. I think, however, that this is not a bridge which was built or erected in 1807, within the meaning of those words in that statute, but one which was then repaired and re-edified within the meaning of 22 H. 8, c. 5, s. 4.¹ It consists, for a great part, of the same materials which existed before 1807. But the question, whether it be the same or not, depends not so much on the identity of the materials of which the bridge is from time to time composed, as of the identity of the public right of passage over a bridge at that place.

LITTLEDALE, J. In 1801, there was a bridge on the same site as the one indicted, and the inhabitants of the county were bound to repair it. The upper part of this bridge was of wood, and rested at each end on stone abutments. The wooden part was washed away in 1807, but the abutments remained. The inhabitants of the county were at that time bound to repair the bridge, which was then ruinous. If it had been repaired by the county in the manner it was subsequently by the parish, it would have been substantially the same bridge which existed before; and, although it was, in fact, repaired, not by the inhabitants of the county, but by other persons, I think it did continue the same bridge. If, indeed, the abutments, as well as the other parts of the bridge had been destroyed, and an entire new bridge had been built on the same site, I should have doubted, whether such a bridge would *be within the act or not. [*388] The fifth section of the act seems to have had two objects in view: one, that the number of bridges which the county were bound to repair should not be unnecessarily increased; and the other, that individuals or parishes should not take on themselves to build bridges, so as to cast the burden of repair on the county, unless they were properly built, under the directions of the county surveyor. Now, a new bridge built on the site and in lieu of an old one, seems to be within the intention of the legislature, and it is certainly within the words of the statute. It is unnecessary, however, to give a decided opinion on that point, because the bridge here is substantially the same as that which existed before the statute: it not only stands on the same site, but consists in great part of the same materials.

PARKE, J. I am of opinion, that the bridge indicted was not built or erected since the passing of the 43 G. 3, c. 59. The evidence is, that there

¹ See as to the words "rebuild and repair," and "re-edify," *Doe d. Dymoke v. Withers*, 2 B. & Ad. 896.

was not in this case an erecting or building of a new bridge, but a repairing of the old one.

PATTESON, J. This is, in substance, the same bridge as the one which existed before the statute. Rule discharged.

*SIMS and Another v. BOND and Another.

[*389]

Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, and was received as such:

And, therefore, where A. as the managing owner of a vessel, was permitted by the other owners, to have the possession of two warrants or orders of the East India Company, to pay to the said owners or bearer, the sum of money therein mentioned, for freight; and A. deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it in account: it was held, on assumption brought after A.'s death by the surviving part owners against the bankers, that on proof of the above facts, they could not recover the money, because it was not shown that the loan was upon their account; for the fact of the warrants being the property of all the part owners, when placed in the bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan.

ASSUMPSIT for money had and received, money paid, &c. Plea general issue. At the trial before DENMAN, C. J., at the London sittings after Michaelmas term, 1832, it appeared that the action was brought by the plaintiffs, who were surviving part owners of a vessel called the Princess Charlotte, to recover from the defendants, bankers in London, 1750*l.*, the balance of a banking account, kept in the name of Charles Gribble, a part owner, and ship's husband, and 3478*l.* 3*s.* 8*d.*, appearing due from them in an account with John Gribble, his executor. It was proved that Charles Gribble, as ship's husband, was permitted by the owners to have the possession of two warrants for the freight of the vessel, payable by the East India Company, which warrants had been given by the company on a receipt being signed by Charles Gribble and another of the owners, and which were directed to the cashiers of the Bank of England, ordering them to pay to the owners of the Princess Charlotte, or bearer, on account of freight. These two warrants Charles Gribble put into the hands of the defendants, in order that they might receive the money, and place it to his credit in an account opened in his name in the defendants' books. This was done; and on Charles Gribble's death, the *first-mentioned balance appeared due [390] to him upon the account. Afterwards John Gribble opened a new account, as executor of Charles, to the credit of which 3478*l.*, which had been lent by Charles Gribble to his son, out of the money due to him on the account kept in his name, was paid by the son after his father's death. Upon the trial, the learned Judge nonsuited the plaintiffs, on the ground that there was no privity of contract between them and the defendants. A rule nisi for a new trial having been obtained in last Hilary term,

The Solicitor-General, *F. Pollock*, and *Hoggins*, in the course of this term, showed cause. There was no privity of contract between the plaintiffs and defendants. Charles Gribble was intrusted with the possession of warrants by the other part owners, and he deposited them in his own name with the defendants, and they thereby became liable to him, and he to the other owners. There was no privity of contract between all the other owners and the defendants. As to the sum of 1750*l.*, *Sims v. Brittain*, 4 B. & Ad. 375, is decisive. The decision in that case proceeded on the ground that the contract was with Gribble alone. In *Stephens v. Badcock*, 3 B. & Ad. 354, the defendant, an attorney's clerk, authorized by the attorney, received money, which his master was in the habit of receiving for the plaintiff, and gave a receipt for his master; and it was held there was no privity of contract between the plaintiff and the clerk, who took the money as the agent of the attorney, and was accountable to him only.

[PATTESON, J. The question is, whether the defendants, in receiving this money, [*391] *contracted with Gribble alone, or with Gribble and the other part owners. PARKE, J. Is it not in substance the same as if the plaintiffs themselves had received the money and handed it over to Gribble, and he had then placed it in the defendants' hands on his own account?] Gribble alone could sue the defendants, though he might be accountable to the other part owners. The defendants never consented, in fact, to receive or hold the money on account of the other part owners, and the law will not imply such a consent: *Wedlake v. Hurley*, 1 Crompt. & Jer. 83. It is incumbent on the plaintiffs to make out that the defendants contracted with them, or consented to hold the money on their account: *Williams v. Everett*, 14 East, 582; *Yates v. Bell*, 3 B. & A. 648. As to the other sum, which was paid in after Gribble's death, there can be no doubt that the executor, on whose account it was paid in, is the only person who can claim it from the defendants.

Sir *James Scarlett*, *R. V. Richards*, *Follett*, and *F. Robinson*, contra. Gribble was the managing owner of the vessel, and was intrusted with the warrants; he, acting for himself and the other owners, deposited them in the hands of the defendants. The plaintiffs might have maintained trover for those warrants; and, if so, their rights cannot be substantially altered by the warrants having been changed into money. That money belonged to all the part owners; they might all join with Gribble (if he were alive) in bringing an action. If a factor sell goods in his own name, the principal may sue the vendee upon the [*392] contract, or the vendee *may sue the principal seller for the goods. [PARKE, J. There the contract is, in point of law, the contract of the principal; the question here is, whether the plaintiffs were, from the beginning, the contracting parties.] Suppose C. Gribble, instead of placing the warrants in the defendants' hands, had kept the money in a private chest, separate from his own, the money would have been ear-marked, and his executors could not retain it. Per Lord MANSFIELD, in *Howard v. Jemmet*, 3 Burr. 1369. The surviving part owners might have maintained trover, or money had and received: *Taylor v. Plumer*, 3 M. & S. 562. So they may, if, instead of keeping the money in his chest, he has sent it to his bankers. It is sufficient for them to show that it is their money. [PARKE, J. They must show a contract by the defendants to hold the money on their account.] The defendants must have known, from the contents of the warrants, that all the part owners were interested in them. The law will then imply a contract by the defendants to hold the money for the benefit of all the part owners: *Skinner v. Stocks*, 4 B. & A. 437; *Garrett v. Handley*, 3 B. & C. 462; 4 B. & C. 664. The loan to the son was of money which the father had no right to place to any but the partnership account. [PARKE, J. Could you have sued the son?] *Cur. adv. vult.*

The judgment of the Court was delivered in the same term by DENMAN, C. J., who, after stating the facts, proceeded as follows:—

We all think that the nonsuit was right. Sums which are paid to the credit [*393] of a customer with a banker, *though usually called deposits, are, in truth, loans by the customer to the banker: *Carr v. Carr*, 1 Meriv. 541, note; *Devaynes v. Noble*, *Ibid.* 568; and the plaintiffs, who seek to recover the balance of such an account, must prove that the loans were made by them.

It is a well-established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.

This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases; and we do not say that where a person lends money nominally on his own account, but really on account of, and as the loan of another, the real lender may not sue for the money.

But where money is lent by another in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own.

It was incumbent, therefore, in this case, upon the plaintiffs to prove that, when Charles Gribble lent the proceeds of the freight warrants to the defendants, and had them placed to his credit in an account kept in *his own name*, he was acting in that respect as the agent of the plaintiffs, as well as on his own account, and really lending the money to the defendants on the plaintiffs' account as well as his own.

*In this the plaintiffs certainly failed; they only showed that the warrants were, at the time they were placed in the hands of Charles Gribble, [*394] their property: which is quite consistent with the supposition that the loan of the proceeds to the defendants was Charles Gribble's loan. Indeed, it would be very difficult for the plaintiffs to prove that they were the real lenders; for if they had intended to be so, it is natural to suppose that they would have taken care to raise the account in the defendant's books in their own names, or in the name of the "owners of the ship Princess Charlotte."

With respect to the larger sum of 8478*l.*, it is quite clear that this was paid to the bankers as the money of John Gribble, the executor, being a repayment to him of a loan to the like amount by the testator, Charles Gribble, to his son. It therefore was a loan *by the executor*; and the executor only can sue the defendants for this account in a court of law.

We therefore think that the rule which has been obtained to set aside the nonsuit should be discharged.

Rule discharged.

*TAPLEY v. WAINWRIGHT.

[*395]

Trespass for breaking and entering two closes of the plaintiff. Plea, that the said closes in which, &c., were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times, when, &c., to use his right of common thereon; and, because the closes in which, &c., were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that the said closes in which, &c., at the said times, were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time, when, &c., had been and were separated, and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty. Rejoinder traversed this averment, and issue was joined thereon:

Held, that the allegation in the replication, that "the said closes in which, &c., for twenty years and more, had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof, that any part of the closes in which the trespasses were committed had been so inclosed for that period.

DECLARATION in trespass for breaking and entering two closes, to wit, a certain close of the plaintiff called The Croft, and a certain other close of the plaintiff, respectively situate in the parish of Bunbury, in the county of Chester, and trampling down the grass and corn, and breaking gates. Plea, that the said closes in which, &c., were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times when, &c., to use his right of common thereon; and, because the closes in which, &c., were wrongfully separated and divided from the residue of the waste, he broke down the gates. Replication, after protesting that the closes in the declaration mentioned, in which, &c., were not parcel of the waste, and that the defendant had not such right of common, averred that the closes in which, &c., at the said times, were not wrongfully separated and divided from the residue of the waste, but continually, for twenty years and more, and before the first time when, &c., had been and were separated and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty

and adversely, without the exercise of the right of common, and without any entry for or relating to the said supposed *right of common, and that at [*396] each of the said times they were so separated. Rejoinder traversed this averment, and issue was joined thereon. At the trial before BOSANQUET, J., at the Chester Spring assizes, 1832, it appeared that the trespasses complained of were committed over the whole surface of a close, by destroying the crops growing thereon, nine-tenths of which close had been inclosed from the common, and held adversely against the commoners for more than twenty years, but the residue had been inclosed for a less period. It was contended, for the defendant, that, to support the statement in the declaration, that the closes in which, &c., had been separated and inclosed from the waste for twenty years and more, it was incumbent on the plaintiff to prove that every part of those closes on which the trespasses had been committed had been so long inclosed; and for that the dictum in *Hawke v. Bacon*, 2 Taunt. 159, was cited. The learned Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Lloyd, in Easter term, showed cause.¹ It is a well-established rule, that the plaintiff may apply the trespasses proved to any close mentioned by name in the declaration: *Cocker v. Crompton*, 1 B. & C. 489. The dictum in *Hawke v. Bacon*, 2 Taunt. 159, that, on an issue joined upon a replication similar to this, the plaintiff will fail if it appear that any part of the common has been inclosed within twenty years, is of very questionable authority, and must be taken to [*397] apply to those cases only where the trespasses *proved are confined to that part. Now, *Richards v. Peake*, 2 B. & C. 918, and *Bassett v. Mitchell*, 2 B. & Ad. 99, show that the words of the issue, "the said close in which, &c.," mean only the particular place in which the trespasses complained of were committed. It would, therefore, have been sufficient for the plaintiff to prove that the parts actually trespassed upon were inclosed for twenty years; and the question raised in the present case is, whether he be bound to prove that *all* the parts trespassed upon had been so inclosed for that period: which depends upon this, whether the words of the issue, "the close in which, &c.," constitute an entire, or a divisible allegation. If it be an entire allegation, and apply to the *whole* of the close in which the trespasses were committed, the proof is not sufficient. If it be a divisible allegation, and apply to any part of the close in which the trespasses were committed, then it is sufficient. In *Richards v. Peake*, 2 B. & C. 918, *HOLROYD, J.*, intimated an opinion that the allegation was divisible; and in *Bassett v. Mitchell*, 2 B. & Ad. 99, *LITLEDAL, J.*, said, that the allegation, "the close in which, &c.," was applicable to any part of the lands, within the bounds stated in the declaration, in which the plaintiff might show a trespass was committed; and *TAUNTON* and *PATTESON, Js.*, delivered opinions to the same effect.

John Williams and *J. Jervis*, *contrà*. The rule laid down by the Court of Common Pleas in *Hawke v. Bacon*, 2 Taunt. 159, is recognised by the learned editors of *Saunders's Reports*, 5th edition, in a note to *Greene v. Jones*, 1 Saund. 299, b. The issue tendered by the plaintiff is, that *the closes [*398] in which, &c., had been separated from the rest of the waste, and enjoyed in severalty for twenty years. The proof was, that part only of those closes had been separated and held in severalty for that period. The plaintiff was bound to prove, that the whole of the closes had been inclosed and enjoyed in severalty for twenty years. He, therefore, has not proved the issue. To meet the proof given, he ought, as in *Richards v. Peake*, 2 B. & C. 918, to have entered a *nolle prosequi* as to that part of the closes which had been uninclosed within twenty years, and confined the issue to the other parts. *Cur. adv. vult.*

DENMAN, C. J., in this term delivered the judgment of the Court. After stating the pleadings and facts, his Lordship proceeded as follows:—The plead-

¹ Before *DENMAN, C. J.*, *LITLEDAL, J.*, and *PARK, J.*

ings may be considered as if there was one close only mentioned. The plea admits the trespasses in that close; but justifies them, on the ground that the close was still part of the common in point of law. The replication admits that it was so, but insists that the commoners' right of entry was taken away by an adverse possession of twenty years, according to the doctrine laid down in the case of *Creach v. Wilmot*, 2 Taunt. 160, n.; and the question on these pleadings is, whether, in order to maintain this issue, the plaintiff must prove that every part of the close had been separated and divided for that time. We are of opinion that he need not.

The words, "the said close in which, &c.," have been settled, by the cases of *Richards v. Peake*, 2 B. & C. 918, and *Bassett v. Mitchell*, 2 B. & Ad. 99, to mean only the particular place, in *which the trespasses complained of [*399] were committed. Therefore, it is clear that, upon the issue in this case, the plaintiff need not have proved that *more* than the parts actually trespassed upon, which the defendant must be understood to have known when he pleaded to them, were inclosed for twenty years.

Whether he is bound to prove that all the parts trespassed upon were inclosed for that period, depends upon the question, whether this be a divisible allegation.

Now it is clear that, on the general issue, the plaintiff, though he may have meant to insist on the trespasses over the whole of a piece of ground, described by name or abutments, and though he gave evidence of trespasses upon the whole, will be entitled to recover pro tanto, though the jury should find that some only were proved. In the declaration, therefore, the term close is a divisible allegation. It seems highly reasonable, that the same rule should prevail in the replication. The plaintiff, when he avers in it, that the close in which, &c., was inclosed for twenty years, means the same thing as if he had averred, that the trespasses complained of in the declaration were committed in places, each of which had been inclosed for twenty years; and if he succeeds in proving that some of the trespasses were so committed, and some not, why should he not recover for those which were?

The case is analogous to an action for goods sold and delivered, to which there is a plea of infancy, and a replication that the goods were necessaries. If the plaintiff, on the trial, should prove that part only were necessaries, there would be no question as to his right to recover for that part. As, upon the allegation in the declaration, the plaintiff need not prove a sale of all the *goods he alleges to have been sold, so, in the replication, he need not [*400] prove all to have been necessaries.

It appears, therefore, to us, that in this case the plaintiff ought to recover pro tanto. No doubt the parties will agree to apportion the damage found for trespasses upon the whole space, and to reduce the amount, so as to be a fair compensation for the trespasses to the part inclosed for twenty years. This will avoid the necessity of a new trial. If the defendant requires it, the verdict will be entered for the plaintiff as to part, and the defendant as to the other part of the close in which, &c.; and then if our judgment be wrong, the objection will be on the record.

Our decision is at variance with the dictum of the Court of Common Pleas, in *Hawke v. Bacon*, 2 Taunt. 159, which, after much consideration, we think is not founded on sufficient reason, and not supported by the analogy to the plea of *liberum tenementum*, on which it appears to have been founded.

CLUTTERBUCK, Gent., One, &c., Assignee of GINGELL, a Bankrupt, v. COMBES. June 11.

The Court of King's Bench does not exercise any common law jurisdiction in taxing attorneys' bills.

The Court, in the exercise of its statutory jurisdiction, refused to order an attorney's

bill to be taxed at the instance of a third person, where the client had before admitted the amount to be due, and declined taxing the bill; such client having since become bankrupt, and the application being made for the purpose of reducing his claim so as to prevent his being a good petitioning creditor.

THE plaintiff having been employed by Gingell to conduct a cause for him, delivered his bill of costs, and proposed that Gingell should have it taxed, which he declined to do, saying there was nothing to object to. The plaintiff then had [*401] it taxed, and it amounted to 98%. *Gingell afterwards petitioned the Insolvent Court, and filed a schedule, containing an admission of this debt. Before he obtained his discharge, the plaintiff and another creditor (their demands together exceeding 150%) struck a docket against him: a commission issued, under which the plaintiff was appointed sole assignee; and in that character he commenced the present action, to recover a debt due to the bankrupt. The defendant's attorney applied to a judge at chambers for an order to tax the plaintiff's bill of costs; the object being to reduce his claim upon the bankrupt so far, that the demands of the two petitioning creditors should, together, be insufficient to sustain the commission. The order having been made, a rule was obtained in Easter term for setting it aside. There was an affidavit, among others, by the bankrupt, in support of the application, complaining of items in the account, and assigning reasons to explain his not having had it taxed before.

R. V. Richards now showed cause. This Court may order the taxation, by the general jurisdiction which it has, independently of the statute 2 G. 2, c. 23, s. 23. [LITTLEDALE, J. That has been denied over and over in this Court. PARKE, J. The only doubt, when this case was first moved, was, whether the plaintiff had not acquiesced in the taxation.] It was held, in an Anonymous case, 2 Chitty's Reports, 155, that this Court had the power now contended for. [LITTLEDALE, J. There are cases to that effect, but the contrary is now settled.] In *Dagley v. Kentish*, 2 B. & Ad. 411, where the point was referred [*402] *to all the Judges, they did not express any decided opinion against the exercise of the power, and this Court merely declined to interfere in the case then before them. *Wilson v. Gutteridge*, 3 B. & C. 157, is in favor of the general authority of the Court. (He then proceeded to show, from statements which it is unnecessary to go into, that the plaintiff had, by his acquiescence down to a certain time, induced the defendant to proceed with the taxation.)

Godson, contrâ. Such an order as this cannot be made, at the instance of a third party, to cut down a petitioning creditor's debt.

DENMAN, C. J. The rule must be absolute. It cannot be right that a third party should tax a bill which the principal has acquiesced in. But, as the plaintiff has led the defendant to suppose that he assented to the taxation of the bill, he must pay all the costs of that proceeding.

LITTLEDALE and PARKE, Js.,¹ concurred.

Rule absolute.

¹ TAUNTON, J., was at Guildhall, PATTESON, J., in the Bail Court.

[*403] *In the Matter of Arbitration *between* LEEMING and FEARNLEY. June 11.

A replevin suit, and all matters in difference touching the distress, were referred to arbitration; the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed: Held, that the award did not show who ought to pay the costs, which were to abide the event of the suit; and, consequently, that it was not final.

A RULE nisi was obtained in a former term for setting aside the award made between these parties. The award stated an agreement, reciting that differences had arisen between the parties touching the amount of rent agreed to be given

by Leeming as tenant to Fearnley from year to year, of a certain dwelling-house; that an action of replevin was then pending between them in the King's Bench touching a distress made by Fearnley and his bailiff on the goods of Leeming, in the said dwelling-house, for rent said to have been due on the 23d of November preceding; and that the parties had agreed to refer the suit and the matter thereof, and all disputes and differences whatsoever between them touching the said distress, and also the costs of the reference, to the award, &c., of two arbitrators, with power to appoint an umpire; and that the costs of the suit should abide the event of the award. The award then went on to state the nomination of an umpire, who awarded, in substance, as follows:—That the said action shall henceforth cease and be no further prosecuted; that the rent agreed to be given, as above mentioned, was 14*l.*; that the sum of 6*l.* was due for such rent at the time of the distress; that the said sum be paid on, &c., by Leeming to Fearnley; that Fearnley pay the costs of the award; and that, on the respective payments being made, the parties mutually execute general releases of all matters in difference up to the date of the agreement. [*404]
 *Among other grounds for setting aside the award, it was alleged, that the umpire had not made an award for either party in the replevin suit, according to submission, and that he ought to have awarded in that suit in favor of the plaintiff.

F. Pollock and *Milner* now showed cause. The umpire has ordered a *stet processus*, which has been held a sufficient determination of a suit, *Blanchard v. Lily*, 9 East, 497. All that can be objected on the other side is, that the award leaves the rights of the parties uncertain as to costs. But the costs are to follow the event: a sum is awarded as due to the defendant in the suit; and that is sufficiently decisive. [PARKE, J. It does not show that an action of replevin was not maintainable. As to that, nothing is awarded but a *stet processus*. It is consistent with the award that the defendant may have avowed for a different rent from that actually reserved.] The umpire had no power to order any verdict to be entered. [PARKE, J. The costs are to follow the event of the action. LITLEDALE, J. The suit is put an end to; but the event is in favor of neither party.] Where a cause is referred to unlearned arbitrators, the Court will go as far as possible to make their determination available. And, in every case, to invalidate an award, some illegality must appear on the face of it: *Cramp v. Symons*, 1 Bing. 104. This is, in substance, an award that the umpire thought the defendant entitled to a verdict; and that was all he had authority to say. It is sufficient if, looking at the whole award, it appears that the matter is determined; *Jackson v. Yabsley*, 5 B. & A. 848. [*405]
 **Starkie*, contra, was stopped by the court.

Per Curiam.¹ It must appear by the award that the action is finally determined in favor of one of the parties, or else it cannot be ascertained how the costs are to go. The rule may be discharged on the defendant consenting that the award shall be amended by directing a verdict to be entered for the plaintiff in the replevin suit.

Rule discharged; costs of the replevin suit to be paid to the plaintiff; and the award, by consent, to be amended if required.

¹ DENMAN, C. J., LITLEDALE, and PARKE, Js.

The KING on the Prosecution of *BRINDLEY v. DEWHURST*. June 11.

An indictment for a libel on the governor of a parish workhouse was preferred by the direction of the select vestry of the parish; and the defendant having removed it by *certiorari* into K. B., was convicted: Held, that the libelled party was not the "party grieved," within the statute 6 & 6 W. & M. c. 11, s. 8; and therefore was entitled to costs.

INDICTMENT for a libel charging Brindley, the governor of the parish workhouse at Meller, in the county of Lancaster, with having cruelly treated a female

pauper. The indictment was removed by the defendant into this Court, and he having been convicted at the Lancaster Spring assizes, 1833, a rule had been obtained for referring it to the coroner to tax the costs to be paid by the defendant to the prosecutor. A rule nisi had been obtained for discharging that rule, upon affidavits which stated that the prosecution was commenced by the direction, and carried on at the expense, of the select vestry of the parish of Meller; and that Brindley had stated he had nothing to do with the proceedings, *and did not give any instructions for them, and was surprised [*406] when he heard they were commenced.

F. Pollock, now showed cause. The statute 5 & 6 W. & M. c. 11, s. 8, authorizes the Court of King's Bench, where the defendant prosecuting the writ of certiorari is convicted of the offence, to give reasonable costs to the prosecutor, if he be the party grieved. Brindley is the party grieved within the meaning of the statute. It is no answer, that the members of the select vestry might, in the first instance, be liable to pay the costs of the prosecution, for Brindley must have paid them ultimately, either wholly or in part, as a rate-payer.

Alexander, contra. Brindley is neither prosecutor nor party grieved, and he must be both, to be entitled to costs under the statute. The object of the statute was to prevent persons who commenced prosecutions at the quarter sessions or other inferior courts from being put to heavier expenses in the superior courts. The prosecutors, therefore, grieved by the removal of an indictment into this Court, must be those who employed the attorney, and thereby subjected themselves to the expenses of the prosecution. Here the attorney was employed, not by Brindley, the nominal prosecutor, but by the select vestry; the persons composing that vestry, therefore, were the prosecutors grieved by the removal of the indictment. In *Rex v. Cooke*, 1 Man. & Ry. 526, the prosecution had been conducted at the joint expense of various inhabitants of the parish in [*407] which the offence *had been committed; and the Court were of opinion that, as the expenses were defrayed by other persons, and not by the apparent prosecutors, these latter could not be regarded as the prosecutors within the meaning of the act. *Rex v. Edwards*, Hilary term, 1830,¹ is also an authority to show that the nominal prosecutor is not in this case the party grieved. There the indictment was for an assault on a watchman, or constable, within the borough of Derby: the prosecution had been carried on by certain paving and

¹REX v. EDWARDS.

The reporters have been favored by Mr. Dealtry with the following note of the above case.

The defendant was convicted and sentenced on an indictment for an assault on a watchman and night patrol, within the borough of Derby, who was also a constable of the said borough. The indictment was removed by the defendant from the sessions; and he consequently was liable to costs by the 5 & 6 W. & M. c. 11, s. 8, if the prosecutor was a party grieved within the meaning of that statute. The prosecutor took out a side bar rule to tax the costs under the statute. In Hilary term, 1830, the defendant obtained a rule to show cause why that side bar rule should not be set aside, on the ground that the prosecutor was not a party grieved within the meaning of the act; the prosecution having been carried on by the Paving and Lighting Commissioners, acting under a local act of parliament for the borough of Derby; that, although nominally the prosecution was carried on at the instance of the party assaulted, it was, in reality, at the sole expense and by the direction of the above commissioners, and they were not public officers within the meaning of the above statute, prosecuting as such. On cause being shown, it was contended that the prosecution was carried on by the commissioners, whose duty it was to preserve the public peace within the borough of Derby, for a matter connected with their duty as commissioners; and therefore they might be considered as public officers prosecuting for a fact which concerned them as such, within the meaning of the statute.

But the Court were of opinion that the nominal prosecutor, the party assaulted, was not a party grieved within the meaning of the statute; nor were the commissioners public officers prosecuting, as such, within the meaning of the statute, and therefore they discharged the rule.

*lighting commissioners, acting under a local act for that borough, and the Court were of opinion that the nominal prosecutor was not a party grieved within the meaning of the statute, nor were the commissioners public officers prosecuting as such. [*408]

DENMAN, C. J. *Rex v. Edwards*, decides this case.

LITLEDAL and PARKE, Js., concurred.

Rule absolute.

*Doe dem. WILLIAM HENRY LEACH and JAMES WHALLEY
WICKHAM v. FREDERICK WHITAKER. June 12. [*409]

At a court baron, held in 1812, before the steward of a manor, two copyhold tenements were granted to W. R., and J. F., habendum for their lives and the life of the longest liver of them successively, at the will of the lord, according to the custom of the manor, at the yearly rents of 26s. 4d. and 7s., all services therefore due, and a heriot when it should happen; and the said W. R. was admitted tenant; but the admission and fealty of J. F. were respited until, &c.

In 1828, the lessees of the manor, by deed, appointed C. L. steward of the manor, with full power to hold courts baron and customary courts, and to do all acts usual to be done by stewards in relation thereunto; and they more especially authorized him to make any voluntary grants of customary or copyhold lands within or parcel of the manor, and to give licenses to demise, or otherwise, as he, the said C. L., should think fit, and either in or out of court, as fully as the lessees might or could do.

At a court baron held out of the manor, in 1825, J. F. (who survived W. R.) surrendered to the lords lessees the above-mentioned copyhold messuages, and the lessees, by C. L. their steward, granted them again to W. H. L. and J. W. W., habendum for their lives, and the life of the longest liver of them successively, according to the custom of the manor, at the yearly rents of 26s. 4d. and 7s., and all services therefore due, and a heriot for each of the said tenements, when it should happen, according to the custom of the manor; and J. H. L. and J. W. W. were admitted tenants.

Held, that it was no objection to this grant that J. F., the surviving life under the grant of 1812, was never admitted tenant: Nor that two rents were reserved, without distinguishing how much was payable for each tenement, the same rents having been reserved by a former grant in 1771: Nor that a heriot was reserved for each tenement when it should happen, according to the custom of the manor; for if a heriot was not demandable for each tenement, the claim could not be enforced; but that would not avoid the grant.

Held, secondly, that a customary court cannot be held out of the manor unless there be a custom to warrant it; and if one be held out of it without such custom, it is void, and such things there done, as are required to be done at a court, such as presentments by the homage, imposing fines, levying fines, and suffering recoveries, are void. But, thirdly, that, as the lord may grant to, or admit a copyhold tenant, not only out of court, but also out of the manor, the grant of 1825, if it had been made by the lord, would have been good, though it purported to have been made at a void court.

Held, fourthly, that a steward cannot, in his mere character of steward, admit a copyhold tenant out of the manor.

Fifthly, that as C. L., by the deed of 1828, had a special authority to make any voluntary grants, either in or out of court, as fully as the lessees of the manor could do, he might take the surrender, and make the grant in question out of the manor; and that although he professed, in making the grant, to act only as steward, and not as the special agent of the lord, the grant so made might operate as a grant made by the lord's attorney, and was therefore valid.

Sixthly, that although, in general, to make a party tenant by copy of court roll, his admission ought to be notified, for the information of the tenants, at the next or some other court, and a regular entry of it made by certificate, presentment, &c.; yet, as the proceedings at this void court were entered by the steward on the court rolls, as if done at a valid court, the tenants must, at a following court, after the admittance, have had information of what had been done, and that was sufficient.

EJECTMENT for two messuages, two dwelling-houses, and four stables, four hay-lofts, four coach-houses, four out-buildings, and forty acres of land, *situate in the parish of Bampton, in the county of Oxford, which [*410] William Henry Leach, and James Whalley Wickham, demised to John Doe. The property sought to be recovered was a mansion-house, in the parish of Bampton aforesaid, wherein the late Edward Whitaker, Esq., resided, with

certain out-buildings, and a close and garden contiguous thereto. At the trial before VAUGHAN, B., at the Oxford summer assizes, 1827, the jury found for the plaintiff; and also that the mansion-house, &c., were part of a copyhold, called Hanks's; and that the house of William Higgins (called the New Inn, in Bampton), was situate out of the manor of Bampton Deanery. The learned Judge gave the defendant leave to move to set aside the verdict, and enter a nonsuit, upon several objections raised to the plaintiff's title; and on motion made accordingly, in Trinity term, 1828, it was ordered that the following case should be stated for the opinion of this Court:—

The premises in question are copyhold, demisable for two lives and a widow's estate by copy of court roll of the manor of Bampton Deanery. By lease, dated the 1st of May, 1761, the dean and chapter of St. Peter's in Exeter, to whom the manor of Bampton Deanery belongs in fee, demised the manor, with the appurtenances (including therein certain demesne and copyhold lands in Bampton, Aston, Coate, Chimney, and Clarifield, in the county of Oxford), to Jonathan Sheppard and Mary Frederick, for twenty-one years from the 1st of May, 1761, then last, at the rents and covenants therein reserved and contained. By another lease, of the 17th of December, 1768, the dean and chapter, upon the surrender of the above lease, demised the manor to Mary Frederick and [*411] John Baggs *for twenty-one years. By an entry on the court rolls of the 30th of October, 1771, it appeared that, at a court leet and court baron of J. Sheppard, gentleman, and Mary Frederick, spinster, farmers of the said manor, held before W. Stephens, steward, J. Fortescue took the premises in question of the said farmers of the manor, and that they, by their steward, gave seisin of the premises unto J. Fortescue by the rod, according to the custom of the manor, to have and to hold unto the said J. Fortescue and Susanna Frederick for their natural lives, and the life of the longest liver of them successively, according to the custom of the manor, yielding and paying therefor yearly to the said farmers 26s. 4d. and 7s., and all burdens, and customs, and services, therefore due and of right accustomed, and a heriot when it should happen. And the said J. Fortescue was admitted tenant to all and singular the said premises, but fealty was respited.

By lease, dated December, 1775, the dean and chapter, upon the surrender of the lease of the 17th of December, 1768, demised the manor to the said Mary Frederick and John Baggs for twenty-one years, at and under the rents and covenants therein reserved and contained.

By lease, dated 5th of October, 1811, the dean and chapter demised the aforesaid manor and premises, with the appurtenances, to A. E. M. Atkins, Edward Whitaker, and several others, for the term of twenty-one years, at and under the rents and covenants therein reserved and contained. Pending this lease, the lessees, by writing, appointed Frederick Whitaker, the defendant in the present action, steward of the manor; and, also, pending the said lease, it appeared, by an entry on the court rolls, that at a court baron held on the 15th [*412] of *October, 1812, before F. Whitaker, steward, the homage presented, that W. Roberts at that court took of the lords farmers of the manor, the premises in question therein particularly described; and that they the farmers, by their steward, gave seisin of the premises to the said W. Roberts, by the rod, according to the custom of the manor, to have and to hold the said premises to W. Roberts and J. Francis for their natural lives, and the life of the longest liver of them successively, at the will of the lords, according to the custom of the manor, by and under the yearly rents of 26s. 4d. and 7s., payable as therein mentioned, and all burdens, customs, and services therefore due and of right accustomed, and a heriot when it should happen; and that for such estate in the premises, the said W. Roberts had given to the said lords farmers 5s., and was admitted tenant; but his fealty, and the fealty and admission of John Francis, were respited until, &c.

By lease, dated the 8th of May, 1819, the dean and chapter, as well for and
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in consideration of the surrender of the said lease, dated the 5th of October, 1811, made and granted by the dean and chapter unto the said A. E. M. Atkins, Edward Whitaker, and others, for the term of years then enduring, and also for divers other good causes and considerations, demised the aforesaid manor and premises, with the appurtenances, to the said A. E. M. Atkins, E. Whitaker, &c., and to E. Leader, N. Roberts, and others, as joint tenants, their executors, &c., for twenty-one years from the 25th day of March, 1818, at and under the rents and covenants therein reserved and contained, and the lessees accepted that lease.

On the 25th of September, 1823, all the above lessees, by deed, made and appointed Charles Leake *steward of the aforesaid manor, with full power [*413] and authority from time to time to hold courts baron and customary courts for the same manor and its members, and to do all acts usual and customary to be done by stewards in relation thereto, accounting from time to time for such fines, heriots, reliefs, forfeitures, amerciements, and other manorial profits, as should be received by him, and which should not have been ordinarily retained by the stewards for the time being of the said manor, and did especially authorize and empower the said C. Leake from time to time to make any voluntary grant or grants of all or any customary copyhold lands or tenements within, or holden, or parcel of the said manor, and to give a license or licenses to demise or otherwise, as he, the said C. Leake, should think fit, and either in or out of court, as they, the lords, might or could do; and also to appoint any deputy steward of the said manor; and also to depute any person or persons to act under him as sub-deputy steward of the said manor, as occasion might require. And they thereby ratified and confirmed all and whatsoever the said C. Leake, or such his deputy or deputies, sub-deputy or sub-deputies, should lawfully do or cause to be done in the premises.

It appeared by an entry on the court rolls, that, on the 24th of July, 1824, at a court baron of A. E. M. Atkins and E. Whitaker, and the other farmers of the manor, holden before C. Leake, steward, the homage presented, that W. H. Jones and J. Roberts, by J. L., their attorney for such purpose appointed, and in consideration of 5s., took of the lords farmers of the manor aforesaid the premises therein particularly described, which premises were then holden for the life of John Francis, surviving the before-named W. Roberts, *deceased, [*414] by virtue of the grant made at the court holden in and for the said manor, on the 15th of October, 1812; and that the lords farmers, by their steward aforesaid, had given seisin of the premises in question by the rod, according to the custom of the manor, to have and to hold the said premises to W. H. Jones and J. Roberts, &c., from and after the decease of the said John Francis, for the natural lives of G. Whitaker and H. Bullen, and the life of the longest liver of them successively, at the will of the lords, according to the custom of the said manor, at the yearly rents of 26s. 4d., and 7s., payable as therein mentioned, and all burdens, customs, and services therefore due and of right accustomed, and a heriot when it should happen; and for such estate in the premises, the said W. H. Jones and J. Roberts gave to the said lords farmers the aforesaid sum of 5s., and were by the said J. L., their said attorney, admitted tenants, but their fealty was respited until, &c. And so (saving the right of the lords) the said W. H. Jones and J. Roberts were acknowledged to have taken such reversionary estate as aforesaid.

By an entry on the court rolls of the 2d of May, 1825, it appeared that, at a special court baron of A. E. M. Atkins and Edward Whitaker, and others, lords farmers, holden at the house of W. Higgins, called the New Inn, in Bampton, within the manor aforesaid, before Charles Leake; the homage, E. B., R. D., and R. W., being sworn, John Francis, W. H. Jones, and John Roberts (by J. L., their attorney), customary tenants of the said manor, in open court surrendered into the hands of the lords farmers, by the acceptance of their said steward by the rod, according to the custom of the said manor, the premises

[*415] therein described (being those in question), *to the intent that the lords farmers, might regrant the same to W. H. Leach and J. W. Wickham, to hold to them, Leach and Wickham, for their natural lives, and the life of the longest liver of them successively, at the wills of the lords, according to the custom of the said manor; to which said W. H. Leach and J. W. Wickham, the lords farmers, by their said steward, granted seisin by the rod, to have and to hold the premises in question unto the said W. H. Leach and J. W. Wickham, for their natural lives, and the life of the longest liver of them successively, at the will of the lords, according to the custom of the said manor, at the yearly rents of 26s. 4d., and 7s., payable as therein mentioned, and all burdens, customs, and services therefore due and of right accustomed, and a heriot for each of the said tenements when it should happen, according to the custom of the said manor; and for such estate, so to be had, the said W. H. Leach and J. W. Wickham gave to the lords farmers 5s., and by the said W. Higgins, their attorney for this purpose appointed, were admitted tenants, but their fealty was respited, until, &c.

W. H. Leach and J. W. Wickham were the lessors of the plaintiff. The question for the opinion of the Court was, whether they were entitled to the possession of the premises sought to be recovered; and, if the Court should be of opinion that they were so entitled, the verdict was to be entered for the plaintiff; if the Court should be of a contrary opinion, then a nonsuit.

The case was argued in Hilary term, 1832, before Lord TENTERDEN, C. J., LITLEDALE, TAUNTON, and PATTESON, Js., and, by direction of the Court, re-argued¹ in last Easter term, by

[*416] *Preston for the lessor of the plaintiff. It may be objected to the grant of May, 1825, that it was made at a court held out of the manor; and, therefore, that the court being void, all the acts done at it were so. Where an act must necessarily be done in court, as a customary recovery, the validity of the court is essential to the validity of the act; but the lord may make a grant of or admittance to a copyhold in or out of court, or in or out of the manor, at what place he pleases. The grant is his act, and binds him alone. The common law as to surrenders of freehold is thus stated in *Shepard's Touchstone*, 306:—"It is further, also, required in every good surrender, that if it be made by word and without deed, that then it be made in the same county where the land to be surrendered doth lie; but by writing a man may make a surrender of lands that do lie in any other county, and in what place soever it doth lie." So livery of seisin must be made in the land or in sight of it, so that the jury of the county may be able to try it. Here the homage is to try the validity of the grant. Now, what difference does it make to them or the public whether the grant be made in or out of court? The homage may try the validity of the grant equally well in either case. But it may be said that, although the lord might make such a grant out of the court, or even out of the manor, the steward cannot: and the fourth resolution in *Melwich's case*, 4 Coke, 26, b, will be cited, to show that the steward of the court of a manor cannot, at any court held out of the manor, make grants or admittances. *Clifton v. Molineux*, 4 Rep. 27, a, may also be cited, to show that the

[*417] court, and all the grants and admittances made at *such a court, are void, because the court of the manor ought to be held within it. But the decision there was a more sweeping one than the case required; and *Melwich's case*, 4 Rep. 26, b, was relied upon. Now, in that case (which is also reported in *Cro. Eliz.* 102), the Court were not called upon to consider what would be the effect of a grant made at a void court, when the grant would be good even though it were made out of court. The point necessary to be decided there was, whether the lord could, at his manor of Harbridge, make a valid grant of tenements in Eastworth, they having been severed from the manor of which they had formed part. In *Lord Dacre's case*, 1 Leon, 289 (cited by

¹ Before DENMAN, C. J., LITLEDALE, and PARKER, Js.

Lord HOLT in *Parker v. Kett*, 12 Mod. 472), it was said in argument, and assented to by the whole Court, that a customary court may be held out of the manor. In Bro. Abr., tit. Court Baron, pl. 23, it is said, "if an under-steward hold a court baron and grant copyholds to the tenants without authority from the lord or the chief-steward, it is good, because it is done in full court; but it is otherwise where it is done out of court without such authority:" and Bro. Abr., tit. Tenant per Copy of Court Roll, pl. 26, is to the same effect. That shows that an authority to make the grant will be implied where the under-steward appointed by the lord makes it in full court; but where he makes it out of court, no such authority will be implied. In *Watkins on Copyholds*, tit. Grants, p. 29, it is said, "In order to enable the steward to grant, it is not enough that he be steward de facto, he must have a lawful authority;" and in page 30, "The bailiff of a manor cannot, as such, *make a grant by [*418] copy; for such a power does not appertain to his office, which was instituted for other purposes;" and he then says, "It is said that an under-steward cannot grant out of court, without a special authority or custom enabling him so to do." But these dicta show that, if there be a special authority or custom, it is sufficient. The whole question is, as to the authority. A steward, as incident to his office, may take a surrender out of court, or even out of the manor. What difference is there, whether it be a surrender or admittance? The court, merely as such, adds no efficacy to the grant: the efficient part is the delivery of seisin. But, further, if the lord may make a grant out of court, and out of the manor, he may authorize his steward to do so: and here the lords farmers, by the deed of September, 1823, gave C. Leake a special authority to make grants either in or out of court, as fully as they could do. He therefore had power to grant in or out of court, or in or out of the manor; and the grant, when made, enures, and may be pleaded as a grant by the lord; not merely, as it imports, by the steward. In early times instruments could operate only in the precise way pointed out by the parties; but now, where a deed cannot operate in the way contemplated by the parties, it will be construed so as to effectuate the intention, if possible, in some other way. *Osborn v. Churchman*, Cro. Jac. 127; *Marshall v. Frank*, Gilbert's Eq. Rep. 143; *Goodtitle v. Bailey*, Cowper, 597. So, here, the grant made by the steward at a void court may operate and *enure as a grant made by the lord. The objection that two rents are reserved, without distinguishing how much is payable for each tenement, [*419] cannot prevail, for the same rents were reserved in the grants of 1771; and it may, therefore, be intended that such distinct rents have always been reserved. Then, as to the heriots: by the grant, a heriot is reserved for each tenement, when it shall happen, according to the custom. If a heriot is not due for each tenement by such custom, it cannot be claimed.

Scriven, Serjt., contra. The grant of the 2d of May, 1825, is void for the following reasons:—First, because it was made on the surrender of John Francis, the survivor named in the grant of the 15th of October, 1812, and it does not appear that he ever was admitted the lord's tenant. Secondly, because the court at which it was made was void, inasmuch as it was held out of the manor, and therefore all the acts done at it were void. Thirdly, a steward, even though he has a special authority to make grants out of court, cannot make a grant out of the manor. Fourthly, no authority was given to the steward, beyond that of doing the acts usually done by a steward in court and out of court. Fifthly, the grant, even if it could be considered an act done out of court, was void and inoperative for want of presentment and enrolment of it at a subsequent court, legally holden within the manor. And, sixthly, it is void for want of reservation of the usual services. As to the first point, the grant is void because it is made on the surrender of John Francis, who had no title to the copyhold, never having been *admitted. Secondly, the court held by the steward [*420] of the manor is void. The following authorities show that a steward cannot grant or admit at a court held out of the manor. *Melwich's case*, 4

Rep. 26, b, fourth resolution, recognised in *Clifton v. Molineux*, 4 Rep. 27, a; the Duke of Suffolk's case, cited by POPHAM, J., in *Sands v. Drury*, Cro. Eliz. 814; Co. Litt. 58, a; and Gilbert's Tenures, 250.¹ In *Marke v. Salyard*, Tot-bill, 45, edit. 1820, a copyhold granted at a court out of the manor was confirmed in equity against the lord who made it; so that there the party was compelled to seek relief in equity even against the lord by whom the grant was made. In 1 *Watkins*, 252, under the head of "Admission," it is stated, that "as the presence of the tenants is not necessary on the admission of a copyholder, the lord or steward may admit out of court as well as in." And afterwards, in p. 253, "It is acknowledged that the lord himself may admit out of the manor; and though it is said that a steward cannot do so, yet most of the cases evidently suppose such admission to have been at a court held out of the manor. Now, it is clear that a court cannot be held out of the manor, unless it be by special custom, as where a court is held in one manor for a whole honor in which there are several manors; and therefore this reasoning does not apply to an admittance merely as an admittance, as an admittance may most certainly be out of court. And as to the case of *Tukeley v. Hawkins*, 1 Ld. Raym. 76, so far as it relates to this point, it seems to be completely answered by the [*421] *reasoning in that of *Dudfield v. Andrews*, 1 Salk. 184, which appears to apply as strongly to an admittance as to a surrender." Now, *Dudfield v. Andrews* is an authority only to show that a steward may take a surrender out of the manor as well as out of court; and it is conceded he may do so out of the manor, note 387, to Co. Litt. 58: but there is a distinction between a grant and an admittance. The admittance completes the title, but the surrenderee takes only from the surrenderor. A grant supposes the estate to have got back to the lord, and to be reunited to the manor. The lord may, perhaps, authorize the steward to grant, but the grant alone is not legally operative. If the lord himself granted out of court and out of the manor, and delivered the rod, or accustomed symbol, the delivery of the symbol would be equivalent to livery of seisin under a feoffment; but, nevertheless, the grant would be only an inchoate act until enrolment, and would not alone be legally available. Secondly, conceding that acts done at a court held out of the manor are good as acts done out of court (which seems contrary to the decision in *Clifton v. Molineux*, 4 Rep. 27, a,) and that the lord himself may admit or grant out of the manor, the steward cannot even admit out of the manor: and, supposing that an authority may be given by the lord to the steward to do acts, not only out of court, but even at a void court, here no authority was given to the steward to make voluntary grants out of court: and without a special authority, a steward can only perform acts ministerially in court. The steward here was empowered "to make any voluntary grant of customary or copyhold lands or [*422] tenements, *and to give a license or licenses to demise or otherwise, as he should think fit, and either in or out of court, as fully as the lords might or could do." Now, the words, "either in or out of court," apply only to the giving of licenses. It is usual for the lord and steward to grant licenses, or dispensations of forfeiture, out of court, and beneficial that it should be so; but it is not necessary that grants should be made out of court. Assuming, however, that the deed of 1823 gave C. Leake an authority to make grants out of the manor, as the special agent or attorney of the lords farmers, the grant in question neither was, nor purported to have been, made in pursuance of that authority: it professes, on the face of it, to have been made by C. Leake, acting in his character of steward, at a court where the homage were sworn; it cannot operate, therefore, as an execution of the special authority given to Leake to make grants as the lord might do. But, further, a grant made out of court, with delivery of the rod or other symbol of investiture, is not legally operative until certified and enrolled at a legal court, so as to form part of the rolls of the

¹ See all these authorities referred to in the judgment.

manor: Calthrop's Readings,¹ p. 36, 37. Therefore, even if the grant can be considered as an act done out of court, still the plaintiff had no legal title at the time of bringing the ejectment, inasmuch as the grant of 1825 had never been presented and enrolled at any court legally holden, so as to constitute the grantee tenant by copy of court roll. The nature of the tenure requires that every act should be entered on the roll of the court. If the court at which the acts were done was void, then the *acts should have been presented and enrolled at some subsequent court: but here no court was held subsequently to the void court at which the grant was made. In *Kitchin on Copyholds*, 165, it is said, "The high steward may admit out of the court by special usage and custom within the manor used; for one which holds by copy of court roll ought to have his estate entered in the court roll, and his admittance to be entered in the court; and for that, if the under-steward or the high steward which hath no patent, as above, take surrender out of the court, and present that in court, and the tenant be in the court admitted, it is good, for it is the lord, by his steward, hath admitted, and the admittance makes a copyholder, and the entry of that in court makes him tenant by copy of court roll; for copyholder is he which holdeth by copy of court roll." In *Co. Copyholder*, s. 46, it is said, "The power of the steward goeth beyond the power of the under-steward, that the steward can make an admittance out of court, and it shall stand good if entry be made in the court roll, that he that is admitted hath paid his fine, and hath done fealty; but the under-steward, though he may take a surrender out of the court, yet he cannot make any admittance out of court without special authority or particular custom." In *Watkins*, vol. i. p. 81, it is said, "If admittance be immediately made by the lord or steward taking such surrender, yet such admittance should be regularly notified at the next court day, for the information of the tenants. This, too, was more immediately necessary in ancient days, as, in case the tenants should have known any objections to the person so admitted, of which the lord might have been *ignorant, they might have informed him of them; from which he might [*424] have been induced to resume the estate, as having conferred it on a person who was unworthy of the grant. Add to this, that it must be regularly inserted on the court rolls of the manor, by a copy of which he is to hold." And it has been held that a surrender out of court to the use of his will, made by the surrenderee of a copyhold before his admittance, is of no effect, and cannot be made good by his subsequent admittance: *Doe v. Tofield*, 11 East, 246. [*LITTLEDALE, J.* You apply your argument, also, to grants by the lord himself.] They are not evidence of title until they are entered on the roll. [*LITTLEDALE, J.* Suppose there be a distinction as between grants made by the steward and by the lord; a private individual may make an attorney for special purposes: and may not the instrument of September, 1823, be considered a general power of attorney to act for the lord in these matters?] It might, but the grantee would not become a copyholder by the delivery of the mere symbol, unless there were evidence of the grant on the manor rolls. There can be no legal evidence of a grant without showing that it has received the character of a court roll. The delivery of the symbol would not alone be evidence of the seisin. So a feoffment could not be proved by a person merely having seen livery of seisin.

But, again, the grant is void for want of the reservation of the usual services. First, two rents are reserved, without distinguishing how much is payable for each tenement; and, secondly, a heriot is reserved for each tenement, whereas one heriot only was reserved *by the grants of 30th of October, 1771, [*425] 15th of October, 1812, and the 24th of July, 1824.

Preston, in reply. It was unnecessary for Francis, who was the grantee in reversion by the copy of 1812, to be admitted tenant. *Roe dem. Cosh v. Loveless*, 2 B. & A. 453, is express on that point. Then, assuming that a grant

¹ Printed with Coke's Copyholder, 5th edit., 1650.

made by a steward at a court held out of the manor is void, and that the grant in question cannot operate as a grant made by the steward; still, in order to effectuate the intention of the parties, it may operate as a grant made by C. Leake, acting as the agent of the lords farmers, in pursuance of the special authority given to him by the deed of 1823. And the grant, being made by the steward in execution of these powers, is entered, in fact, upon the court rolls. To say that the rolls in the particular instance are not those of an actual court, is no objection. They are documents for the information of the lord. It is for him to see whether or not the steward has properly exercised his powers. There is no ground for saying that the authority to the steward is only to grant licenses in or out of court. [LITLEDAL, J. The language of the instrument is perfectly clear as to that point. PARKE, J. The last words are not confined in construction to the last antecedent.] *Cur. adv. vult.*

DENMAN, C. J., now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows: The question to be considered *is, whether the verdict can be sustained on the demise of W. [*426] H. Leach and J. W. Wickham,¹ who were admitted as customary tenants of the premises in question on the 2d of May, 1825.

The objection is, that the grant of the 2d of May, 1825, is void: First, because it was made on the surrender of John Francis, the surviving life in the copy of the 15th of October, 1812, and the grantee in reversion; and it was not shown that John Francis was admitted the lord's tenant, although his admission was expressly reserved by the grant of the 15th of October, 1812: secondly, because the grant was voluntary, and no authority was shown in the steward of the manor to make such a grant: thirdly, because the court was held out of the manor, though expressly alleged in the grant to be held within it: fourthly, because two rents are reserved without distinguishing the particular tenements liable thereto respectively, and because a heriot for each tenement was reserved by this grant, whereas one heriot only was reserved by the grants of the 30th of October, 1771, the 15th of October, 1812, and 24th of July, 1824.

As to the first of the objections, that John Francis, the surviving life in the copy of the 15th of October, 1812, is not shown to have been admitted the lord's tenant, although his admission was reserved by the grant of the 15th of October, 1812, we are of opinion that there was no necessity for a formal entry of the admission of John Francis. The case of *Roe on the demise of Cosh v. Loveless*, 2 B. & A. 453, is not exactly in point as *to this question, yet [*427] the principles there laid down will be found applicable to this question. It was an ejectment for copyhold premises. The plaintiff, in support of his case produced a copy of the court rolls of the manor, dated the 13th of June, 1789, by which it appeared that Richard Kiddle and Sarah, his wife, took of the lord the reversion or remainder of and in the premises in question therein described as being then in the tenure of them, the said Richard Kiddle and Sarah Kiddle, his wife, to have and to hold to James Cosh, aged nineteen years, for the term of his natural life, at the will of the lord, according to the custom of the said manor, immediately after the death, surrender, or forfeiture of the said R. Kiddle and S. Kiddle, his wife, by yearly rent, &c.; and the said R. Kiddle and S. Kiddle, gave to the lord, for a fine, 37*l.* 12*s.*, and it was granted in form aforesaid. The plaintiff then proved the death of R. Kiddle and his wife. It was objected, on the part of the defendant, that the admittance of Cosh ought to have been proved, to give him the legal title. The Judge directed the jury to find for the plaintiff, reserving liberty to the defendant to move to enter a nonsuit. In giving judgment upon this case, Lord Chief Justice ABERTON says, that, "by the general law of copyhold, the lord has a right to insist that the tenant shall come in to be admitted, and do fealty and homage;" and, after some other observations, he goes on: "but where the lord makes an ori-

¹ There was another demise, on which judgment went by default.

ginal grant, no admittance to a copyhold, conformable to the custom of the manor, seems necessary, except in cases analogous to those where livery of seisin would be requisite in the grant of a freehold. Now a feoffment is not effectual till livery *of seisin takes place; but a freehold may be granted in reversion without any livery of seisin, and, therefore, reasoning by analogy [*428] from the grant of a freehold, it seems to me that the grantee of a copyhold in reversion has a good and perfect title by the grant without admittance; and that being so, he may take possession on the death of the tenant for life."

And, without more particularly noticing the opinions of the other Judges, we think the principles upon which that case was determined, warrant us in saying that there was no necessity for John Francis to be admitted.

As to the objection, that two rents are reserved without distinguishing how much is payable for each tenement, we think that no ground of objection: the rents are the same as reserved in the year 1771, and no distinct objection is stated to the rents being so severed, and we cannot intend but that they may always have been so.

Then with regard to the heriots: a heriot for each tenement is reserved when it shall happen; if the circumstances do not occur that a heriot is demandable for each tenement, the claim cannot be enforced, but it does not make the grant void.

The principal objection is, that the grant of the premises in question was made at a court held before the steward out of the manor. And it is contended, that any court held out of the manor is a void court, and all the proceedings in it are void also; and even if it were not a void court, or if the lord himself could grant out of the manor, independent of the court, still the steward could not do so.

The first question then is, whether a copyhold court *can be held out of the manor. It seems to be quite clear, that a court baron of free- [*429] holders cannot be held out of the manor.

In Co. Litt. 58, a, it is said, "The court baron must be holden in some part of that which is within the manor; for if it be holden out of the manor, it is void, unless a lord being seised of two or three manors, hath usually, time out of mind, kept at one of his manors courts for all the said manors; then by custom such courts are sufficient in law, albeit they be not holden within the several manors. And it is to be understood that this court is of two natures. The first is by the common law, and it is called a court baron, as some have said, for that it is the freeholder's or freeman's court (for barons in one sense signify freemen), and of that court the freeholders, being suitors, be judges; and this may be kept from three weeks to three weeks. The second is a customary court, and that doth concern copyholders, and therein the lord or his steward is the judge."

In Clifton and Molineux's case, 4 Co. 27, a, it was resolved, "that if a court be held by a steward of a manor out of it, and divers grants and admittances there made, the court and all grants and admittances are void, for the court of the manor ought to be held within the manor, and not out of the jurisdiction of it, which agrees with the resolution of the fourth point before in Melwich's case. But it was resolved that by custom the court may be held out of the manor, and grants and admittances made there good enough, as divers abbots, priors, &c., used to *hold courts at one manor for divers several manors, [*430] and good by custom."

The case of Melwich is reported in Cro. Eliz. 102, and the matter seems to have been compounded; and it is again mentioned in Bright v. Forth, Cro. Eliz. 442, and is there mentioned as a strange judgment; but the case in Cro. Eliz. appears rather to have been upon the freehold of the copyholds being divided from the rest of the manor, and the effect that would have upon the copyholds. In Sands v. Drury, Cro. Eliz. 814, in giving judgment, it was said that it was adjudged in the time of Queen Mary, in the case of the Duke of Suffolk, that

where one had two manors, and granted a copyhold of the one manor, at the court of the other manor, it was a void grant; for it cannot be a copyhold according to the custom of a manor whereof it is not parcel. But Gaudy doubted thereof, and considered it would have been well enough if it had been so used from time whereof, &c.; but that was not found, and therefore no title in the defendant.

But in Lord Dacre's case, 1 Leon. 289, it was held that a customary court may be held out of the precinct of the manor, for no pleas are holden, which was agreed *per totam curiam*. But this was not the point in discussion, which was as to the appointment of a steward. The reason, also, there given, does not seem to be a good one, for the holding of pleas is not the only reason why it should be held within the manor. And in fact the court does hold pleas of land, as fines levied, and recoveries suffered in the copyholders' court.

[*431] *It would be attended with the greatest inconvenience if suitors were compelled to go a great distance to attend the court; and if proclamations were made affecting the copyhold tenants, they would not necessarily know of them, if they were made off the manor.

We do not enter into any consideration of the cases where the freehold of the copyholds has been severed from the manor; a good deal of uncertainty seems to prevail as to them, and whether courts may be held off the manor for the admittance of the copyhold tenants: they stand upon their own particular circumstances.

This question has engaged the attention of Chief Baron GILBERT. In his *Treatise on Tenures*, p. 250, he says: "A lord may make a grant or admittance of a copyhold out of the manor, at what place he pleases; but the steward cannot at a court held off the manor make any grants or admittances; and in 1 Coke Inst. 58, a, he says that a court baron cannot be held off the manor unless the lord hath two or three manors, and hath usually kept court at one for all, which plainly shows that a lord cannot make admittances or grants at a court held off the manor, no more than the steward. For Coke says, that if the court baron be held off the manor, it is void, and he there speaks of a court baron as including the copyholders' court, where the steward is judge. But, as hath been said before, a lord may make admittances or grants out of the manor, at what place he pleases, which are Coke's words, and must be understood not at a court, but at some other time, or else he contradicts himself. It is held, that if the inheritance of copyholds be granted to one, he may hold courts where he will; for [*432] it is no longer a court baron, and that the lord or his steward may grant copies out of court as well as in court. And as the case is reported by Croke, the grant was at a court held at another manor. But, as Coke reports it, though the grant be at another place, yet it is not said to be done at a court. So quære, whether a steward may make grants by copy out of a court; but if a steward can, an under-steward cannot." And in page 319, he says:—"My Lord Coke says, that the lord may make admittances and grants by copy at what place he pleases, but the steward of the manor at any court held off the manor (for out of the court it is said by him, in another place, he may make admittances and grants by copy), cannot make any admittances or grants by copy. This seems to imply that the lord may make by copy, grants and admittances, at a court held off the manor; or else where is the difference between the case of the lord and the steward? and in the next case but one it is resolved, that if the steward at a court held off the manor make any grants or admittances, they are all void: but he says nothing of the lord. In his comment upon Littleton he says the court baron must be held upon the manor, else it will be void. As Melwich's case is reported by Croke, it is there said, that if the lord grant away the freehold of his copyholds, the grantees may hold courts where he will to make admittances and grants. If then a grant by copy or admittance should be made at a court held off the manor, though it be a court baron, why should it be void? since a court baron contains in it two courts, one for the freeholders,

the other for the copyholders; and since that for the copyholders as to granting copies, &c., may be held off *the manor, there is no reason that because [*433] the court baron is void, that therefore the admittance should be void; for they are two distinct courts, and the admittance had been good, had the court been only the copyholder's court. And if we look back to the reason of the thing, if an admittance may be made at a place off the manor, why not at a court held off the manor? for it is no judicial act; if it were, surely it must of necessity be done in court; and therefore it was held per totam curiam, that a court to do these things might be held off the manor: it is not distinguished in this case between the grant of the lord or steward: but Coke is express that grants by stewards at courts held off the manor are void. *Ideo quære de hoc?*"

Taking the whole of these authorities into consideration, though there is some want of clearness among them, we think that a customary court cannot be held out of the manor, unless there be a custom to warrant it. But though the court be a void court, that only affects such things as are required to be done at a court, as presentments by the homage, imposing fines and amercements, levying fines, suffering recoveries, &c.; but as to many other things, though they are correctly done at a court, it is not essential they should be so. And amongst these things it has been held, that the lord may grant to or admit a copyhold tenant, not only out of court, but also out of the manor: the fourth resolution in *Melwich's case*, 4 Co. 26, b. It was, therefore, competent for the lord himself to have admitted, or made a grant to these persons out of the manor, without *any consideration of a court, and if he had gone alone to this [*434] house, and these persons had come there, he might have made out a grant to and admitted them, and have delivered seisin by the rod, and thus have completed two of the ingredients towards making them tenants by a copy of court roll. But, supposing instead of that, either by mistake as to the house not being within the manor, or under other circumstances, twenty or thirty persons, one of whom called himself the crier, some other bailiffs, beadles, or officers, and some homagers, had assembled there about the lord, and the crier had made proclamation to open a court, and had sworn persons to be of the homage, and the lord had given a charge to those persons as the homage, and they had made presentments, and had imposed fines and amercements, and fines had been levied and recoveries suffered, all which would have been void; and then these lessors of the plaintiff had offered themselves to receive a grant, and the lord had made and signed a grant and admitted them, and had delivered seisin by the rod;—the question is, whether all this machinery of a court would have invalidated the grant, or whether it would have been mere surplusage, and the grant and seisin remained valid; and we are of opinion that as there are effectual words of grant, and an actual seisin delivered, all this statement about the court is only to be considered as surplusage, and that the grant and seisin would be effectual. Thus, therefore, it would be if the lord himself had made the grant.

But the grant itself, or admittance, not being made by the lord in person, it is necessary to consider whether *it was made by an authorized person. [*435] And the first question upon that is, whether the steward of a manor can admit out of the manor. It should seem that he may take a surrender out of the manor, *Howsego v. Wild*, 1 Roll. Abr. 500, F. 3. And so it would appear by *Dudfield v. Andrews*, 1 Salk. 184. It is so taken in *Tukely v. Hawkins*, 1 Ld. Raym. 76, and the Court say that a custom to the contrary would be void. That is perhaps going a good way, for in *Dudfield v. Andrews* it is only by reasoning and queries that it is thought proper the steward should have such a power. But as to an admittance out of the manor, *Tukely v. Hawkins*, 1 Ld. Raym. 76, is express that the steward cannot admit out of the manor. And the fourth resolution in *Melwich's case*, 4 Rep. 26, b, and *Clifton v. Molyneux*, 4 Rep. 27, a, are to the same effect, though in these cases it is said that the steward cannot admit at a court held out of the manor. *Watkins*, in his *Trea-*

tise on Copyholds, vol. 1, p. 253, seems to incline to the opinion that a steward may admit out of the manor; but it is only by putting queries and reasoning that he supports that opinion. But we are of opinion that a steward cannot, in his mere character of steward, admit out of the manor.

But, in the present case, Leake, who made the grant, derived his authority from the deed of the 25th of September, 1823, by which the lessees of the lord of the manor appointed him steward of the manor, and besides giving him the usual powers and authorities to hold courts, and to do all acts usual and customary to be done by stewards, they more especially authorized and [*436] empowered him from time to time to make any voluntary grant or grants of all or any customary or copyhold lands or tenements within, or holden, or parcel of the said manor, and to give a license or licenses to demise or otherwise as he, the said Charles Leake, should think fit, and either in or out of court, as fully as they might or could do. And though, from one part of the instrument, it seems doubtful whether the powers conferred upon him are not merely an enlarged explanation of what his duties are as mere steward, yet, upon the whole of the instrument, we think it amounts to putting Leake in the capacity of attorney to represent the lord as to surrenders, grants, and admittances, and that whatever the lord might do Leake might do also, and that he therefore might take the surrender and make the grant in question off the manor. But it may be said that Leake, in the document, does not profess to act as the general attorney of the lord, but only as steward; and that, as steward alone, he could not make the grant: but, as to that, he had the authority; and, as in common parlance he would be called steward, who is generally taken to represent the lord as to copyhold matters, we think the calling himself steward is sufficient, and that it was not necessary to say that he acted as the general attorney of the lord.

But, besides making the grant or admittance and delivery of seisin, it is necessary, in order to make the person tenant by copy of court roll, that the admission should be notified for the information of the tenants at the next court, or some other court, according as the custom of the manor may be; and an entry of it should be made, either by a certificate of the lord, or the [*437] steward, or presentment by the homage. None of these have been done: but then the proceedings at this supposed court are entered by the steward in the court rolls as if done at a court, and therefore at the following court after the admittance, the tenants have information of what has been done, through an incorrect medium, but we think it sufficient.

An objection may be made, that nothing done at this supposed court should be allowed to have any effect, as it has a tendency to create a custom to hold a court out of the manor; but, if such were adopted again, it is probable the tenants would object to it: this supposed court could be no evidence of such a custom, because, if the court rolls were produced, it would appear that the court was held within the manor. Besides, even if it had a tendency to introduce such a custom, we do not think that it could affect the validity of the admittance if it were otherwise sufficient.

Upon the whole of this case, although this irregular proceeding has brought the parties into considerable difficulties, we think they may be got over; and that the lessors of the plaintiff are entitled to judgment.

Judgment for the lessors of the plaintiff.

[*438] *The KING v. The Trustees of the CHESHUNT Turnpike Roads.

Mandamus lies to admit a clerk of trustees under the general turnpike acts.

A RULE nisi had been obtained for a mandamus to the above trustees, to admit Richard Jordan into the place and office of their clerk.

F. Pollock and *W. H. Watson* showed cause (June 11th) against the rule, which was supported by the Solicitor-General and Sir *James Scarlett*. In opposition to the rule it was argued that a clerk to turnpike trustees had not, by the general turnpike acts (under which these roads were managed), such a tenure in his office, as could render it properly the subject of a writ of mandamus. On the other hand it was urged that under the provisions of the acts, and particularly 4 G. 4, c. 95, s. 43, and 9 G. 4, c. 77, s. 15, the clerk had a valuable estate in his office; that by 4 G. 4, c. 95, s. 39, the order appointing such clerk could not be revoked without certain notices and formalities, nor without the assent of a greater number of trustees than concurred in making the order; and that the case was entirely different from that of a vestry clerk (*Rex v. The Churchwardens of Croydon*), 5 T. R. 713, who had no lasting interest in his office, but might be elected merely *pro hac vice*.

The Court, on consideration of the clauses referred to, and particularly on a comparison of sections 43 and *39 of 4 G. 4, c. 95, were of opinion [*439] that a mandamus lay; and they consequently made the rule absolute.¹

¹ In Hilary term, 1829, the Court granted a rule nisi for a mandamus to the trustees of the Hincksey turnpike roads (Berkshire) to admit certain persons to the office of clerks to the said trustees. Cause was shown in Trinity term following, and the Court directed the matter in dispute to be tried on a feigned issue, which being found against the prosecutors of the mandamus, the rule was ultimately discharged with costs.

The KING *v.* The Justices of CHESHIRE. June 12.

An adjudication of justices under 11 G. 2, c. 19, s. 4 (inflicting penalties for fraudulently removing goods to avoid a distress), is an order, and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form.

A RULE had been obtained, calling upon the justices to show cause why a mandamus should not issue, commanding them to enter continuances and hear the appeal of Richard Oxton against an order of two justices, dated the 11th of February, 1833, by which he was required to pay Sir Thomas Stanley Massey Stanley, Bart., 72*l.* 5*s.*, being double the value of goods fraudulently removed by the said R. O. to prevent their being distrained for rent due to the said Sir Thomas. It appeared by affidavit that an order was made as above upon the said R. O., pursuant to 11 G. 2, c. 19, s. 4, under the hands and seals of two justices, who, on the same day, gave R. O. a copy of the order. He appealed against it, first giving the justices due notice. The appeal was entered on the third day of the sessions; the last day, according to the practice there, for entering appeals. The original order was defective in point of form. On Monday, the first day of the sessions, the two justices caused a new and different order (but not varying as to the facts or nature of the offence) to be filed with the clerk of the peace, giving notice of it on the same day to the appellant. The appeal came on to be heard on the Saturday, and the appellant handed in *the original order, and proved his notice of appeal; but the [*440] respondents contended that the second order was the only one of which the Court could take notice; and the sessions so held. The new order was then confirmed without opposition.¹

¹ The original order was intended to follow the precedent (No. 9) in 1 Chitty's Burn, p. 1009, tit. Distress for Rent, xxi., but was inaccurately framed. The amended order was as follows:—

"Whereas T. W. of P., in the county of Chester, Gent., agent for and on behalf of Sir Thomas S. M. Stanley, Bart., did, on, &c. at, &c., duly make and exhibit before me the Rev. R. M. F., clerk, being one of his Majesty's justices, &c., residing near the place whence the goods and chattels hereafter mentioned were removed, and not being interested in the premises hereinafter mentioned whence the same were removed, his complaint and information in writing against R. O. of, &c., laborer, thereby setting forth," &c. (stating the charge laid in the information, viz. that one W. O. was indebted to Sir

**Cottingham* now showed cause against the rule. Justices may return [441] a conviction to the sessions in a more formal shape than that in which it was drawn up, although a copy has been delivered to the party convicted, *Rex v. Barker*, 1 East, 186; and the copy so returned to the sessions is the only one which that Court ought to notice, *Rex v. Allen*, 15 East, 333. The instrument returned here, is drawn up as an order, because the statute so directs, but it is in substance a conviction. [PARKE, J. The moment the justices have put their hands and seals to it, meaning it to be an order, it is one, and must be subject to the same rules.] Being substantially a conviction, it is within the reason of *Rex v. Barker*, 1 East, 186, and ought, like a conviction, to be returnable in an amended form. The error here, in the original instrument, was a mere mistake, and if it could not have been corrected, the sessions would have had to adjudicate upon an order which was absurd on the face of it. [DENMAN, C. J. They must have done so if it was the order appealed against. If an order of removal were absurd, could a new one be filed at the sessions? The absurdity of the instrument cannot increase the power of the justices. PATTESON, J. In *Rex v. Bissex*,¹ it was expressly held that an instrument of this kind was to be treated as an order, and not as a conviction.]

Whitcombe, contra, was stopped by the Court.

DENMAN, C. J. The strongest point in favor of the respondents is, that the [442] statute directs the justices to *determine whether or not the persons be guilty, which certainly makes the proceeding very like a conviction. But still the adjudication is to be by an order. One distinction between an order and a conviction is decisive; namely, that, in a conviction, evidence is set out, upon which the Court of Appeal is to form a judgment: in an order, none is stated. The document here is only an order; and the consequence is, that the party affected had a right to appeal against it in the form in which it was made. The rule must be absolute.

LITLEDAL, PARKE, and PATTESON, Js., concurred. Rule absolute.

T. S. M. S. for rent of certain premises occupied by the said W. O., and that the said rent being in arrear R. O. did wilfully and knowingly assist him in fraudulently removing from the premises six cows, the goods and chattels of the said W. O., being under the value of 50*l.*, and of the value, &c., with intent to prevent their being distrained for the said rent). "And thereupon the said R. O. being duly summoned to appear before two of his Majesty's justices of the peace in and for the county of Chester, on, &c., at, &c., to answer the said complaint and information; and the said R. O. having appeared accordingly before us the said R. M. F. and the Rev. U. C., clerk, being two of his Majesty's justices, &c.: now we the said justices residing, &c., and not being either of us interested, &c., in the presence of the said R. O., having heard and examined the witnesses produced by the said T. W. upon oath (we the said justices having then and there full power and authority to administer the oaths to the said witnesses) touching the said complaint and information, and having heard what was alleged by the said R. O. in his defence, and having also inquired in better manner upon oath the value of the said cows, and upon due consideration had in the premises, do hereby adjudge that the said R. O. is guilty of the offence with which he is charged in and by the said complaint and information, according to the form of the statute, &c.; and the said justices do adjudge and order the said R. O. to pay to the said Sir T. S. M. S., Bart., the sum of 72*l.* 5*s.*, being double the value of the said cows, goods, and chattels in the said complaint mentioned, on or before the 18th day of February now next, &c. In witness whereof we the said justices to this order have put our hands and seals, at, &c., on," &c.

Signed and sealed by the two justices.

¹ *Chitty's Burn*, 986, note (a), tit. Distress for Rent, *V. Sayer's Rep.* 304.

The KING v. The Duke of BEAUFORT. June 12.

A custom for the jurors of a court leet holden for a borough and manor, to present persons to be admitted burgesses of the borough, and for the persons so presented to be admitted and sworn in burgesses, was held, on motion in arrest of judgment, to be valid in law.

MANDAMUS to the defendant, lord of the borough and manor of Loughor, in

the county of Glamorgan, and to the steward and port-reeve, recited that the borough and manor of Loughor was an ancient borough and manor, and, by immemorial usage and custom used in the borough, the jurors of the court leet holden for the borough and manor of Loughor have and exercise, and of right ought, &c., the privilege and authority of presenting persons to be admitted burgesses of the said borough; and by such immemorial usage and custom the persons so presented by the jury to be admitted burgesses have been used to be and of right ought to be sworn in by the steward of the borough and manor, and admitted burgesses thereof; and further recited *that one T. Walters, [*443] on the 2d of May, 1828, was, by the jury of the court leet holden for the borough and manor, presented as a fit person to be admitted a burgess of the borough, and in respect thereof, according to such immemorial usage and custom, had a right to be sworn in and admitted a burgess of the borough, and that he had, since such presentment, demanded to be sworn in and admitted, but had been refused: it then commanded the defendants to cause him to be sworn in and admitted. The lord and steward, after denying the custom stated in the mandamus, returned, as the immemorial custom used in the borough, that "all persons admitted or claiming to be admitted burgesses have been and ought to be presented by the jurors, previous to their being admitted and sworn as burgesses of the borough; but that no person by the said jurors presented to be such burgess has been or ought as of right to be sworn and admitted a burgess, except persons being sons of burgesses of the borough, born after their fathers have been sworn in burgesses, and persons married to the daughters of burgesses, born after their fathers have been so sworn in, and persons having served apprenticeships for the term of seven years to burgesses of the borough, residing during such apprenticeship within the borough, and which persons have been used and ought to be thereupon duly presented by the said jurors to be admitted burgesses of the borough. The return then stated that Walters did not come within any one of these classes of persons, and that he was not qualified to be admitted a burgess on any presentment of the jurors, and that he was not duly presented by the jurors to be of right thereupon *admitted. The return [*444] of the port-reeve is not material. The prosecutor, by his plea, denied that the custom was limited, as in the return was alleged; and upon that issue was tendered and joined. At the trial before ALDERSON, J., at the Spring assizes for the county of Glamorgan, 1832, the jury found a verdict for the crown. A rule nisi was afterwards obtained to arrest the judgment, upon the ground that the custom stated in the mandamus was bad, inasmuch as the effect of it was to constitute the leet jury of the borough and manor of Loughor electors of the freemen for that borough, which jury might possibly consist of persons, none of whom were corporators, or even inhabitants of the borough.

E. V. Williams in this term showed cause. The custom stated in the mandamus is good. In *Rex v. Rowland*, 3 B. & A. 130, a plea to a quo warranto stated that a court leet was, in part, holden in the morning and in part in the evening; and that the usage had been to elect a burgess to be mayor at the morning court; and it was proved, in addition, that a jury of the leet used to present the person elected to be sworn in by the steward at the evening court, which burgess had been accustomed to be sworn into the office of mayor, at such evening court, by the steward or his deputy; and the only objection there taken was, that the latter usage ought to have been stated in pleading, as a necessary part of the custom. In *Rex v. Joliffe*, 2 B. & C. 54, a similar custom, as to the nomination of jurors, was stated, and no objection taken. There is no reason why the king should not grant the court leet for the manor and borough, authority to *present persons to be admitted burgesses of the borough, nor [*445] why such persons should not be admitted: and, if such a grant would be good, a custom which may be presumed to have originated in such a grant may be equally so.

Ludlow, Serjt., and *Whitcombe*, contra. The single question is, whether the

custom stated in the mandamus be good; and the Court ought to see affirmatively on the face of the record that it is so. *Rex v. Bird*, 13 East, 384, shows that a by-law is void which purports to give a voice in the election to any person who does not possess it under the custom or charter, as if it be given to the recorder when not a corporate officer, but merely a legal adviser: and Lord ELLENBOROUGH there says, "He may be a stranger to the corporation, and therefore there could be no delegation of the elective power to him." It is clear that the leet jury may consist of strangers: in *Comyn's Digest*, tit. Leet, G. 1, it is stated, "that if there be not twelve present in the leet a stranger may be sworn on the inquest, and the steward may compel a stranger travelling within the leet to be sworn." Besides, the prosecutor's plea negatives the custom stated in the return, which would limit the power of the leet to the appointment of persons falling within the three specified classes. In order, therefore, to support, in point of law, the custom relied on by the crown, it must be maintained that a body of strangers to a corporation may possess the right of compelling the admission into it of any persons they may think fit to select, though *such persons also may be wholly unconnected with the corporation.

Cur. adv. vult.

DENMAN, C. J., now delivered the judgment of the Court. After stating the custom set out in the mandamus, and the return and traverse, his lordship proceeded as follows:—The case was tried before my brother ALDERSON, at the assizes for the county of Glamorgan, and a verdict found for the crown. A motion was afterwards made in arrest of judgment, upon the ground that the custom stated on the record was bad, inasmuch as the effect of it was to constitute the leet jury of the borough and manor of Loughor electors of the freemen for that borough, which jury may possibly consist of persons none of whom are corporators, nor even inhabitants within the borough. It does not appear upon the pleadings whether the borough and manor are co-extensive, but it does appear that one leet jury serves for both; and we must presume that such jury is properly and legally constituted. We have examined the authorities which bear upon this subject, none of which are directly in point, and which need not therefore be cited; and we are of opinion, that there is nothing unreasonable or illegal in a custom which gives to the leet jury of the borough (although it be also the jury of the manor) the right of electing the members of the corporation, in whom the government of that borough is vested.

The existence of the custom has been found by the verdict, and therefore judgment must be entered for the crown. Judgment for the crown.

[*447] *COTTLE v. WARRINGTON, Clerk. June 12.

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of Yorkshire, to secure payment of an annuity, need not be registered under 8 G. 2, c. 6; for though it may be enforced by sequestration, the benefice is not affected by the judgment.

The judgment was for 1800*l.* The warrant of attorney provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a sequestrari facias thereupon, it appeared that at that time the former creditor had by sequestrations levied more than 1800*l.* for arrears of his annuity, and there were arrears still due. The Court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor: and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l.*, levied before the signing of his judgment.

In Michaelmas term, 1832, *W. H. Watson*, on behalf of Messrs. Meggison, Pringle, and Manisty, creditors of the above-named defendant, obtained a rule calling on the plaintiff, on one Charles Metcalfe, and on the Archbishop of York, to show cause as follows, viz.:

Why the said Archbishop should not forthwith suspend the several sequestrations by him granted at the suit of the plaintiff, and now remaining unsatisfied, so far as the same relate to or affect the vicarage and parish church of Leeke, in the North Riding of the county of York; and why he should not make a return to the writ or writs under which the said plaintiff (or Charles Metcalfe of, &c., in the name of the plaintiff), has received the profits of the said vicarage since the 10th of August last, and show what has been levied thereon; and why the amount so levied should not be paid over by the said C. Metcalfe to the said M. P., and M.; and why the said archbishop should not forthwith execute a writ of sequestrari facias issued at the suit of the said M., P., and M., and levy the debt and damages in the said writ mentioned, out of the growing profits of the said vicarage; and why it should not be referred to the Master of this Court to ascertain what sums of money the said C. Metcalfe hath from time to time *levied and received under and by virtue of writs of execution or sequestration from time to time issued in pursuance of a judgment obtained [*448] by the plaintiff James Cottle against the defendant, upon a warrant of attorney dated the 9th of August, 1811; and why, if the master shall find that he hath levied or received more than 1800*l.*, he should not refund the surplus, and pay to the said M., P., and M., so much thereof as may be necessary to satisfy their said debt and damages (the said defendant consenting thereto), and pay the residue, if any, to the defendant; and why the said C. Metcalfe should not cause satisfaction to be entered upon the roll of the judgment so obtained by the plaintiff against the said defendant, and why he should not pay the costs of this application.

It appeared that the defendant, by indenture of the 9th of August, 1811, in consideration of 900*l.*, granted to the plaintiff an annuity of 150*l.*, payable as therein mentioned, and charged upon the vicarage of St. Lawrence Jewry, London, for ninety years, if the defendant should so long live; and covenanted that, if he should exchange that vicarage for any other living, he would charge the latter with the annuity. He also executed a warrant of attorney, of the above date, to suffer judgment in an action of debt for 1800*l.* at the plaintiff's suit; with a memorandum or defeazance, stating that the said warrant of attorney was given for securing to the plaintiff, his executors, &c., an annuity of 150*l.* for the defendant's life, by equal quarterly payments on, &c., as mentioned in an indenture of the same date, between, &c.; and it was thereby agreed, that no execution should issue upon such judgment unless and until some quarterly payment of the said annuity should *be in arrear thirty days, and then, [*449] and in every such case it should be lawful for the said plaintiff, his executors, &c., from time to time to sue out execution for the recovery of the arrears of the said annuity, and every part thereof, and all costs and charges attending the non-payment thereof, see *Colebrook v. Layton*, 4 B. & Ad. 578; and it was thereby also agreed that from and after the decease of the defendant, and full payment of the arrears and costs, the plaintiff, his executors, &c., should, on the request and at the cost of the defendant's heirs, executors, &c., acknowledge satisfaction of the said judgment on the record. The plaintiff sold the annuity for 800*l.* to Metcalfe, who, in February, 1814, sequestered the vicarage of St. Lawrence Jewry by virtue of a judgment entered up in the plaintiff's name, on the warrant of attorney. In November following the defendant exchanged that vicarage for the vicarage of Leeke, which, in the ensuing May, was sequestered for payment of the annuity, and continued under sequestration, on the same account, down to the present time. In November, 1818, the defendant, at Metcalfe's request, executed a deed, charging the annuity on his vicarage of Leeke, by way of substitution for the vicarage of St. Lawrence Jewry, making such annuity payable to Metcalfe, his executors, &c., and covenanting with him for the payment thereof. A memorial of this indenture was registered in the North Riding of Yorkshire, pursuant to 8 G. 2, c. 6, in the same month of November. The said Metcalfe, by virtue of the judgment en-

tered up in the name of the plaintiff, issued from time to time divers writs of sequestrari facias; and the defendant, in his affidavit, *stated his belief [*450] that the amount levied under such writs exceeded 1800*l.*, and that the judgment had been long ago satisfied.

The defendant was also indebted to Messrs. Meggison, Pringle, and Manisty, as his attorneys, in the sum of 500*l.* for business done, and advances; to secure which he gave them a warrant of attorney, dated August 9th, 1832, to suffer judgment for 500*l.* and costs. Judgment was entered up thereon by Meggison, Pringle, and Manisty, on the 10th of August, 1832, and a memorial of such judgment registered in the registry for the North Riding, pursuant to the statute. They afterwards issued a *fi. fa.* upon the judgment, directed to the sheriffs of London, who returned *nulla bona*, and certified that the defendant was a beneficed clerk, &c. M., P., and M. then sued out a writ of sequestrari facias, directed to the Archbishop of York, commanding him to sequester the vicarage of Leeke, and hold the same till he should have levied their debt and damages out of the profits. At the time of the present application the last-mentioned writ remained in the Archbishop's hands, ready to be executed so soon as the writ or writs of sequestrari facias issued in the name of the plaintiff, at Metcalfe's instance, should be satisfied, or the sequestrations issued thereon should be relaxed. There was no judgment against the defendant registered in the North Riding, except that obtained by Messrs. Meggison, Pringle, and Manisty.

Metcalfe, in his affidavit in opposition to the rule, stated that he had caused several writs of sequestration to be issued on the judgment obtained by him, and sequestrations to be granted thereon, for levying the arrears of annuity [*451] *upon the vicarage of Leeke, but only such arrears (with costs) as from time to time had become and were due at the time of issuing such sequestrations, and not for levying the penalty of 1,800*l.* in the warrant of attorney and judgment mentioned; and that a large amount still remained due to him in respect of the sums directed to be levied under the said writs of sequestrari facias, and sequestrations; and that he claimed to retain the rents and profits received by him, towards payment and satisfaction of the said several arrears, and to collect such rents and profits until his demands should be fully satisfied. Metcalfe also suggested that the exchange of St. Lawrence Jewry for Leeke, was made for the purpose of defeating the sequestration on the former vicarage.

Kelly, in Easter term last, showed cause. The first ground laid for this application is, that the judgment entered up in the name of the plaintiff, not being registered, is fraudulent and void as against the registered judgment of Meggison, Pringle, and Manisty, by the provision of 8 G. 2, c. 6, s. 1; and, consequently, that the writs ought to be set aside. But the case is not within that statute. The statute was intended to prevent the secret conveyance or incumbering of lands; and it requires the registration of all deeds and conveyances, judgments, &c., whereby any lands, tenements, or hereditaments may be any way affected in law or equity. The proceeding upon this judgment begins with a *fi. fa.*, to which the sheriff returns, that the defendant is a beneficed clerk, having no goods in the bailiwick upon which a levy can be made, and then the [*452] writ issues for sequestering the ecclesiastical goods. It *cannot be said that this judgment "affects the lands" within the meaning of the statute. As to the other point, that Metcalfe has received more than 1,800*l.*, and that nothing beyond that sum ought to have been levied, it may be proper, in the first instance, that the Master should ascertain what has in fact been received.

W. H. Watson, contra. The words of 8 G. 2, c. 6, s. 1, extend to all "honors, manors, lands, tenements, and hereditaments," and require a memorial to be registered of all deeds, conveyances, judgments, statutes, and recognisances, "of or concerning, or whereby" such lands, &c., "may be any way

affected in law or equity." [PARKE, J. Suppose there are two judgments, and the party who has obtained the later judgment first sues out execution. Which execution would have the priority?] The first sued out. [PARKE, J. Then the judgment does not affect the lands. LITLEDALE, J. How can it be said that a judgment affects the glebe of a vicarage?] The *feri facias de bonis ecclesiasticis* issues on a judgment; on that writ a sequestration issues, whereby the profits of the land may be taken in the same manner as the profits of the land were taken at common law, by a writ of *levari facias*, *Arbuckle v. Cowtan*, 3 Bos. & Pul. 421. It is difficult to say how the land can be more immediately affected. [PARKE, J. To come within the meaning of the statute, the judgment ought to bind the lands. Here that was not the case. Nor was the living affected, in the sense of the act, by the judgment.] The words in the statute, "in any way affected in law or in equity," were meant to have an operation beyond *the word "bound." If the land was not immediately, it was [*453] immediately, affected by the judgment.

The Court,¹ however, being of opinion that the judgment did not need registration, referred it to the Master to ascertain what had been levied under the writs sued out by Metcalfe.

The Master now reported that Metcalfe, down to August 10th, 1832, had levied 2,393*l.*; and *Watson* moved that the report should be confirmed, and that so much of his rule as was not already disposed of by the proceedings which had taken place, should be made absolute.

Kelly showed cause. By the terms of the defeazance of the warrant of attorney, the plaintiff was to be at liberty from time to time to levy the arrears of the annuity. The judgment was, therefore, a mere security, by virtue of which the arrears might be levied. When the arrears had been levied, then the judgment, by the agreement of the parties, might be put in force for future arrears. The judgment has only been enforced for levying the arrears. [PARKE, J. The judgment may be a security; but you cannot levy in all above the amount. If the arrears, at one time, had amounted to 2,000*l.*, it is clear you could not have levied above the penal sum.] This is not like an ordinary judgment. By the defeazance to the warrant of attorney it is agreed that no execution shall issue till some quarterly payment be in arrear thirty days; and in every such case it shall *be lawful for the plaintiff from time to time to sue out execution for the arrears: and satisfaction is only to be entered up in [*454] the particular event stated. At any rate, the Court cannot be asked to order that Metcalfe should pay back what he has received to the parties making this application, for there are large arrears of the annuity. This is an application to the equity of the Court. [LITLEDALE, J. How can it be said that this is an application merely to the equity of the Court? Suppose an action had been brought upon the judgment, and payment pleaded, the plaintiff could not have recovered more than the penal sum. After the whole penal sum had been levied, the parties might be trespassers for levying on another sequestration. PARKE, J. On suggestion of breaches under the statute of 8 & 9 W. 3, c. 11, the plaintiff might have a *sci. fa.* from time to time for subsequent breaches and execution; but in all he could not recover or have execution on the judgment beyond the penalty.] To order the surplus to be paid to the present applicants would debar Metcalfe from his equity on that fund against the defendant, to which fund Messrs. M., P., and M., have no right.

W. H. Watson, in support of the rule, contended, that the surplus levied ought to go in discharge of the debt due to Messrs. Meggison, Pringle, and Manisty, as the defendant was entitled to it, and had assented (by the rule of Court) to the surplus being paid over.

*Per Curiam.*² These parties cannot be placed in a better situation than if an

¹ DENMAN, C. J., LITLEDALE, and PARKE, Js.

² DENMAN, C. J., LITLEDALE, PARKE, and PATTERSON, Js.

[*455] application had been made by *them immediately on obtaining their judgment, to enter up satisfaction on the record. The rule will be, that satisfaction be entered on the judgment roll as of and up to the 10th of August, 1832; and that the Archbishop of York pay over to Messrs. Meggison, Pringle, and Manisty, all sums levied on the vicarage in question since that day, towards satisfaction of their judgment, giving priority therein to their writ.

Rule absolute accordingly.

SIGGERS v. BRETT, Clerk. June 12.

Sections 87, 88, of the first general rule of Hilary term 2 W. 4, relating to the discharge of prisoners in the custody of the marshal of the King's Bench and warden of the Fleet, who are supersedeable, apply only to persons within the walls of the respective prisons.

THE defendant, being a prisoner within the rules of the King's Bench prison, applied to be discharged as supersedeable, pursuant to section 88, of the first general rule of Hil. T. 2 W. 4, 3 B. & Ad. 387. The plaintiff objected, on the ground that the defendant had agreed not to supersede the action; to which it was answered, that no notice of that agreement had been given to the marshal, as required by the same general rules, section 87. Cause was shown against the discharge, upon summons before PATTESON, J., at chambers; and the learned Judge there decided that the question of notice was immaterial, inasmuch as the 88th rule only applied to prisoners within the walls; but he left it to the defendant to move this Court if he should be so advised. A rule was accordingly obtained, calling on the plaintiff to show cause why the defendant should [*456] not forthwith *be discharged out of the custody of the marshal as to this action, being supersedeable therein.

R. V. Richards now showed cause. The rule only applies to prisoners in the "actual custody" of the marshal. Those are the words used in the rule, sect. 87, which applies to all the cases contemplated in the 88th; and actual custody must mean imprisonment within the walls, as distinguished from confinement with benefit of the rules. The mischief which this rule of Court was intended to counteract, was, that persons voluntarily remained within the walls of the prison, when there was no real cause for their detention.¹

Channell, contra. The construction which is contended for attaches too much importance to the word "actual." A person within the rules is in custody; he is under restraint, and his going out without proper sanction would be an escape as much as if he were within the walls. The alleged purpose of the rules, viz. to keep the gaols clear, does not appear from the rules themselves. [PATTESON, J. I was of opinion that the eighty-seventh section of the late rules of court, [*457] was only a repetition of the rule of Mich. T. 57 G. 3, 5 M. & S. 522, introduced *for the purpose of extending that rule to the Courts of Common Pleas and Exchequer. And the rule of 57 G. 3, was intended only to remedy an inconvenience arising under the rule of Trin. T. 56 G. 3, there referred to.²

¹ The affidavit of the plaintiff's attorney stated his information and belief that before the making of the rules of Court on this subject, it was the practice of many persons to cause themselves to be arrested and committed to the prisons of the King's Bench and the Fleet for the purpose of keeping shops therein, and to enable them to hold lucrative appointments in the said prisons, such as cook, kitchen-keeper, racket-master, nine-pin-master, and others; and that the said rules were made to enable the marshal and warden to discharge any person who might be in such voluntary confinement.

² The rule (which is only in part recited in 5 M. & S. 522) is as follows:—

Trin. T. 56 G. 3. Whereas, by a rule of this Court made in Trinity term in the twenty-first year of his present Majesty's reign, it was ordered that the marshal of the Marshalsea of this Court do not suffer the wives or children of any of the prisoners to lodge in the prison under any pretence whatsoever; and whereas, notwithstanding the above order of this Court, a practice has prevailed for the wives and children of the prisoners to lodge in the prison, even without special leave or permission given them by the mar-

Now the early part of this last-mentioned rule (of which only the last clause is given in the books of practice) refers wholly to persons *within the walls; it would seem, therefore, that the concluding part was meant to [*458] have the same application.]

DENMAN, C. J. I think, upon comparison of the rules of Court, that the regulation in question applies to persons within the walls; and it appears to me that the words "actual custody" must have that sense.

LITLEDAL, J., concurred.

PARKE, J. It appears clearly, from the several rules, that the occasion of making them was to prevent the prisons being too full.

PATTESON, J. I am of the same opinion; and a learned Judge (BAYLEY, J.), who was on the bench of this Court when the rule of Trin. T. 56 G. 3, was made, told me the reason of it was, that the Court constantly found the King's Bench Prison full of persons who were supersedeable, and would not go out.

Rule discharged.

shal for that purpose; and whereas it is expedient that the due execution of that rule should be revived and strictly enforced, except for some special cause, to be judged of and allowed by the marshal, and afterwards notified to the Judges of this Court; it is therefore hereby ordered by this Court, that no persons except the prisoners, lodge or continue during the night in the prison, unless by the permission of the marshal for special cause, which shall be presently written in a book and signed by him, and laid before the Judges of this Court in their Chamber at Westminster Hall, within the first four days of the term next ensuing, for which permission no fee or gratuity shall be taken by any person whatsoever; and it is further ordered, that the marshal do keep a book, wherein shall be regularly entered from time to time the number of persons sleeping in each room, which book shall be in like manner laid before the Judges of this Court within the first four days of each term; and it is further ordered, that the marshal take care that the prison doors be shut and locked for the night, at nine of the clock every evening, except in term time, and then at ten of the clock, and that the coffee-room and tap-room be shut and locked at ten of the clock every night, except in term time, when the same may continue open until half-past ten. And it is further ordered, that the marshal present to the Judges of this Court in their chamber at Westminster Hall within the first four days of every term, a list of all such persons as are supersedeable, showing as to what actions, and what account, they are so, and as to what actions (if any) they still remain not supersedeable.

TESSIMOND v. YARDLEY. June 12.

The act 1 W. 4, c. 21, "to improve the proceedings in prohibition," does not enable this Court, where a party has declared in prohibition and succeeded, to grant him his costs incurred in the Ecclesiastical Court.

THE plaintiff, a churchwarden, commenced proceedings against the defendant in the Consistory Court of Lichfield, for the recovery of church rates. A question of boundary being raised by the defendant, the *plaintiff afterwards [*459] obtained a rule of this Court calling on him (the plaintiff) to declare in prohibition; which he did, and obtained a verdict. The Master, in taxing the costs, disallowed those incurred in the Ecclesiastical Court before the prohibition, and a rule nisi was thereupon obtained for reviewing the taxation.

F. Robinson now showed cause. The motion must be grounded on 1 W. 4, c. 21, s. 1; and that only provides that "the party in whose favor judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings." The preamble, indeed, states that "it is expedient to make some better provision for payment of costs in cases of prohibition;" but that does not necessarily apply to the present case: there were other instances in which the former law had been found defective in this respect, and to which the new enactment is applicable. *Scammell v. Wilkinson*, 3 East, 202; *Pewtress v. Harvey*, 1 B. & Ad. 154; *Brymer v. Atkyns*, 2 Tidd, 349, 9th ed.

R. V. Richards, contra. If the Master cannot tax these costs, then, when-

ever the Court grants a prohibition, the successful party is left without remedy for the costs below. [PARKE, J. Could not the Ecclesiastical Court grant the costs? They had jurisdiction of the matter in the first instance, though not of the question raised in defence to the action.] They have no power (see *Crompton v. Waterford*, Hetley, 167). An analogy may be drawn here from the practice in replevin, where the costs below are taxed (see *Davies v. James*, [*460] 1 T. R. 371). [LITLEDALE, J. *There the proceeding above is a continuation of the original suit.] The practice before the late act is stated in *Houghton v. Starkie*, 1 Stra. 82; but the act must be taken to have corrected it in all respects, and to extend to the present case.

Per Curiam. The words of the act are express. It may be hard on the defendant not to obtain these costs, but there are many cases to which the same observation would apply, where costs cannot be recovered.

Rule discharged.

HILLARY v. ROWLES and Two Others. June 12.

The Uniformity of Process Act, 2 W. 4, c. 39, Sched. No. 4, repeals sect. 24 of the first General Rule of Hilary term 2 W. 4: and, therefore, if a party held to bail on a *capias* do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail-bond in suit.

On the 7th of May the defendant Rowles was arrested at the suit of the plaintiff, and executed a bail-bond, with the two other defendants as his bail. On the 15th, Rowles not having put in bail above, the plaintiff took an assignment of the bail-bond, and issued writs of summons against all the parties. *Platt*, in this term, obtained a rule to show cause why the proceedings on the bail-bond given in the original action should not be set aside for irregularity; on the ground, principally, that the bail-bond had been put in suit too soon, inasmuch as the first rule of Court, Hilary term, 2 W. 4, s. 24, 3 B. & Ad. 377, directs that no bail-bond taken in London or Middlesex shall be put in suit until after the expiration of four days exclusive from the appearance day of the process.

[*461] **Archbold* now showed cause. The rule is now altered by the Uniformity of Process Act, 2 W. 4, c. 39, for the Schedule to that act, No. 4, gives the form of the writ of *capias*, in which the defendant is required to take notice "that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him, in our court of ———, to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written." And the warning, sect. 3, states, that "If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail-bond." Before the act of 2 W. 4, a defendant arrested in London or Middlesex had four days exclusive, from the return of the process, to put in special bail; and the rules of Hilary term, 2 W. 4, gave four days exclusive, from the appearance day, before the bail-bond could be put in suit. Now, the defendant has eight days after execution of the process, including the day of execution, to put in his bail, but after the expiration of that period no further time is given: so that, the arrest here being on the 7th, the proceedings were properly commenced on the 15th. The same point has lately been determined in the Court of Exchequer, *Alston v. Underhill*, 3 Tyr. 427; 1 Cro. & M. 492; and see *Thompson v. Dicas*, 4 Tyr. 875.

Platt, *contrâ*. The rule of Hilary term, 2 W. 4, expressly forbids proceeding on the bail-bond till after the expiration of four days from the appearance day, [*462] and the warning referred to only says in general terms, that *if bail be not put in as required, the plaintiff "may proceed" against the sheriff.

That does not amount to a repeal of the rule. [LITLEDAL, J. The form of the *capias* expressly points out the time after which the plaintiff may proceed.]

The Court held that the action was rightly commenced; but on a statement of merits on the defendants' part, they allowed the proceedings to be set aside on terms.

THOMAS, Gent., v. SAUNDERS and Another, Esquires. June 12.

The 7 & 8 G. 4, c. 30, s. 41, which directs that actions brought for anything done in pursuance of that statute shall be tried in the county where the fact was committed, applies only to the case of parties exercising particular powers conferred by the statute.

In an action against justices for falsely imprisoning the plaintiff on a charge of feloniously beginning to demolish a house contrary to the act, the Court granted a rule to change the venue, on a suggestion that a fair trial could not be had in the county.

A RULE had been obtained, calling on the defendants to show cause why a suggestion should not be entered on the roll for the purpose of changing the venue, on the ground of prejudice in the county where it was at present laid. The plaintiff had been committed to prison by a warrant under the hands and seals of the defendants, justices of the county of the borough of Carmarthen, for riot and feloniously beginning to demolish a dwelling-house, contrary to the statute 7 & 8 G. 4, c. 30, s. 8, and for that committal he brought his action of false imprisonment against them.

Sir James Scarlett now showed cause, and relied on sect. 41 of the act, which provides, "that all actions and prosecutions to be commenced against any person *for anything done in pursuance of this act, shall be laid and tried [*463] in the county where the fact was committed."

John Evans, contra. The matter complained of here is not a thing done in pursuance of the act within the meaning of the clause. That relates to the exercise of peculiar powers given by this act, as in the case of summary convictions. Here the defendants were not acting on any such powers, but in the course of the common law. The more general clause, 21 Ja. 1, c. 12, s. 5, to which this corresponds, was passed for the purpose of making certain actions local which would otherwise have been transitory, but does not prevent the Court from removing the trial of a cause, by suggestion, from a county where it could not be fairly tried. [PARKE, J. The 7 & 8 G. 4, c. 30, s. 41, applies to cases where the thing is done by color of the act; where it could not have taken place if the defendants had not been armed with powers which the statute gives. When the parties are acting on the jurisdiction so conferred, the limitation operates, but not when they are proceeding upon a common law authority.]

The Court made the rule absolute for changing the venue to the county of Brecon.

*POPE v. LANGWORTHY.

[*464]

Where certain roads were, by local acts, placed under the direction of trustees for amending, improving, and repairing the same, and the trustees were empowered to erect turnpike-gates on the said roads, and receive tolls there; but there was a certain portion of one of the said roads, which they were prohibited from repairing or improving, and on which they were not to erect toll-gates:

Held, that a person travelling along the last-mentioned road for more than a hundred yards, including the excepted part, but less if that part were excluded, was not exempt from toll by 8 G. 4, c. 126, s. 32.

ASSUMPSIT for tolls by the plaintiff as farmer, renter, and collector of the tolls upon a turnpike-road, in the county of Somerset. Plea, the general issue. At the trial before ALDERSON, J., at the Somersetshire Summer assizes, 1831, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

By a local act, 10 G. 4, c. xciii., intituled, "An Act for more effectually repairing and improving several roads which lead to and through the Town and Borough of Chard, in the county of Somerset," it was enacted, that the statute should be put in execution for the purpose, amongst others, "of amending, altering, diverting, turning, widening, improving, and keeping in repair," several roads, of which the roads in question are part. The trustees were empowered to erect turnpikes, toll-gates, &c., upon, across, or near the side or sides "of the roads thereinbefore described, or any of them," and to receive there certain tolls. All moneys arising from the tolls were directed to be applied, after payment of certain incidental expenses and debts, interest due on mortgages, &c., and expenses of building toll-houses, &c., in defraying the expenses of making or diverting, altering, raising, widening, improving, repairing, and preserving the said roads, and, lastly, in paying off the debts. The trustees were prohibited from applying any of the tolls "in or towards the repairing, lighting, or improving any of [*465] the streets, highways, or places *within the said town and borough of Chard." By virtue of this act the trustees erected a turnpike-gate, called the east gate, at the eastern entrance of Chard, upon the road after mentioned, leading from Crewkerne to and through Chard towards Ilminster, at which gate the plaintiff was the collector.

An act of the 11 G. 4, repealed the clause of 10 G. 4, which enacted, that the trustees should not apply the tolls, towards repairing, &c., any of the streets, &c., within the town and borough of Chard, but provided that none of the tolls should be laid out and expended in the repair and improvement of certain streets in Chard, therein particularly described, and, among others, the principal street, extending from the School-house Porch to a dwelling-house in this act described, at the west end of the town; and it forbade the erecting of any toll-gate within those limits.

The Ilminster turnpike-road (described in the local act of 9 G. 4, under which it is maintained, as "The turnpike-road from the east end of the town of Chard through Ilminster") joins the Crewkerne turnpike-road above mentioned at a place called School-house Garden, at the entrance of Chard, the said Crewkerne road passing through the east gate, and through the town of Chard, to the said point of junction.

The defendant passed in a carriage on the Crewkerne road through the east gate, and thence to the Chard Arms hotel, in the town of Chard, and, on the following day, returned in the same manner, on each occasion refusing to pay the toll of 6d., which was demanded of him. From the east gate to the point where the Ilminster road joins the Crewkerne road, the distance travelled by [*466] the defendant, is forty yards; from the east *gate to a place called School-house Porch, between the gate and the hotel, is less than a hundred yards; but the whole distance so travelled by the defendant to the Chard Arms hotel is several hundred yards. The road from the School-house Porch to the hotel is a part of the road which the trustees are restrained from repairing or improving. Before the passing of the 10 G. 4, the trustees repaired the whole road, including the part from the hotel to the School-house Porch; and, ever since that period, they have exercised control over the part which they are restrained from repairing, by preventing nuisances upon it.

The question for the opinion of the Court was, whether under s. 32, of the general turnpike act (3 G. 4, c. 126), which exempts all horses, carriages, &c., "which shall only cross any turnpike road, or shall not pass above 100 yards thereon," the defendant was exempted from the payment of toll at the eastern gate of Chard.

This case was argued in the present term by *Follett* for the plaintiff, and *Erle* for the defendant, who endeavored to distinguish the case from *Bussey v. Storey*, 4 B. & Ad. 98, on the ground, that the trustees here were expressly prohibited from laying out their funds in improving the portion of the road in ques-

tion, from the School-house Porch to the Chard Arms hotel, as well as from taking tolls on it. But

The Court¹, held that the two cases were not distinguishable.

Postea to the Plaintiff.

¹ DENMAN, C. J., LITLEDALE, PARKE, and PATTESON, Js.

*REGULÆ GENERALES.¹

[*467]

IT IS ORDERED, That in all cases in which a defendant shall have been, or shall be detained in prison on any writ of *capias* or *detainer*, or being arrested thereon shall go to prison for want of bail, and in all cases in which he shall have been, or shall be, rendered to prison before declaration, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or *detainer*, or render and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or *detainer*, upon entering an appearance according to the form set forth in the statute 2 W. 4, c. 39, Schedule No. 2, unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge.

(Signed by all the Judges.)

IT IS ORDERED, That, from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the Sheriff, the defendants shall plead to the declaration at the same time, in the same manner, and under the same rule as in actions against defendants who are not in custody.

(Signed by all the Judges.)

¹ These rules were read in Court on the 24th day of May.

THE END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDUM.

IN Trinity vacation, John Balguy, of the Middle Temple, Esq., was appointed one of his Majesty's counsel, and took his seat within the bar on the first day of this term.

REGULA GENERALIS.

IT IS ORDERED, That from and after the 10th day of July next, where the plaintiff proceeds by action of debt on the recognisance of bail in any of the Courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

Signed by all the Judges on the 17th of June, 1838.

[*469]

*The KING v. The Inhabitants of LEAKE.

The inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.

Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them.

By an act for draining fen lands, commissioners were authorized to make drains and other works therein prescribed, and also to make a new cut or main drain as therein mentioned, and to dispose of all earth and soil arising from the drains directed to be made, in forming banks, at certain distances, on each side thereof; and the banks, drains, &c., were to remain under their control, for the purposes of the act. The commissioners, under the powers of the act, made a drain according to the act, and with the earth taken from it made a bank on one side of it, of the average breadth of forty feet: this drain and bank were never part of the fen, but were old inclosed land, and bounded by old inclosures on both sides; and the land upon which they were respectively made, was purchased by the commissioners for the purposes of the act. The bank had been used for about twenty-five years as a public highway, and was a convenient and useful road for the public.

Upon a special case, stating these facts, it was held by DENMAN, C. J., and PARKER, J., LITTLEDALE, J., dissentiente, that the dedication of this part of the bank as a road to the use of the public was not inconsistent with the purposes to which the commis-

sioners were bound by the act to apply it; it not appearing by the case (which, however, ought to have been more express on these points; per PARKER, J.), that the cleansing of the drains or any other purpose of the act had been or was likely to be interfered with by such user of the soil.

INDICTMENT for the non-repair of a road lying on the east side of Hobhole Drain, in the parish of Leake, in the county of Lincoln, beginning at a certain bridge called or known by the name of Simon's House Bridge, situate in the parish of Leake, and continuing from thence in a northwardly direction towards and unto a certain other bridge, situate at Lade Bank, in the county aforesaid, containing in length 1,160 yards, and in breadth eleven yards. At the trial before TINDAL, C. J., at the Lincoln Summer assizes, 1831, a verdict of guilty was entered, subject to the opinion of this Court on the following case:—

By an act, 41 G. 3, c. 135, for the more effectually draining certain tracts of land called Wildmore Fen, and West and East Fens, and other lands in the county of Lincoln, certain commissioners were appointed for the purpose of such drainage, and by section 11 they were authorized to make the drains and other works therein *prescribed; and, among other things, they were authorized and required to make a new cut or main drain from Hobhole Gowt, in the river Witham, in a northward direction to a place called Bennington Bridge, and thence in continuation to a place called Simon's House Bridge, and from thence across the Lade Bank, and thence to the lands of Toynton St. Peter's, which said main drain at Bennington Bridge was to be made of a certain width and slope described in the act. And they were, by section 12, further authorized and required to dispose of all the earth and soil arising from the several cuts and drains thereinbefore directed to be made, in forming banks on each side thereof respectively, at least six feet distant, at an average, from the verge of the slopes or batters: and they were to make, erect, alter, &c., such other cuts, drains, and banks as they should think necessary in the East Fen, &c. And by section 14 it was further enacted, that the several cuts, drains, banks, &c., and other works thereinbefore directed to be executed by the said special commissioners, should be executed under the direction and control, and to the satisfaction of certain commissioners in the said act mentioned, called general commissioners; and should, from and after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject and liable to the power, jurisdiction, and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done, and executed under the authority of an act therein recited, passed in the second year of George III., for draining and preserving certain lands therein mentioned, and other purposes; by which said act of the second of George III. the said general *commissioners had the same powers of purchasing lands, or making compensation, for the purposes of such drainage, as are contained in the act of 41 G. 3, c. 135; which lands, when so purchased, were to be conveyed to the said general commissioners, and entirely divested from the vendors (as in this act of 41 G. 3), and vested in the said commissioners for the purposes of that act of the second year of George III. And by the 41 G. 3, c. 135, it was further enacted (s. 19), that the said special commissioners should have full power and authority to agree with the proprietors of, and persons interested in, any lands or tenements which the said commissioners should judge necessary or expedient to be cut, dug, or otherwise made use of for the purposes of the act, for the purchase of the same, or for allowing compensation for any injury that might be done thereto: and that, in case of purchase, all such contracts, agreements, sales, conveyances, &c., should be valid and effectual in law to all intents and purposes whatsoever, to convey all estate and interest of the person conveying, and all right, title, estate, interest, trust, or claim of any person whatsoever to the said commissioners.

The commissioners under the above act forthwith made a drain, called Hobhole Drain, as directed by the act, in a straight line from Hobhole in the river

Witham to Toynton St. Peter's. The length of this drain from Hobhole to Bennington Bridge is about six miles; from Bennington Bridge to Simon's House Bridge about 814 yards; from Simon's House Bridge to Lade Bank 1160 yards; and from Lade Bank to its termination in the lands in Toynton St. Peter's, about four miles. The commissioners made a bank on the east side of [*472] the drain, with the earth taken from it, in the manner *directed by the act, and of the average breadth of forty feet. The drain and bank from Bennington Bridge northward to Lade Bank, was never part of the fen, but was old inclosed land, and is bounded by old inclosures on both sides; and the land upon which the drain and bank are respectively made was purchased by the commissioners for the purposes of the act. The said bank has been used by all persons for about twenty-five years as a public highway for horses, carts, and carriages, without intermission, and is a very convenient and useful road for the public. About two miles of this road, commencing at Bennington Bridge, and extending northwards towards Toynton St. Peter's, are in the parish of Leake. The part indicted is that part of these two miles (in length 1160 yards) between Simon's House Bridge and Lade Bank. It is in the parish of Leake, and out of repair as charged in the indictment. There is a road, joining the road in question, leading from Simon's House Bridge to Leake town.

By virtue of another act of parliament, passed in 1807, certain commissioners for draining the east and west fens, set out, and, in September, 1820, awarded, a public carriage road of the width of fifty feet, beginning at Lade Bank at the northern termination of the part of the road now indicted, and forming a continuous and straight line therewith, and proceeding along the said east bank to the northernmost extremity thereof, where it joins another public highway.

The parish of Leake has always repaired the part of the said road on the east bank from Bennington Bridge to Simon's House Bridge, and from Lade Bank northward as far as the parish of Leake extends; and it was proved that about ten years ago that parish repaired that part of the road now indicted.

[*473] *If the Court should be of opinion that the parish of Leake was liable to repair the part of the road indicted, then the verdict of guilty was to stand; if not, then a verdict of not guilty to be entered. This case was argued last Easter term.¹

Whitehurst, for the crown, contended, first, that it was competent to the commissioners, in whom the soil was vested, to dedicate a part of it to the use of the public as a highway, and that if it was so, it was clear that such dedication had taken place; secondly, that it was not necessary to charge the parish, that it should have adopted the highway; and, thirdly, that if it was, the parish had adopted it. Upon the first point he argued that, as by the 41 G. 3, c. 135, the lands, when purchased, were to be conveyed to the commissioners, and entirely divested from the vendors, the commissioners were owners of the fee, and as such might dedicate the surface of the soil as a road to be used by the public: The fact that the commissioners here were trustees for a special purpose did not show that they had no power. In *The Rugby Charity v. Merryweather*, 11 East, 375, note (a), the owners of the fee simple were trustees, and it was not objected that they could not dedicate. [PARKE, J. They were only trustees as to the profits; they acted as ordinary owners.] In *Rex v. Edmonton*, 2 Moody & M. 24, the dedication, if any, was by the churchwardens of Edmonton, who were trustees for the owners of freehold messuages within the parish of Edmonton; and it was held that the road was public, and that the parish was liable [*474] to repair. That is a direct authority that the commissioners in *this case may dedicate. So, in *Rex v. Wright*, 3 B. & Ad. 681, commissioners under an inclosure act had been empowered to set out public and private roads; the former to be repaired by the township, the latter by such persons as the commissioners should direct: and the public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as pri-

¹ Before DENMAN, C. J., LITLEDAL, and PARKE, Js.

vate, and eight yards wide; but in setting it out, a space of sixty feet was left between the fences, and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road; and PARKE, J., who tried the cause, thought the commissioners had exceeded their authority in awarding that a private road should be repaired by the township, but left it to the jury to decide whether the road, though originally meant to be a private road, had not subsequently been dedicated to the public; and this Court, on motion for a new trial, held that the case had been properly submitted to the jury. [PARKE, J. The lord, or owner of the adjoining land, was the person to dedicate.] There can be no doubt that some person had the power to dedicate. In *Rex v. Mellor*, 1 B. & Ad. 32, the point might have been raised, but was not. It may be further contended here that the commissioners could not dedicate the use of this part of the bank to the public, because the public right to use it as a highway may interfere with the purposes for which the soil was vested in the commissioners. But, first, the bank itself is not necessary for the purposes of draining the fen. The commissioners are authorized to make cuts and drains; and as, in order to do so, they must dig out the soil where these cuts and drains are made, it [*475] became necessary to provide a place for depositing the soil: but with reference to the drainage of the fen, it was wholly unimportant what became of that soil. The commissioners are expressly authorized to dispose of the soil arising from the cuts and drains in forming on each side thereof banks six feet distant from the verge of the slopes. They might clearly give the public the right of using the surface of that bank as a road, unless such use of it necessarily impedes the draining of the fen. It is found, as a fact, that the public have use it as a highway for twenty-five years; it is not stated that during that period such public user, has ever, in any degree, impeded the drainage of the land, and it is not to be presumed that it will do so in future; it lies on the defendants, at least, to show that the right of the public so to use it must, of necessity, impede the draining of the fen. Secondly, it is clear that, by common law, the inhabitants of a parish are bound to repair all public highways within it. Where a road, by user, has become a public highway, no adoption of it by the inhabitants of the parish is necessary to make them liable. The doctrine that an adoption by the parish is necessary to make the parish liable to repair, was first stated by BAYLEY, J., in *Rex v. The Inhabitants of St. Benedict*, 4 B. & A. 450; but it is not supported by any other authority, and has not been generally approved of in the profession. Thirdly, supposing an adoption by the parish necessary, they have here, in fact, repaired not only a part of the road, but the very part indicted.

**Waddington*, contra. The road in question was not a public highway: [*476] first, because it could not become so; and secondly, if it could, it has not. The land was vested in the commissioners for the purpose of executing the drainage works mentioned in the act of parliament; they made a bank, and the public have used the surface of that bank as a highway, the user, as explained, began by usurpation. The commissioners having no occasion for the bank, permitted the public to use the surface of it, which was not required for the purposes of the drainage: that was not evidence for the jury to presume a dedication. But even if the commissioners had wished and intended to dedicate the surface to the public, they could not do so consistently with the other duties which they are required to perform. By section 12, the commissioners are authorized to dispose of all the earth and soil arising from the cuts and drains therein directed to be made, scoured, and cleansed, in forming banks, and they are to make, alter, support, repair, or remove, all cuts, drains, &c. Non constat that it may not become necessary for the purpose of altering the drains adjoining the bank, for the commissioners to take possession of this bank, and thereby obstruct the highway; but supposing the argument on the other side to prevail, if they do so, they may be indicted for a nuisance. It might be their duty to

build on this bank, if that became necessary for the purposes of the drainage. [LITLEDAL, J. The fact ought to have been found by the jury, whether the powers of the commissioners could have been exercised consistently with the public right to use this as a highway. It is possible tunnels might be made through the bank without endangering the road.] There is no authority to show [*477] *that persons holding land for public purposes, inconsistent with a right of way, may dedicate the use of that land to the public. In *The Rugby Charity v. Merryweather*, 11 East, 375, note (a), the dedication was by trustees for private purposes. In *Rex v. Edmonton*, 1 Moody & M. 24, the road had been actually set out by commissioners under an inclosure act, and the churchwardens were only trustees for certain landowners.

Secondly, according to the opinion of BAYLEY, J., in *Rex v. St. Benedict*, 4 B. & A. 450, an adoption by the parish is necessary to make the parish liable to repair a road, and that doctrine is recognised by Lord TENTERDEN in *Rex v. Cumberworth*, 3 B. & Ad. 112. Lastly, if an adoption by the parish be necessary, the single instance of repair ten years ago is not conclusive evidence of such adoption.

Cur. adv. vult.

There being a difference of opinion on the bench, the Judges delivered their opinions seriatim.

PARKE, J. The questions raised on the argument of this case were three :

1st, Whether it was competent for the persons in whom the soil was vested, to dedicate the use of part of it to the public, as a highway; it not being disputed but that if they had the power, such dedication had taken place.

2dly, Whether it is necessary in order to charge the parish, that it should have adopted the highway; and if it was,

*3dly, Whether the parish had in fact adopted it.

[*478] I have never entertained the least doubt upon any of these questions, except the first; upon that I have felt some difficulty; but after much consideration, my opinion is, upon the statements in this case, that the commissioners in whom the property was vested might dedicate part of it to this special use.

If the land were vested by the act of parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the act, then I think it clear that the commissioners have that power. The mere circumstance of their not being beneficial owners, cannot preclude them from giving the public this right.

Let us consider, then, whether the special purposes, indicated by the act of parliament, are inconsistent with the use of the bank as a highway.

The land over which the alleged road passes was purchased by the special commissioners appointed under the 41 G. 3, c. 135, under section 19 of that act: whether it was conveyed to them or their appointees, under section 19, on a voluntary purchase; or, under section 26 and 27, after an assessment by a jury, to the special commissioners in trust for the general commissioners, does not appear; but in whomsoever the title was vested, it must have been held in trust for the special purposes of the act.

What, then, were these special purposes?

[*479] The case does not state whether the powers given by *the 41 G. 3, c. 135, to the special commissioners appointed under that act have terminated or not.

By section 11, they are authorized, empowered, and required to make certain new gowts and drains; and by section 12, to dispose of the earth arising from making the drains six feet from the verge of the slopes or batters at an average, or otherwise, as they shall think necessary: they are also required to make and maintain such other cuts, drains, outlets, sluices, gowts, tunnels, and other works

as they shall think necessary, in the grounds in East Fen, &c. (comprising the lands adjoining to this cut).

By section 14, the several cuts, works, &c., before directed to be executed by the special commissioners, shall be done under the direction and control of the general commissioners; and shall, after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the general commissioners, as if made, done, and executed under the authority of the former act.

By section 39, the special commissioners are to make an award, with a true plan annexed, of the grounds to be drained.

The forty-first section gives the general commissioners the power to tax for the purposes of general drainage.

From these clauses it appears that the special commissioners have special powers, which seem not to have been of a permanent nature, and which would be determined after the works were completed and the award made; and then the authority of the general commissioners of drainage under the 2 G. 3, would alone be in force. But, as the case does not enable us *to say whether the [*480] powers of the special commissioners, if any, which remained after the drain was made, are yet in force, we must treat the question as if they were; though, probably, the general commissioners, by virtue of the act of 2 G. 3, enabling them to make works for the general purpose of drainage, would have the same power of making cuts, drains, and other works, as is given to the special commissioners under the latter part of the twelfth section.

The general commissioners would unquestionably be entitled, and indeed bound, to cleanse the Hobhole drain when required, and remove the mud from it.

The special commissioners, and probably the general commissioners also, would have the power, if necessary, for the purposes of the general drainage, to make smaller cuts communicating with this; and drains, gowts, tunnels, or other works; and might use the soil on which the bank is placed for this purpose.

The question then is reduced to this, whether, upon the finding of the jury in this case; the public use of the bank as a road would interfere with the exercise of these powers?

The case might and ought to have stated whether the operation of cleansing the drain would or would not have been impeded by the use of this road; but as it does find that the drain was constructed in the manner directed by the act, and the act requires six feet to be left between the verge of the slope and the bank, which must have been for the purpose of allowing sufficient space for cleansing the drain, I think we may reasonably conclude that the use of the top of the bank itself, for the purpose of cleansing the drain or depositing the mud there, was unnecessary.

*With respect to the exercise of the other powers, of making cuts [*481] communicating with this drain through the bank in question, or other works necessary to the drainage, it is impossible not to see that such powers could no longer be exercised upon the space occupied by the road, if the public had an unqualified right of road there; and unless they had, this indictment cannot be supported. But I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public. The special commissioners certainly might have sold the land, or let it, or disposed of it for money, under sect. 35, if it was not necessary to be made use of for the purposes of this act; and I do not see why they might not also, in the like case, have given it up to the public as a public highway: inasmuch as it is by no means impossible, that the general works of the drainage might receive a benefit perhaps equal to the pecuniary advantage from a sale, by facilitating the carriage of materials, and the transport of workmen, necessary for the purpose of the drainage.

As the public have enjoyed the road without interruption for twenty years and upwards, we must infer that no purpose of the drainage has yet required

the construction of cuts or other works upon the part of the bank in question; and if in that time the ordinary purposes of the drainage have not required them, it is not too much to say, that such works will not be required, and that the space is not now wanted for any purposes of this act.

If this were a special verdict, I should have thought that both these facts should have been found by the jury, and that a venire de novo would have been necessary; *but upon a special case, we are not so strictly bound; and [*482] I do not think we ought to put the parties to the expense of a new trial on that account.

I am of opinion, therefore, upon this case, that we may come to the conclusion, that the dedication of this part of the bank to the use of the public, as a road, was not inconsistent with the purposes to which the commissioners, whether special or general, were bound by the act of parliament to apply it.

Upon the other two questions I never had any doubt. As to the second, I have always considered it as clear that the parish is at common law bound to repair all public highways; this being by the common law, the mode by which each parish contributes its share towards the public burden of repairing all highways, instead of all the public roads being repaired by one general tax. Hence, if a road be dedicated to the public, no parish can refuse to repair it. It must bear in that shape its share of the general burden, and its inhabitants receive an equivalent, not in the use of that road in particular, but in the use of all the public roads in the realm. The absence of repair by the parish is indeed a strong circumstance, in point of evidence, to prove that the road is not a public one,—the fact of repair has a contrary effect; but the conduct of the parish in acquiescing or refusing to acquiesce is, in my opinion, immaterial in every other point of view.

The judgment of Mr. Baron BAYLEY in the case of *Rex v. Benedict*, 4 B. & A. 450, was cited on the argument as an authority to the contrary; but with every [*483] respect for that very learned Judge, I must say I cannot accede to *the doctrine there laid down, and I am not aware that there is any authority in support of it.

Upon the third question, also, I feel no doubt. The repair by the parish of the part in question is undoubtedly a sufficient adoption, if adoption be necessary, which I am clearly of opinion it is not.

Upon the whole, therefore, I am of opinion that the crown is entitled to our judgment.

LITTLEDALE, J. A great number of cases have been cited as to what shall be taken to be a dedication of land to the public, so as to establish a highway. I need not advert to these, because I agree in their authority; and I think if this land was not in the peculiar circumstances in which it is placed, there would be a sufficient dedication to make it a public highway.

But the difficulty I have is, that the land over which the road lies has been appropriated by the act of the 41 G. 3, c. 135, *for the purposes of drainage*; and by that act certain powers are given to the commissioners to deal with the land mentioned in the act in the manner there prescribed: and under their powers they have made a bank which is subservient to the purposes of the drainage. Over a part of this bank the road in question extends.

It is true that the bank has not, for a great number of years, been practically used to give any further protection or support of the works than it did when first made, and very probably it never may be wanted in any other state than that in which it now is.

But I cannot take judicial notice of that, and I cannot say but at some future time it may be wanted for the works of the drainage, in such a manner as that [*484] it could *not be used beneficially for these purposes if there was a common highway over it. And I think the commissioners had no power to dedicate to the use of the public as a highway, land which they were intrusted with the ownership of, for a special purpose, and for which special purpose this

land may at some future period be required; and as all the king's subjects are presumed to know acts of parliament, they, when they used the road, must be presumed to have known that in point of law it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by parliament, and which, therefore, could not be infringed upon.

The adoption of the parish, by repairing part of it, does not vary the case: the adoption of a parish is no more than the use of it by the public: the parish are merely a part of the public.

If a road has been used by people in the parish, it furnishes evidence pro tanto of its being a way for the rest of the public; and if the parish have repaired it, it furnishes a strong inference that it is a public highway, or else they would not have been at that expense: but it only raises a strong presumption, and there is no estoppel against a parish in such a case; the adoption by the parish does not necessarily, as a matter of law, make a road public; nor does their refusal to adopt it, prevent its being so. And if it as a general rule do so, still it would not be the case here, as parliament has already directed it to be under the control of commissioners for parliamentary purposes.

A public road has been made by legal authority, in *continuation of what is now contended to be a road; but that can make no difference as [*485] to the legality of this road.

If the use of this as a public road be an object of great importance, the only way to have it made a legal road is by an application to parliament, who will exercise their discretion on the subject.

On the whole of the case, I am of opinion that judgment should be entered for the defendants.

DENMAN, C. J. The question raised by this case was whether the parish of Leake is bound to repair a road which runs along the top of a bank forty feet wide; in other words, whether this, which is unquestionably a road de facto, is also a road de jure. The bank was made in execution of certain works of drainage done under an act of the second of G. 3, and under another act of the forty-first of G. 3; and it is stated as a fact that "the said bank has been used by all persons for about twenty-five years as a public carriage-road without intermission, and is a very useful and convenient road to the public." It is further stated, that part of the indicted portion of the road was repaired by the parish of Leake ten years ago.

All the terms in the definition of a public road are found in this statement. But it was argued that the bank in question cannot be a public road, because that would be inconsistent with the purposes of drainage for which it was raised, and with the superintending power vested in the commissioners for drainage purposes. The words relied on are, that "all banks made (as this was) under the 41 G. 3, as well as the cuts, drains, dams, forelands, and other works," should be made, *done, and executed under the direction and control, [*486] and to the satisfaction, of such general commissioners, and should after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done, and executed under the authority of the former act above mentioned.

We must therefore refer to the provisions of the former act, to see if it directs the banks to be maintained or regulated in any manner inconsistent with a right of passage over them.

The former act gives power to the general commissioners to purchase lands for the purposes of the drainage, the purchased lands to be divested from the vendors and vested in the general commissioners. It appears that the general commissioners, by virtue of this power, purchased certain inclosed land, and the

special commissioners cut a drain through it, and, with the soil cast out, made the bank (forty feet wide) over which the indicted road runs.

The argument for the defendants at the bar proceeded on the assumption that the bank of a drain must, of necessity, be subject to obstruction from laying upon it soil out of the ditches, and from other obvious causes, so as to render the constant user of it as a public road impossible. But I think that we cannot draw such an inference judicially from the act; and the case does not allege the fact to be so.

The words which place these banks under the control of the general commissioners are not of very clear import; but their primary object seems to be to exclude *them from the control of the special commissioners appointed [*487] by the subsequent act, who, after making them to the satisfaction of the general commissioners, were to have no more concern with them. The words of the clause referred to in the earlier act, and above stated, seem rather applicable to a property in the banks than to any mode of managing them. The words are certainly very extensive; sufficiently so, indeed, to enable the commissioners to devote the surface of the banks to any purpose whatever not inconsistent with the trust of draining the district. Now it can hardly be but that good roads should be extremely useful for the general purposes of the drainage, by facilitating the conveyance of persons and property; and such roads may be more easily procured and maintained by giving a right of passage to the public and casting the repair upon parishes, than by any other means enjoyed by the commissioners. The case states that a part of this very bank, being a continuation of the indicted road, was set out as a road in 1820 by virtue of an inclosure act; and it does not appear that the general commissioners saw any reason to complain. I think, therefore, it is reasonable to infer that they, like the rest of the public, acquiesced in this use of the soil, from finding that their duties as commissioners might be perfectly discharged notwithstanding. And this appears by no means improbable in point of fact, when the width of the bank is remembered.

A second point was, that the parish was not stated to have adopted the road, but only to have repaired it on one occasion. If the fact of adoption were necessary, this statement of evidence from which it might be inferred would be [*488] insufficient. But I by no means think *any distinct act of adoption necessary in order to make a parish liable to repair a public road: I am of opinion that if it is public, the parish is of common right bound to repair it.

Judgment for the crown.

In the Matter of Arbitration between TUNNO and BIRD. November 4.

A party to an arbitration cannot object to the award, that the arbitrators chose an umpire by lot, if he expressly agreed to, or acquiesced in, that mode of choice.

Where a submission to arbitration under seal, has been varied by endorsing on it a new agreement (as, for changing one of the arbitrators), to which both the principal parties have expressly assented, one of those parties cannot afterwards move to have the award set aside on the ground that the endorsement was not under seal.

An umpire, being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was in question, made his award without calling for further evidence, or giving any notice upon that subject to the parties: Held, that the award could not be objected to on that ground by a party who knew that the case had gone before the umpire, and made no application to him to hear further evidence.

D. Pollock, in Easter term, obtained a rule, calling upon Edward Rose Tunno to show cause why the award made in this matter should not be set aside, on the grounds, first, that the umpire was appointed by lot; secondly, that Henry Lakin, one of the arbitrators, was not lawfully appointed; thirdly, that the arbitrators did not differ, and therefore the umpire, if lawfully appointed, had no jurisdiction; fourthly, that the umpire made his award without hearing

the evidence. The facts as disclosed by the affidavits on each side, were in substance as follows :—

Bird had been tenant to Tunno of farms, &c., which he was desirous to quit before his term expired. It was, therefore, agreed between them, by deed, that in consideration of that agreement and the mutual observance of the award, to be made, Bird should surrender the premises on the ensuing 29th of September; *and that the differences and respective claims of the parties should be referred to the award, arbitrament, &c., of Adam Murray and William Jellicoe, or, "in case they should not agree in opinion," of such third indifferent person as they should appoint by writing before entering on the reference.

The choice of an umpire was as follows :—On the 2d of November, 1832, six names, three proposed by Murray and three by Jellicoe, were written on papers and thrown into a hat, and the person whose name first came out (Staples) was chosen. The gentleman who drew acted as the attorney, and by the authority of Tunno; and had previously received a letter from Bird, introducing a Mr. Stallard as his (Bird's) friend, who would represent him "in the business of drawing for an umpire." This letter stated the manner in which Bird expected the proceedings to take place, and which was, in fact, adopted. *Stallard attended at the drawing. Neither arbitrator was present, but it appeared that the drawing had been agreed to by them.^a None of the six persons named had been objected to by either arbitrator. A meeting afterwards took place by appointment at Bird's house, which was attended by Bird himself, Beale, an attorney, Margrave, who was agent for Tunno, Staples, and Lakin, who had then been substituted for Jellicoe as arbitrator; and at that meeting Beale, as the professional adviser of Bird, endorsed upon the agreement of reference a memorandum, dated 20th November, 1832, appointing Staples umpire in case the arbitrators should disagree, which memorandum was signed by Murray and Lakin in the presence of Bird, Beale, and Margrave, and (according to the statement of Murray, confirmed by Staples and Margrave), with Bird's full concurrence. Lakin, in an affidavit made by him, stated that he offered no opposition at this time, considering Staples as the umpire already appointed.

After the choice of an umpire, but before the last-mentioned meeting, viz.

¹ The letter, dated October 27th, 1832, was as follows :—"The bearer of this, Mr. Stallard, is a friend of mine, who will be so kind as represent me in the business of drawing for an umpire in the arbitration pending between Mr. Tunno and myself. His time is very limited in London; I shall therefore feel obliged by your making the arrangement for drawing as speedily as possible. If I understand the thing rightly, the six names are to be rolled up and placed in a hat, and drawn for; now if you will prepare this, Mr. Stallard will draw, or, if you furnish that gentleman with the names on proper pieces of paper, he can prepare them for the hat, and you can draw. I am now writing at Worcester. I shall be at home on Tuesday, and expect, from my correspondence with Mr. Margrave" (Mr. Tunno's agent), "to find the agreement ready endorsed for my signature, which, in such case, I shall be able to execute prior to the 1st of November."

In another letter to his agent, dated the 25th of October, Mr. Bird said,—"Mr. Jellicoe has stated, in his letter to Mr. Murray, that the names of the three gentlemen he before sent in he still approves, and therefore the six names may be put in a hat as proposed, and may be drawn or decided in Mr. Crowder's office. A friend of mine will be in London the early part of next week, who shall call on Mr. Crowder for the purpose of representing me in that matter."

² Murray's statement on this point was as follows :—"As the three persons whose names had been handed to him by the said William Jellicoe were, in his judgment, unobjectionable, and as no objection was made by the said W. J. to any of the three persons whose names had been handed to him by deponent, it was finally arranged that six pieces of paper, each containing the name of one of the said six persons, should be folded up and placed in a hat, as is usual in such cases, and that some person should draw out one of the said six pieces of paper, and that the person whose name was written upon the piece of paper so drawn out should be appointed to act as umpire in the said reference."

on the 19th of November, 1832, it was agreed between the two principal parties, that Henry Lakin should be appointed an arbitrator on the behalf of Bird, in the place of Jellicoe, who had declined to act : and by a memorandum under the hands of *Tunno (by his agent) and Bird, endorsed on the above-mentioned articles, it was agreed that Lakin should be, and he was thereby appointed such arbitrator. The appointment was not sealed. Beale, as Bird's attorney, approved of the memorandum, and signed it as attesting witness. The agreement, and the memorandums thereon, were afterwards made a rule of court.

Murray and Lakin proceeded on the reference about the 19th of November, and, in company with Staples, the umpire, viewed the farms, lands, and premises, and examined witnesses. On the 23d, Staples left them : Lakin and Bird requested him to stay longer, but he considered it unnecessary. He said, however, that if he were called in as umpire, and on receiving the statement of the arbitrators, it should appear to him necessary to obtain further evidence, he would call a meeting of all the parties. The arbitrators went on with the reference, inquiring into the respective claims of the parties, and examining witnesses, till the 27th, when they separated, without having agreed upon any award. On the part of Bird, this was ascribed to Murray's having taken offence at some expression used by Lakin ; and it was suggested that Murray had, merely in consequence of this circumstance, refused to proceed further with Lakin in the business of the arbitration, and that neither of them had at that time formed a judgment, nor, consequently, had they differed in opinion on the merits of the case ; although Lakin, in his affidavit, now declared his opinion to be, that compensation ought to have been awarded to Bird from Tunno. Murray, on the other hand, stated that a difference of opinion upon the matters of the reference, and not the alleged *disagreement, had caused the breaking off of the arbitration.

The case was then referred to Staples as umpire. Murray furnished him with a statement in detail of the claims of Tunno against Bird, and the grounds of such claims, and Lakin sent him a similar statement, with all the depositions made before him on the reference, including some taken by him after the disagreement with Murray ; and Staples, in an affidavit, stated, that having inspected these several documents, and having, on the days when he attended the reference, minutely examined the premises for the purpose of being competent to form a judgment if appointed umpire, he considered it unnecessary to go into further evidence, or examination of the parties. Bird, in his affidavit, complained of the omission, and stated that it was material and important for him that Staples should have heard him and his witnesses before making his award.

The umpire awarded that Bird should pay Tunno 518*l*. The award was dated January 29th, 1833.

The Solicitor-General (with whom was *Crowder*) now showed cause. As to the first point : the specific agreement between the parties distinguishes this case from others, where it has been held that an umpire could not be chosen by lot. And the written appointment here was drawn and attested by Bird's agent, and made a rule of court, with the acquiescence, at least, of both parties : for if Bird had originally wished to enforce this objection, he might have moved to set aside the rule. Secondly, it is objected, that the submission to arbitration being by deed, a new arbitrator could not *be substituted by an instrument not under seal. But this was the appointment of Bird himself, signed by him, attested by his attorney, and made a rule of court pursuant to the submission : and Bird sanctioned the acts of Lakin as arbitrator. The last two objections are answered by the affidavits.

D. Pollock and *Lumley*, contra, were called upon by the Court. On the first point, this case does not essentially differ from *Ford v. Jones*, 3 B. & Ad. 248. There the principal parties not only consented to the appointment by lot, but were present at it : *LITTLEDALF, J.*, however, seems to intimate in that case,

that the acquiescence of the parties will not remove the objection. It appears, too, in this case, that Bird, in the assent which he gave, was merely acting on the suggestion of Jellicoe, the arbitrator at that time appointed on his side, and did not know of the objection there might be to the proceeding. Lakin acquiesced afterwards, because he considered the matter already decided. But the umpire ought to be one whom the arbitrators personally know and approve of: *In re Cassel*, 9 B. & C. 624. The mere absence of objection, even on the part of Jellicoe, was not sufficient. As to the second question, the appointment by an instrument under seal could not be altered by a mere endorsement in writing. But if the Court should think that the subsequent conduct of Bird has removed this objection, there is still no sufficient answer to those upon the merits of the arbitration itself. The arbitrators cannot be said to have differed in opinion, when one of them did not hear all the evidence. They should have heard the whole, and *then joined in a statement to the umpire, as in *Hall v. Lawrence*, 4 T. R. 589. But here, during the arbitration, Murray took [*494] offence, and ceased to attend. [DENMAN, C. J. The arbitrator appointed on your side handed over the papers to the umpire afterwards, without making this objection.] Then as to the conduct of the umpire; after hearing part of the case in company with the arbitrators, he withdrew from the inquiry. [TAUNTON, J. That was before he was called in as umpire. PARKE, J. No such objection was raised on your part when he was about to make his award.] At all events, after he was called in as umpire, he should have given the parties the opportunity of producing evidence. In *Hall v. Lawrence*, 4 T. R. 589, it was said, that such an objection could not prevail, because the parties did not apply to have evidence received till after the award was made. Here, the umpire had partly heard the evidence before the arbitrators ceased to act, and the parties had no intimation that he was about to make his award without hearing the rest: otherwise they would have applied to him to hear the whole *vivâ voce*. [TAUNTON, J. You lie by and take the chance of the award, and when disappointed, come to the Court to set it aside for the non-reception of evidence, which the umpire was never required to hear.]

DENMAN, C. J. I am of opinion that this rule must be discharged. As to the appointment of an umpire by lot, the law, as laid down in *Matter of Cassel*, 9 B. & C. 624, is, that a choice by lot is bad, and the appointment must be the act of the will and judgment of the two arbitrators, "unless the parties consent to or acquiesce in *some other mode." Now, here they did so. [*495] In *Ford v. Jones*, 3 B. & Ad. 248, indeed, there is some language a little more general, but the decision there probably went upon some difference in the affidavits of the respective parties, for LITTLEDALE, J., says, "such assent must always be a matter of doubt," which shows that a difficulty was felt there in getting at the real facts. To the second objection, it is a sufficient answer that Bird, by his attorney, signed the memorandum. As to the arbitrators not having differed; it may be that they did not go through the whole of the evidence and then differ, but that took place, which in fact put an end to their authority as arbitrators: and it is clear, that Lakin, the arbitrator on Bird's side, was of that opinion. Then it is said that the umpire did not hear the evidence. But it is not, in every case, necessary that an umpire should do so. If, indeed, a necessity had arisen, and the parties had called upon him to examine witnesses, his declining to do so might have been a ground of objection. But here there was no such refusal. At the time when he left the parties, and declined to hear more of the evidence, he was not yet umpire. When all the evidence had been taken, it was put into his hands; and he had already said that if he required further information, he would call a meeting. It is said, Bird did not know that the umpire was going to make his award; but a party must be supposed to look after his own interest: he knew that the depositions were before the umpire, and should, if he thought it necessary, have called on him to hear evidence. He has not done so, but has taken the chance of the award. I think he cannot now raise this objection.

*PARKE, J. I am of the same opinion. As to the first point, on a [496] submission of this kind, *prima facie* the appointment of an umpire ought to be determined by the judgment of the arbitrators; but it is competent to the parties to agree that it shall be decided by chance, or to acquiesce in its being so decided. An agreement subsequent to the original submission, that a person so appointed shall act as umpire, is a new submission, and will bind the parties, at least as to an application like the present. Whether, under circumstances like these, an attachment would issue for non-performance of the award (it having been made a rule of Court) may be a different question; this is not the case of an attachment or an action, but a motion by one of the parties to set the award aside. *Ford v. Jones*, 3 B. & Ad. 248, only confirms the doctrine laid down in the matter of *Cassell*, 9 B. & C. 624. It is true, in *Ford v. Jones* something was proved of an acquiescence by the parties, but that cannot have been very strong, for it is not insisted upon in showing cause, and LITLEDAL, J., says, "such assent must always be a matter of doubt." If that means that the appointment would be bad although the parties assented, I cannot agree in the proposition; but I think what was said there proceeded on the want of any sufficient proof of assent or acquiescence. With regard to the second objection, the agreement for changing one of the arbitrators was a new and distinct agreement, though not under seal, incorporating the original one; and I have no doubt that the parties are bound, as to this application, by the award made under it, for the [497] reason I have already given in adverting to the first *objection. It is unnecessary to add anything on the other points.

TAUNTON, J. On the last three points, it is only necessary to say that I agree with my Lord. On the first I will say a word or two, as I was a party to the decision in *Ford v. Jones*, 3 B. & Ad. 248. If the present case were in all points the same as that, I should pause before I could say I was satisfied that the opinions of the Court there expressed, were wrong. But my concurrence, in the present case, will not clash with those, or with the decision in the matter of *Cassell*, 9 B. & C. 624. Lord TENTERDEN there lays it down as a general rule, "that the appointment of the third person must be the act of the will and judgment of the two, must be matter of choice, and not of chance, unless the parties consent to or acquiesce in some other mode." Now here ample evidence is given that they did "consent or acquiesce." Bird knew and approved of the selection of six names, and took part in the arrangement by which they were subjected to the chance of drawing. And after that had been done, the endorsement appointing the umpire was witnessed by Bird's agent in his presence. The fact, therefore, that the appointment was by chance, may be thrown out of consideration here, for there was an appointment of an umpire by the arbitrators, in Bird's presence, and there attested by his own agent. To hold this an insufficient appointment, would be impeaching the solemn act of the parties.

PATTESON, J. It is an answer to the last objection, that at the only time [498] when Staples refused to hear *further evidence, he was not umpire. On the second and third points, I agree with the rest of the Court. As to the first, I have no distinct recollection of the manner in which the case of *Ford v. Jones* was put to the Court; but I think the circumstance of the parties having been present at the choice of an umpire by lot, and consenting to it, was not strongly brought to their attention. It does not appear to have been insisted upon in showing cause. I can hardly think, if it had distinctly appeared that the parties agreed to the mode of choice, the Court would have decided as it did. But here, the party making this application gave an express consent by letter; and the appointment, when endorsed upon the articles of reference, was attested by his own agent in his presence. There is no doubt here, that the parties both consented to and directed the mode of choice. Rule discharged.¹

¹On reference to the papers in *Ford v. Jones*, it appears that in an affidavit in support of the rule, Powell, one of the arbitrators, stated that the defendant was "neither party nor privy" to the choice of the umpire, and, on being informed of it, objected;

and the defendant himself stated, in an affidavit, that after being informed of the appointment, he found on inquiry that R. M., the umpire, was not a proper person; and he "was also much dissatisfied with the way in which R. M. had been appointed." But the affidavits in answer, contained the following statements, part of which was read to the Court in showing cause:—

Harper, the other arbitrator, deposed, "That it was agreed to by this deponent and the said W. Powell, and also by the plaintiff and defendant, that an umpire should be named to decide the said matters agreeably to the said agreement of reference, and various names were mentioned, and among them the name of R. M., of, &c. That this deponent, the said W. Powell, and also the said plaintiff and defendant, met on the 7th day of April, 1880, at the office of M. T. D., attorney at law at Abergavenny, when the name of the said R. M. was proposed by this deponent, and T. K., of, &c., by the said W. Powell. That neither this deponent nor the said W. Powell objected to the person named by the other of them, when it was proposed by some one present, but deponent cannot state *who in particular, that the said two names should be put into a hat, and that [*499] the one drawn should be the umpire. That with the consent of all parties present, and including the said plaintiff and defendant, Thomas Baker, a clerk to the said Mr. Davis, then wrote the said two names on two slips of paper, and put them into a hat. That the said Mr. Davis then drew out the name of R. M., whereupon it was agreed to and resolved on by all parties, including the plaintiff and defendant, that he, the said R. M. should act as umpire." Ford, the plaintiff, deposed (after having stated the meeting of the parties, including the defendant, and the nomination of different umpires, who were not objected to), that "it was proposed by some one, and, as deponent thinks, by the said Mr. Davis, that the said two names should be written on two strips of paper, and drawn out of a hat. That the clerk of Mr. Davis accordingly wrote the said two names on two strips of paper, and put the same into a hat, and the said Mr. Davis drew the name of R. M.: when, with the consent of all parties, a memorandum was written on the said agreement, appointing the said R. M. to be the umpire to decide the said matters in dispute."

It seems probable that the observation of LITLEDALE, J., referred only to a consent under such circumstances as appeared on these affidavits.

REID and Another, Executors of ELIZABETH STENTON, v. DICKONS.
Nov. 4.

Payment of money into court on a count on a promissory note payable by instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note: it does not bar the statute of limitations as to a further sum claimed to be due on the same note.

ASSUMPSIT. Declaration stated, that whereas the defendant, in the lifetime of the testatrix, to wit, on the 24th of March, 1824, made his promissory note in writing, and thereby promised to pay the testatrix 231*l.* by several instalments, on the days therein specified; and, if default should be made in any one or more of the payments for thirty days after the same respectively became due, then the whole, or the whole of the remainder of the 231*l.* and interest should become due on demand. It then stated, that the defendant, on the 24th of March, 1824, delivered the note to the testatrix, and promised to pay her according to the tenor and effect thereof. Breach, non-payment of any of *the instal- [*500] ments, though the several times for payment had long since elapsed. Upon this count the defendant paid into court 110*l.* 10*s.* 6*d.*, and pleaded the general issue and the statute of limitations. At the trial before TAUNTON, J., at the Summer assizes for the county of Nottingham, 1833, the plaintiffs produced the rule for paying money into court, and contended that the effect of that payment was to entitle them to recover the whole residue of the instalments and interest, unless the defendant could prove payment. On the part of the defendant, Long v. Greville, 3 B. & C. 10, was cited, to show that where a defendant pleads the general issue and the statute of limitations, and pays money into court generally, such payment does not take the case out of the statute. The learned Judge nonsuited the plaintiffs, but reserved liberty to them to move to enter a verdict for the difference between the sum paid into court and that claimed to be due upon the note.

Whitehurst now moved accordingly. In *Long v. Greville*, which was an action for goods sold and delivered, it is stated by the court, that where money is paid into court on a declaration setting forth a special contract, that is admitted as alleged. [DENMAN, C. J. And it is further stated, "that in no case has the effect gone beyond admitting that the sum paid in is due."] The payment of money into court on the special count admits the plaintiff's right of action on the special contract therein stated. [DENMAN, C. J. To the amount of money paid into court. Suppose, after six years had expired, the defendant had written a [*501] letter and said. *"I have paid you all but 110%," and at the trial had not proved any payment, would the letter be an admission of a debt due beyond 110%?"] *Dyer v. Ashton*, 1 B. & C. 3, shows that the defendant, by paying money into court on this special contract, admitted the whole contract set out in the count. If the defendant had paid the 110% to the plaintiffs, the effect of that would have been to take the case out of the statute of limitations.

DENMAN, C. J. The payment of money into court on the special count merely admits the defendant's liability on the contract therein stated to the amount of 110%.

PARKE, J. The payment of money into court admits the contract as alleged, and a right to recover 110%; but beyond that sum, every defence is open. It is much the same thing as if the defendant had admitted the contract, and stated at the same time that no more than 110% 10s. 6d. was due upon it.

PATTESON, J. In *Cox v. Parry*, 1 T. R. 464, it was decided that payment of money into court is an acknowledgment, by the defendant, of the contract, and that the plaintiff is entitled to recover the sum so paid; but that it did not preclude him from taking any objection limiting the operation of the contract, in order to bar the plaintiff from recovering more than had been paid into court. The principle of that case applies here. Rule refused.

[*502] *GRIFFITH, Gent., one, &c., v. DAVIES. Nov. 5.

A witness may be called upon by the plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant.

THIS was an action on an attorney's bill. At the trial before DENMAN, C. J., at the sittings in London, after last Trinity term, it became a question whether or not the plaintiff had been employed by the defendant. To prove the retainer by the defendant, a witness, also an attorney, was called, who stated that, after the business in question had been done, he, as the then attorney of defendant, went with him to the plaintiff, and on that occasion heard a conversation between them respecting a proposed compromise of the plaintiff's demand. The jury found a verdict for the plaintiff.

Heaton now moved for a new trial, on the ground that this witness ought not to have been allowed to give evidence of a negotiation at which he had been present as attorney to one of the parties; and he cited *Gainsford v. Grammar*, 2 Camp. 9, where Lord ELLENBOROUGH held, that a witness could not be called upon to disclose propositions which he, as the defendant's attorney, had carried to the plaintiff, respecting the subject-matter of the suit.

DENMAN, C. J. The fact of the witness having been present as attorney on one side, does not prevent his giving evidence of a conversation between the parties.

[*503] *PARKE, J. There is no pretence for the objection. This is not a confidential disclosure, but an open communication from one adversary to another, witnessed by the attorney of one party. In *Gainsford v. Grammar*, 2 Camp. 9, the Lord Chief Justice might properly reject the attorney's evidence of what his client said to him, but not his statement of what he himself afterwards said to the opposite party.

TAUNTON, J., concurred.

PATTESON, J. This was not a confidential disclosure to the attorney, but merely a conversation between the plaintiff and defendant. I do not understand the case in Campbell: there was a well-founded objection there to the attorney's stating what his client had communicated to him; but I do not see why he should have been prevented from stating at the trial what he had already communicated to the opposite party. So, here, the disclosure objected to is of something which had already been said to the plaintiff. Rule refused.'

¹ In *Gainsford v. Grammar*, Lord ELLENBOROUGH's attention does not appear to have been particularly called to the present question; the whole contest there being, whether or not the attorney bore a privileged character at the time of the communication.

*HOWELL v. BATT. Nov. 5.

[*504]

Defendant was office-keeper of an Exeter and London coach, and servant to C., a proprietor at Exeter, where the office kept by defendant was. Defendant from time to time made up accounts of shares of profits, due to the several proprietors, and sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion defendant sent to plaintiff, a proprietor, a packet purporting to contain 28*l.*, which was due to him, but in reality containing 20*l.* only. Plaintiff sued defendant for 8*l.* had and received to his use:

Held, that defendant was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from this defence by having told the plaintiff (after action brought) that he, defendant, had had the 23*l.* of C., and sent it to the plaintiff, and debited C. with it.

ASSUMPSIT for money had and received. At the trial before ALDERSON, J., at the last assizes at Exeter, the facts of the case appeared as follows:—The plaintiff was a joint proprietor of a stage-coach running from Exeter to London. The defendant was office-keeper and servant to Clench, the proprietor at Exeter; and used, in his capacity of office-keeper, at stated intervals, to make up the share-bills of the coach, and to take sums of money from a balance of Clench's which he had in hand, and send them to the several joint proprietors as their respective shares of the profits of the coach. On one of these occasions 23*l.* were due to the plaintiff; and the defendant made up a packet, purporting to contain that sum, and sent it to the plaintiff as his share, as usual, by the guard of the coach. The packet contained 20*l.* only; and this action was brought for the difference. It appeared that the expenses of keeping the office were provided for by the defendant, for which he received money from the proprietors. He rendered his accounts to Clench, the Exeter proprietor. No sum of money was expressly given to him by Clench for the plaintiff. Upon this evidence, it was contended, that Batt was improperly made defendant, for that there had been no privity of contract between him and the plaintiff; and it was said that, there having been no specific *appropriation by Clench of any sum to be paid to the plaintiff, the defendant could not be charged as having received [*505] any sum to the plaintiff's use. It was therefore contended that the action should have been brought against Clench. It appeared, however, that the plaintiff's attorney, after commencing the action, had written to a gentleman at Exeter, who was called as a witness, stating his view of the case, and requesting him to examine Clench and other persons as witnesses, which letter contained the following expressions:—"A sum of 23*l.* was given to or left by Mr. Clench with the defendant to be transmitted to the plaintiff."—"The action has proceeded on the assumption that Mr. Clench will prove that he gave to or left with the defendant the sum of 23*l.*, the plaintiff's money, for the plaintiff, to be forwarded to him." This letter being shown to and read by the defendant, he said, "it was perfectly true; he had the money of Clench and sent it to the plaintiff, and debited Clench with it." Clench had also written a letter to the plaintiff containing these words: "Defendant says 23*l.* was inclosed; with that sum he has

charged me in account, and I have paid it ;" and this letter being shown to defendant, he observed on it in similar terms. The learned Judge directed a nonsuit, giving leave to move to enter a verdict for 3*l*.

Dampier now moved accordingly. Supposing it to be rightly objected (on the authority of *Stephens v. Badcock*, 3 B. & Ad. 354, that there was no privity of contract between the plaintiff and defendant, the latter being *Clench's* servant and not the plaintiff's; still the plaintiff, *under the circumstances, [*506] is entitled to say that 23*l*. were paid by *Clench* to the defendant, and received by him for the special purpose of being forwarded to the plaintiff. Supposing the fact to be otherwise, he cannot allege so, for he is concluded by the statement which he himself made to the plaintiff, and on which that party has acted. In *Edwards v. Hodding*, 5 Taunt. 815, this point was ruled by *DAMPIER, J.*, at *Nisi Prius*, though the Court upon motion afterwards, gave no opinion upon it, there being another sufficient ground for discharging the rule for a new trial. [*DENMAN, C. J.* Here the statement which is said to have misled the plaintiff, was after action brought.] The plaintiff continued acting on a mistake by reason of it. [*PARKE, J.* Is *Clench* discharged by what has taken place?] If the defendant, by his admission has made himself liable, a judgment against him would discharge *Clench*.

DENMAN, C. J. The supposed admission is, that he *has* sent the 23*l*. There is nothing to distinguish this case from *Baron v. Husband*, 4 B. & Ad. 611, which was lately decided here.

PARKE, J. It does not appear that *Clench* might not have countermanded the payment to the plaintiff, at any time before he actually received the money. Nor is it shown that the plaintiff has been induced to do any act on the faith of receiving payment from the defendant. If it had been proved that the defendant had, as it were, attorned to the plaintiff, and agreed to hold the money [*507] for his use, and not subject to the direction of *Clench*, *the case would have been different. But that does not appear.

TAUNTON and *PATTESON, Js.*, concurred.

Rule refused.

DOE dem. GRUBB v. The Earl of BURLINGTON.

If a copyholder pull down a barn, without any intention of rebuilding, the lord cannot recover the place from him, on the ground of a forfeiture, if the jury find that the premises are not damaged.

EJECTMENT for premises in Buckinghamshire. On the trial before *GASELEE, J.*, at the Buckinghamshire summer assizes, 1832, it appeared that the premises in question were part of a copyhold tenement; that the lessor of the plaintiff was the lord, and the defendant the copyholder; and that the plaintiff's lessor claimed by virtue of a forfeiture alleged to have been incurred by the pulling down of a barn on the premises by the defendant's tenant. It was proved that the barn, which was not built by the copyholder, had been so pulled down; and the jury found (upon questions put separately to them by the learned Judge), first that the tenant, at the time of pulling down the barn, did not intend to rebuild it; secondly, that the property would not have been damaged if the barn had not been rebuilt; thirdly, that according to the custom of the manor, the copyholder might pull down what he himself had built, but nothing else. A verdict was taken for the plaintiff, and the learned Judge reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained in Michaelmas term, 1832,

*The Solicitor-General, *Storks*, Serjt., and *Kelly*, showed cause in Trinity Term last.¹ This is not a question on the statute of Gloucester, 6 Ed. 1, c. 5, between a tennor and a freeholder, but turns upon the relation between a copyholder and his lord. Under the statute there must be damage to

¹ Before *DENMAN, C. J.*, *LITLEDALE, PARKE*, and *PATTESON, Js.*

a certain amount, and the thing wasted is to be recovered with treble damages: a copyholder holds on condition of committing no waste; and, on breach of that condition, he forfeits his whole estate. The question then is, whether the pulling down of an ancient barn be waste. That is a general question of law. It is not to be left to the discretion of a copyholder to judge whether the estate will be thereby improved or not: it is a matter to be determined by the lord only, who may license it if he pleases. The authorities on this subject are collected in Comyn's Digest, Copyhold, M. 3; see also Co. Litt. 53, a, from which it is clear that it is waste to pull down any building. The case of *The Keepers of Harrow School v. Alderton*, 2 B. & P. 86, which turned on the statute of Gloucester, was against a tenant for years; and there the defendant was permitted to enter up judgment because there were only three farthings damages on the three closes. There a passage of Bracton, Lib. 4, c. 18, s. 12, fol. 316, b, was cited to the effect that waste shall be an injury, unless it be so trifling that inquisition ought not to be made. That seems to be spoken only of landlord and tenant. And in *Pindar v. Wadsworth*, 2 East, 154, which was an action on the case by a commoner for an injury done to his right of common, the case of *The Keepers of Harrow School v. Alderton* was distinguished; and it was held that the plaintiff might have judgment, [*509] though the damages were only one farthing. The statute of Gloucester furnishes the only case in which the civil law maxim "de minimis non curat lex" has been applied. In *Cole v. Green*, 1 Lev. 309; S. C. not S. P. 2 Saund. 228, as *Green v. Cole*; which was an action of waste on the immemorial custom of London, it was held, that pulling down houses and erecting others in their stead was waste, though the annual rent was thereby improved from 120*l.* to 200*l.* In the *City of London v. Greyme*, Cro. Jac. 182, it was said, that the conversion of a corn-mill to a horse-mill was waste, though it were to the lessor's advantage. In *Lord Darcy v. Ashworth*, Hob. 234 (ed. 1724), it is laid down as generally true "that the lessee has no power to change the nature of the thing demised; that he cannot turn meadow land into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of park." Converting two chambers into one, or e converso, or converting a hand-mill into a horse-mill, is waste: Hal. MSS. Co. Litt. 53, a, not. (3). So a tenant cannot make rails where none were before: Hal. MSS. Co. Litt. 53, b, not. (4).¹ So in case for injury to the reversion, brought against a stranger, it was held sufficient for the plaintiff to show any alteration, although the property were thereby improved: *Alston v. Scales*, 9 Bing. 3. Cases to the same effect are collected in 2 Rolle's Abridgment, 815, Waste. In fact, property must always suffer by an *alteration which affects the evidence of its identity. Suppose the fine for alienation were [*510] uncertain, and to be assessed according to the value for the time being, Com. Dig. Copyhold, H. 4, and the alienation were to take place after a building had been pulled down and before it was rebuilt, the lord's fine would be diminished, though, ultimately, the new building was of greater value than the old one.

Sir J. Scarlett and *Austin* contra. If there be any distinction between the application of the law of forfeiture for waste to landlord and tenant, and that to lord and copyholder, it cannot be more peremptorily applied in the latter case than in the former. The landlord is a real loser by the waste: the lord loses nothing, for he has no practical enjoyment of the inheritance. A lessee holds the land subject to the conditions annexed to the particular species of estate, as much as a copyholder. The arguments as to the deterioration which might ensue from the loss of evidence, or diminution of fines, are inapplicable here, because the jury have negatived the production of any damage. *Cole v. Green*, 1 Lev. 309, was a case of landlord and tenant, and there the evidence of the title was injured; if that case be applicable generally, a copyholder

¹ Citing *Dyer*, 332 (*Manwood v. Myne*). In this case the question seems to have been, for what erections on the land the tenant was justified in cutting down timber.

could not build a new house on his land. [PARKE, J. According to Watkins on Copyholds, vol. i. c. 8, pp. 331, 332, he could not.] If Lord Darcy v. Ashworth, Hob. 234 (ed. 1724), be applicable, a copyholder cannot plough up land which has not been ploughed before. But that rule appears to be qualified as to any occupier. In 2 Rolle's Abr. 814, Waste, 1, 47, it is said, that where, by the custom of the country, it is good husbandry to plough the meadow, and it is for the *amelioration of the meadow, it is not waste to [*511] plough it. The general rule is, that the law will not allow that to be waste which is not any ways prejudicial to the inheritance: per RICHARDSON, C. J., in Barret v. Barret, Het. 35. Thus in 2 Rolle's Abr. Waste, p. 815, pl. 17, 18, it is said, that it is waste to pull down a house and rebuild a smaller, or a larger; the reason given in the latter case is, that the new house will be a greater charge to the lessee; which brings the question to the same test. In Keil. 38,¹ it is said, that if a lessee plead, in waste for pulling down a house, that he has built a larger, if it be to the lessor's advantage, he may show it. The division of a meadow into many parts, by making ditches, is said not to be waste, for the meadows may be the better for it: Vin. Abr. Waste, D. 46. The change of one kind of mill for another may be waste; but that would be from the change in the nature of the property causing some damage. In Alston v. Scales, 9 Bing. 3, there was actual damage done, though very minute; and the Court said that it altered the evidence of the title. The Court looks to the actual effect upon the value of the interest of the reversioner; this rule has been adopted in actions on the case for injury to the reversion, as in Jessor v. Gifford, 4 Burr. 2141, Jackson v. Peaked, 1 M. & S. 234, Strother v. Barr and Another, 5 Bing. 136, Ferguson v. Cristall, 5 Bing. 305, Young v. Spencer and Another, 10 B. & C. 145. The passage in Bracton mentioned on the other side is perfectly general; and it was written *before the statute of Gloucester [*512] passed: and the inquisition, there spoken of, answers to the verdict of a jury now. Bracton's doctrine is recognised in Lord Coke's first, Co. Litt. 54, a, and second, 2 Inst. 306 (11), Institutes, and in Topping v. King, Winch, 5. In the case of a copyhold, the Lord Chancellor doubted whether a legal forfeiture was incurred by the copyholder working a quarry, as to which it did not appear whether it had been opened before the copyholder's time; or by grubbing up boundary hedges, as to which it did not appear whether they were between parts of the copyhold or between the copyhold and adjoining freehold; and by topping timber trees: Peachy v. The Duke of Somerset, 1 Str. 447. So it was doubted whether it were waste for a copyholder in fee to dig open mines, in Lord Rutland v. Gie, 1 Sid. 152. The erection of a new house on a copyhold, without license, was held to be no forfeiture, as being for the improvement of the tenement, though the nature of the land was altered: Cecil v. Cave, Vin. Abr. Copyhold, L. c. In Simmons v. Norton, 7 Bing. 640, it was held that, in support of a general plea of nul wast, evidence could not be given that the act was in conformity to the custom of the country, and in amelioration of the land; but that was a decision merely as to the proper method of raising the question on the record. In Burton's Law of Real Property, 411 (1835) (ed. 1830), it is said, "The tenant of a copyhold estate of inheritance may also forfeit that estate by waste. But reason seems to require that the waste which is attended with such penal consequences should be either an invasion of the [*513] lord's property, as by cutting down trees without being authorized *by the custom; or, at least, some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity. To this last reason may also be referred the forfeiture which is incurred by an inclosure, or other alteration of boundaries." [PARKE, J. Suppose the barn had been the sole object of the grant.] In that case the act might have destroyed the identity of the property, and then the jury would probably have found that it

¹ Per Constable, arg. in the Abbot of Stratford's case, assented to by BRIAN, C. J., of C. P., Keil, 89.

did damage. In ejectment against a termor, upon a special proviso in the lease, giving a right of re-entry upon the commission of waste to the value of 10s., it was held that, when buildings of more than that value had been pulled down and others substituted for them, the jury should have been directed to ascertain whether, on the whole, waste had been committed to the value of 10s. : Doe dem. Earl of Darlington v. Bond and Others, 5 B. & C. 855, and BAYLEY, J., gave as a reason, that it was possible that the value of the reversion might be increased by the alteration. *Our. adv. vult.*

DENMAN, C. J., in the course of this term delivered the judgment of the Court.

This was an ejectment for ten messuages, in the manor of Princes Risborough, in the county of Bucks, which was, after a former trial, again tried before my brother GASELEE and a special jury at the Summer assizes, 1832, for that county. The lessor of the plaintiff was lord of the manor of Risborough, and the defendant was a copyhold tenant of that manor; and the *premises for which the ejectment was brought were in the occupation of a tenant. On the [*514] 31st of May, 1819, Charles Currie was admitted tenant of the premises, in trust for Lord George Henry Cavendish (now the Earl of Burlington), the defendant. The premises, as described in the admission, were a messuage or farmhouse, with all outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, and back-sides thereto belonging, and also certain lands therein particularly mentioned and described. There were two barns on the premises: one of them was in a ruinous state, and was pulled down by the tenant. Leave was asked of the steward to take it down, but it was refused: the barn was some time afterwards rebuilt by the defendant. The ejectment was brought for alleged waste, in having taken down and removed the barn without license.

Upon the evidence given on the trial, the Judge left three questions to the jury.

1st. Whether, at the time when the barn was pulled down, the defendant had no intention to rebuild it; for that if he had, there was no ground of forfeiture.

2dly. Whether any damage was occasioned to the estate by pulling down and rebuilding the barn; stating, that if they found there was not, he would reserve for the opinion of the Court whether this was an answer to the action.

3dly. As to the existence of the custom, and particularly whether it authorized the pulling down all buildings generally, or only those additional ones which the tenant himself had erected.

The jury found that the defendant did not contemplate the rebuilding the barn; that the estate would have sustained no damage if the barn had not been *rebuilt; that by the custom, a man may pull down what he has built, [*515] but not generally.

A verdict was taken for the plaintiff, with liberty for the defendant to move to enter a nonsuit, if, upon the finding respecting damage, the Court think him entitled so to do.

By the general custom of copyholds, if a copyholder commits waste, it is a forfeiture, Com. Dig. Copyhold, M. 3; for which he cites 1 Roll. 508, l. 31; Moore, 392; Owen, 17; in which last case it is said that all waste done by a copyholder is forfeitable.

In the quotation from Roll. Abr., the language is, if a copyholder commits waste against the custom of the manor, this is a forfeiture; and for that he cites Clifton v. Molyneux, 4 Coke, 27, where the qualification is stated that it must be waste, according to the custom of the manor.

But without considering whether the custom of the manor need be taken into consideration or not, the custom here found, is that the copyholder may pull down what he has built, but not generally.

Then a question arises, is the pulling down a barn waste?

The instances and cases where waste has been considered as applicable to

buildings, are almost all as to houses or mills; but there are some where waste has been assigned as to outbuildings. In Brooke's Abridgment, Waste, pl. 67, waste was assigned, among other things, in a stable. In Dyer, 108, it was assigned in a stable. In Rastal v. Turner, Cro. Eliz. 598, which was a case of forfeiture of copyholds for waste in burning an outhouse, no doubt was made as to [*516] its being a forfeiture by the *person who did it; but the case was decided on its being done in collusion for some purposes as to the estate, or the person connected with the copyhold.

In Townsend's and Cornwall's Tables of Pleading, there are several precedents referred to of waste being assigned in various sorts of outbuildings. And in the statute of Marlbridge, 52 Hen. 3, c. 24, it is enacted "that farmers, during their terms, shall not make waste nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to farm." And though waste be by the common law, this may be considered as a legislative exposition of the subjects in which waste may be committed. On the words, "nor of anything belonging to the tenements which they have to farm," Lord Coke, in the 2d Institute, 146, says, "there were before particularly named *de domibus boscis et hominibus*;" and these other words, "of anything belonging to the tenements that they have to farm," comprehend lands and meadows belonging to the farm.

Lord COKE, therefore, must be supposed to consider that the word houses includes all outbuildings; if not, the general words here used would certainly extend to them.

We are, therefore, of opinion, that the pulling down a barn, taken absolutely, is such waste as subjects the copyhold tenant to a forfeiture. But there is another principle applicable to waste, that is, the smallness of the value, and there are a great number of old authorities to say, that if the value be very small, the consequences of waste do not attach.

They will be found collected in 2 Roll's Abr. 824, Comyn's Dig. Tit. Copyhold, M. 3, and Waste, E. 1.; *Viner's Abr. Tit. Copyhold, K. c, and [*517] Waste, N.; 2 Saunders, 259, Green v. Cole, notes. See also The Keepers of Harrow School v. Alderton, 2 Bos. & Pul. 86. Some of these authorities are not directly in point, for they are decided upon the statute of Gloucester, and in actions of waste, and between landlord and tenant. And it is laid down by Lord Chancellor LOUGHBOROUGH, in Dench v. Bampton, 4 Ves. jun. 706 (see Richards v. Noble, 3 Mer. 673), that an action of waste will not lie between a lord of a manor and a copyholder. But they are illustrations of the principle, that where there are no damages there can be no waste; and to this effect is the case of Barret v. Barret, Hetley, 35, where C. J. RICHARDSON said, "The law will not allow that to be waste which is not any ways prejudicial to the inheritance."

Upon the whole, there is no authority for saying that an act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden upon it, or thirdly, by impairing the evidence of title. And the law is distinctly laid down by C. J. RICHARDSON in Barret v. Barrett, cited at the bar from Hetley's Reports, 35. This case is entirely clear of the two former grounds; and as the jury have found that the defendant did no damage to the estate, it follows that there was no waste and no forfeiture. The rule must therefore be made absolute.

Rule absolute.

[*518]

*MACARTHUR v. CAMPBELL. Nov. 7.

On a reference of a cause and all matters in difference by a Judge's order, one of the parties moved after the proper time, to set the award aside: Held, no excuse for the delay, that the arbitrator made an exorbitant charge for the award, in consequence of which the party now applying did not take it up.

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges: whether they be reasonable or not.

THIS cause, and all matters in difference between the parties, were, by an order of Lord TENTERDEN, referred to an arbitrator; the costs of the suit and reference to abide the event of the award. The arbitrator, on the 13th of November, 1832, gave notice that he had made his award, ready to be delivered, on payment of his charges; but the plaintiff, considering the charges exorbitant, did not take up the award, and, consequently, remained in ignorance of its contents till the 14th of March, 1833, when he received a duplicate of the award from the defendant, in whose favor it was. The award bore date the 12th of November, 1832. The order of reference having been made a rule of Court, the plaintiff, in Easter term, 1833, obtained a rule nisi for setting the award aside, on several grounds, of which the exorbitant charge was one.

Sir *James Scarlett* now showed cause, and contended that the application came too late, and that the plaintiff's objection to pay the arbitrator's demand was no excuse for the delay; to which point he cited *Musselbrook v. Dunkin*, 9 Bing. 605.

Follett, contra. This, being a reference under a Judge's order, is not within 9 & 10 W. 3, c. 15, s. 2, and therefore it was not necessary that the motion *should have been made in the next term after the award was published. [PARKE, J. The Court adopts the provision of that statute as a rule in [*519] other cases.] At all events, the circumstances of this case take it out of the rule. [DENMAN, C. J. You do not state that you applied for the award, and that it was refused because an exorbitant fee was not paid; though I do not know that even that would be sufficient.] In *Musselbrook v. Dunkin*, 9 Bing. 605, TINDAL, C. J., says, referring to the words of the statute, which directs that a motion to set aside an award shall be made before the last day of the term next after the award shall have been made and published:—"The question is, what is meant by the word *published*? I think that word is satisfied by the award's having been made, and notice having been given to the parties that it is within their reach, on payment of just and reasonable expenses." Then the award here was not published on the 13th of November, for the parties were not then informed that it could be had on such terms. The Lord Chief Justice proceeds:—"And I concur in thinking that the award cannot be said to be ready, when it only is to be had on submitting to a wrongful demand." Now, to discharge this rule upon the ground suggested, the Court must decide that an award is published, when notice has been given to the parties that it is to be had on payment of an exorbitant demand. It is not clear that there was any authority by which these charges could have been taxed; and, if so, the plaintiff could take no course but that which he has adopted. [PARKE, J. If the award was not published when the notice was given to the parties, the arbitrator *might have altered it afterwards, which will scarcely be contended.] [*520] That shows that the publication of an award is not merely its being ready on payment of a moderate sum.

DENMAN, C. J. We are all of opinion that the plaintiff ought to have come to the Court sooner: and we do not think the Court would have a difficulty in dealing with an arbitrator who made exorbitant charges. If the ground alleged for the delay in this case were held available, litigation might be kept up for ever. It is indeed said by the Lord Chief Justice in *Musselbrook v. Dunkin*, 9 Bing. 605, that an award is published when the parties have notice that it is within their reach on payment of such expenses as are just and reasonable. But I think these last words need not form part of the definition.

PARKE, TAUNTON, and PATTESON, J_s, concurred. Rule discharged.

[*521]

*DOMETT and Others v. BECKFORD.

In *indebitatus assumpsit* for freight, it appeared that goods were laden in Jamaica, on board the plaintiffs' ship, according to a bill of lading, which stated them to have been shipped by W. J., on a vessel bound for London, on account of the defendant, and that they were to be delivered in London to the consignees, paying freight for the same at the rate therein mentioned; the goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees without receiving the freight, it was held that the defendant was liable by law to pay the freight to the shipowners; and that independently of any express contract by charterparty.

INDEBITATUS *assumpsit* for freight, *primage*, and *pierage*, due from the defendant to the plaintiffs, in respect of the carriage of certain goods and merchandise mentioned in the declaration. Plea, general issue. At the trial before DENMAN, C. J., at the London sittings after Trinity term, 1833, the following facts were admitted:—"The goods mentioned in the declaration were shipped in the island of Jamaica, on board the ship William Bryan, belonging to the plaintiffs, according to the following bill of lading:—'Shipped, in good order and well conditioned, by W. Jackson, in the ship William Bryan, bound for London, 145 hogsheads of sugar, and forty-eight puncheons of rum, on account of W. Beckford, Esq., being marked and numbered as in the margin, and are to be delivered at the West India Docks, in the port of London (with the usual risks expressly excepted), unto Messrs. Plummer and Wilson, or to their assigns, paying freight for the said sugar at 5s. sterling per hundred weight, and rum at 6d. sterling per imperial gallon, with *primage* and average accustomed.' The arrival of the ship was reported on the 30th of August, 1830, and a freight note for 622l. 10s. 4d. (which was admitted to be the just amount of the freight, *primage*, and *pierage*, payable for the shipment and carriage of the goods), was, on that day, delivered by the agents of the plaintiffs, who reported the ship to Plummer and Wilson, the consignees named in the bill of lading. The goods were the property of the *defendant, and were [*522] shipped and consigned by W. Jackson, his attorney in Jamaica, on the account and risk of the defendant, and afterwards delivered to Plummer and Wilson as his consignees in London, and were sold by them as such consignees, and the net proceeds thereof, after setting off the freight and charges in question, were carried by them to the credit of the defendant's account with them. Plummer and Wilson stopped payment on the 27th of November, 1830; and a commission of bankrupt issued against them in the December following, under which they were found and declared bankrupts, and the amount in question had not then, nor has it since, been paid to the plaintiffs."

For the defendant, it was contended, that the plaintiffs, having undertaken by the bill of lading (which was the only evidence of the contract between the parties), to deliver to the consignees, they paying freight, were bound to withhold the goods from the consignees until payment of the freight; and having delivered them without having insisted on such payment, they had no claim on the consignor, and *Drew v. Bird*, 1 Moody & M. 156, was relied upon. On the other hand, it was contended, for the plaintiffs, that from the fact stated in the bill of lading that goods had been laden on board the plaintiffs' ship, and bound for London, and were to be delivered there, the law would imply a contract on the part of the owner of those goods to pay freight, and that the clause in the bill of lading as to the consignee's paying freight was introduced solely for the benefit of the shipowners, to enable the latter to receive payment from the consignees, if they thought fit, and that it did *not preclude the ship- [*523] owners, in default of payment by the consignees, from suing the consignors; and *Barker v. Havens*, cited in the American edition of Abbott on Shipping, and in 1 Moody & M. 157, note (a), was referred to. The Lord Chief Justice was of opinion, that the defendant, the owner of the goods, and on whose account they were shipped, was *prima facie* liable to pay freight, and

that the clause in the bill of lading, "that the goods were to be delivered to the consignees, they paying freight for the same," being introduced merely for the benefit of the master or shipowner, did not make it compulsory on the latter to withhold the delivery of the goods until payment of freight by the consignee, and, consequently, that the owner of the goods was not discharged from his primary liability by the neglect of the shipowner to obtain payment from the consignee. The defendant then called several witnesses to show, that by the custom of merchants in the port of London, the shipowner, by delivering the goods to the consignee named in the bill of lading, lost all claim on the consignor; but he failed in establishing that custom, and a verdict was found for the plaintiffs, liberty being reserved to the defendants to move to enter a non-suit.

F. Pollock, in this term, moved accordingly. The only evidence of any contract to pay freight was the bill of lading signed by the agent of the plaintiffs. By that the plaintiffs undertook to deliver the goods in London to the consignees, they paying freight. There was no evidence of any contract by the consignor to pay freight, and the law will not, under these circumstances imply *one. In *Penrose v. Wilks*, *Abbott on Shipping*, 281 (5th edit.); [**524*] *Tapley v. Martens*, 8 T. R. 451; *Christy v. Rowe*, 1 Taunt. 300; and [**524*] *Shepard v. De Bernales*, 13 East, 565, there were charterparties, whereby the shipper expressly stipulated to pay the freight; but, in this case, there was no charterparty; and in *Drew v. Bird*, 1 Moody & M. 156, where a bill of lading stated that the goods were "shipped by the consignor, to be delivered to the consignee or his assigns, he or they paying freight," Lord TENTERDEN held *ad nisi prius*, that if the goods were delivered without receiving freight, the consignor was not liable for the freight, there being no charterparty.

PARKE, J. As soon as these goods (which were the property of the defendant), were shipped in the plaintiffs' ship, to be carried from Jamaica to London, the defendant, even before any bills of lading were signed, became liable by law to pay freight, unless that liability be controlled by special custom, and of that there is no proof. From the fact, that the goods were laden on a ship to be conveyed from Jamaica to London, the law will imply a contract by the owner of those goods to pay for the carriage. The only difference between the present case and *Shepard v. De Bernales*, 13 East, 565, is, that in this case a contract to pay freight is implied by law from the fact of the defendant having shipped his goods on board the plaintiffs' ship, to be carried from Jamaica to London. In the other case, there was an express contract by charterparty; but it was there decided, that the clause in the bill of lading, "he or they paying freight for the said goods," was introduced, not for the *benefit of the shipper, but for that of the master or shipowner, and was intended to [**525*] give the latter the option of insisting, if he thought fit, on receiving the freight before he should make delivery of the goods; and that it did not cast the duty on the captain, at his peril, of obtaining the freight from the consignee at the time of delivery; but that if he did not get it from him, he might insist on receiving it from the consignor. I have not the least doubt, that in this case, the defendant, who is the owner of the goods, is liable to pay freight to the plaintiffs.

TAUNTON, J., concurred.

PATSON, J. *Shepard v. De Bernales*, 13 East, 565, shows that the clause in the bill of lading was introduced for the benefit of the master only, and not for that of the consignor, and consequently the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. In *Christy v. Rowe*, 1 Taunt. 300, the Court of Common Pleas held, that the master was not bound at his peril to insist upon his freight at the time of delivering the goods; but that if he delivered the goods, and could not afterwards get the freight from the consignee, he might sue the merchant on the charterparty.

Rule refused.

[*526] *The KING v. The Inhabitants of WICK ST. LAWRENCE. Nov. 9.

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence, that the pauper was not settled in that parish; and, therefore, upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may show by parol evidence that the first order of removal was quashed on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement; and that he afterwards sold the tenement, and thereby became removable.

ON appeal against an order of two justices, made in 1832, for the removal of Elizabeth the wife of Isaac Harle (who had lately left the parish of Banwell), and children of the said Isaac Harle and Elizabeth his wife, from the parish of Banwell to the parish of Wick St. Lawrence, in the county of Somerset, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

It was proved that the paupers were, in 1822, removed by an order from the respondent to the appellant parish; against which order there was an appeal to the Easter sessions in that year; and that the respondents having discovered before those sessions that the paupers were irremovable, by reason of their residing on a tenement purchased by the pauper Isaac for less than 30*l.* determined to abandon their order of removal; that the reason was communicated by the then attorney of the respondents to the then attorney of the appellants, but no mention of the same was made to the Court; and at the said sessions an order was made by the consent of all parties for quashing the said order of removal, in which order of sessions no mention was made of the ground on which the same was quashed. The Court (on the hearing of the present appeal), thinking themselves bound to admit the evidence above stated, overruled an objection [*527] to it made by the counsel for the *appellants; and upon proof that the pauper Isaac did, before the order of removal now appealed against, sell the tenement which rendered him irremovable, and that he had before 1822 obtained a legal settlement in the appellant parish, the Court confirmed the last order of removal. If the Court of King's Bench should think that the court of quarter sessions improperly admitted such evidence, and that the order of sessions in 1822 was, as between the present parties, conclusive of the pauper's settlement at that time, the order now appealed against was to be quashed.

Erle and *Moody* in support of the order of sessions. The order of sessions in 1822 was not conclusive evidence that the pauper at the time of the order of removal then appealed against, was not settled in the appellant parish; and parol evidence was admissible to explain the ground upon which the judgment of the court of quarter sessions proceeded. The general rule is, that the judgment of a court of competent jurisdiction directly on the point is, as evidence, conclusive between the same parties upon the same matter directly in question, *Duchess of Kingston's case*, 20 *Howell's St. Tr.* 538 (note), and that on the principle that no matter once litigated and determined by proper authority shall a second time be brought into controversy between the same parties. The order of sessions therefore, made in 1822, was conclusive between the contending parishes only as to the point thereby decided. Now, by that order, the Court only decided that the appellant parish was not bound to receive the pauper when the order of removal was made; and that may have been *either [*528] because the party was not chargeable or was irremovable, or because the order was defective for want of form, or because he was not settled in the parish. *Rex v. Saint Andrew's Holborn*, 6 *T. R.* 613, shows that if it had appeared on the face of the proceedings that the order of removal had been quashed for want of form, it would not have been evidence that, at the time when it was made,

the pauper's settlement was not in the parish to which he was directed to be removed. In *Osgathorpe v. Diseworth*, 2 Str. 1256, Burr. S. C. 261, a pauper was removed by an order of two justices from Diseworth to Osgathorpe, and the order on appeal was quashed. He was, by a second order, sent from Diseworth to Osgathorpe as a certificate man, and upon appeal it was stated that the first removal was before he became chargeable, and the second after he became so; and the sessions were of opinion that the first determination was not final between the parties, and therefore confirmed the second order of removal; and on motion to quash the last two orders, on the ground that the first judgment of the court of sessions was final between the parties, this Court held it was not final, and that, because it appeared by evidence that it proceeded on the ground that the pauper was not removable when the first order was made. The special ground for quashing the first order of removal was not stated on the face of the order of sessions; but was stated (and, it must be presumed, was proved) to the court of quarter sessions upon the trial of the second appeal; and if it was competent to the removing parish, in that case, to show by evidence that the reason for the court of quarter sessions *quashing the first order of removal, was because the pauper, at the time when it was made, was [*529] not chargeable, it must also be competent to the removing parish, in this case, to give evidence that he was irremovable for a temporary cause. *Rex v. Wheelock*, 5 B. & C. 511, is also a direct authority to show that such evidence is admissible. There, this Court refused a mandamus to the justices at sessions to make a special entry on their proceedings, that an order of removal was quashed for want of proof of chargeability, because the respondent, on the trial of another appeal against another order of removal of the same party, might explain by evidence the particular ground on which the former order was quashed. [TAUNTON, J. It would be most inconvenient, and would lead to great expense, if it were competent to parties to give parol evidence to explain the particular ground of the judgment.] That objection would apply in many other cases, where a judgment in a former action does not specify the particular ground on which it proceeded. Where a judgment is pleaded in bar, and the real merits of the action have not been at all inquired into in the former proceeding, issue may be taken on the fact: *Hitchen v. Campbell*, 2 W. Bl. 779, 827; 3 Wils. 304. A recovery in one action is no bar of a second, where on the trial of the first action, no evidence was given in support of the claim on which the second is founded, *Seddon v. Tutop*, 6 T. R. 607. If there be a reference of all matters in difference between the parties, and, after an award is made, either party bring an action against the other for a matter in difference which subsisted at the time of the submission, parol evidence may be given to *show [*530] that that matter was not brought before the arbitrator, *Golightly v. Jellico*, 4 T. R. 147, note (a). In *Rex v. Denbighshire*, 1 B. & Ad. 616, an appeal was dismissed, on the ground that it was entered on behalf of one overseer only, and then a second notice was given by two. The second appeal was heard and decided on the merits in favor of the appellants, and this Court refused to disturb that decision. [TAUNTON, J. There a new state of facts had intervened.] So it has here; for the pauper had parted with the property which made him irremovable at the time when the first order was made. In 1822 he was in possession of a property too small to give him a settlement, but which made him irremovable. This point is adverted to in *Phillips on Evidence*, vol. i. p. 329 (7th edit.), where it is said that it will be competent to the respondents to prove that the judgment in the former appeal, reversing the order of removal of the pauper, was given, not on inquiry into the settlement, but on the preliminary objection that the pauper was not chargeable.

The Solicitor-General, and *Rogers*, contra. A judgment of a court of quarter sessions, confirming an order of removal, being in rem, is conclusive, not only as between the contending parishes, but against all the world, that the pauper was, at the time of that order, settled in the parish to which he was removed; but a

judgment of a court of quarter sessions, quashing an order of removal, without assigning, on the face of it, any special reason for doing so, is conclusive against the removing parish, that the pauper, at the time when the order was made, [*531] *was not settled in the parish to which he was removed, and that on the presumption that the order was quashed on the merits, and that the sessions must therefore have adjudged that the pauper was not settled in that parish; nor is parol evidence admissible to show that the decision proceeded on any other ground. Secondly, if such evidence could in any case be given to explain the ground on which the judgment had proceeded, it cannot be done in the present case, because the order was quashed by consent, and the special ground attempted to be proved was not even stated to the court of quarter sessions. It has been the general understanding of the profession, that an order of sessions, quashing an order of removal, is conclusive between the contending parishes; and on that ground it has been a frequent practice to apply to the court of sessions to make a special entry of the ground on which an order is quashed. In *Rex v. St. Andrew Holborn*, 6 T. R. 613, the special ground for quashing the order of removal was stated on the face of the order of sessions. In *Osgathorpe v. Diseworth*, 2 Str. 1256, Burr. S. C. 261, it does not distinctly appear, from the report, whether or not the special ground for quashing the first order of removal was stated on the face of the order of sessions. There the pauper, at the time when the first order was made, must have been removed on the ground that he was likely to become chargeable; but as that was no ground for removing a certificated man, as soon as the certificate was produced, the order must have been quashed; but afterwards he became chargeable, and was removed a second [*532] time. [PATTESON, J. Evidence must have been *given on the trial of the second appeal to show that the pauper was a certificate man, though the first order on the face of it was good.] The second order of removal must have been different from the first. The first must have stated that the pauper was likely to become chargeable; the second, that he was actually so. In *Rex v. Whelock*, 5 B. & C. 511, what is said by BAYLEY, J., is a mere obiter dictum. It was sufficient ground for the decision there, that the sessions had pronounced their judgment, and that this Court is not a court of error from that. In *Mungerhunger v. Warden*, cited 6 T. R. 614, two justices removed a pauper from the parish of Warden to the parish of Mungerhunger, which appealed, and the order was reversed for a defect of form; but the order was good. Afterwards the parish of Mungerhunger sent the pauper back: yet, the order being good, it was held final, and a bar to all subsequent orders. Here it must be taken *prima facie* that the first order of removal was quashed on the merits, no special ground being stated on the face of the order. [PARKE, J. The parol evidence rebuts the *prima facie* presumption that the court of quarter sessions adjudicated on the settlement; it shows that no evidence was heard.] That evidence was not admissible. The Court must be understood to have adjudicated only on the facts legitimately brought before them. Assuming that evidence might have been admissible to prove that the order was quashed because the pauper was irremovable, there was no sufficient evidence here to show that it was not quashed on the merits of the settlement. The only proof was, that the parties consented to its being quashed.

[*533] *DENMAN, C. J. The only question submitted to us by the court of quarter sessions is, whether the parol evidence was properly admitted. The justices have drawn their conclusion from the facts proved; and I think it sufficiently appeared that the consent was given in consequence of its having been discovered that the pauper was irremovable. The question as to the admissibility of the parol evidence, depends on the nature of the point actually decided by the court of quarter sessions when they quashed the first order of removal; for judgments of courts of competent jurisdiction directly on the point are, as evidence, conclusive between the same parties upon the same matter directly in question in another suit. Upon this principle a judgment of the court

of sessions confirming an order of removal is conclusive not only against the parish to which the removal is directed to be made, but (being a judgment in rem) against all the world, that the pauper, at the time when that order was made, was settled in the parish to which he was sent; for that is the point which the sessions must have decided when they confirmed the order of removal. An order of sessions, quashing an order of removal, is also conclusive between the contending parishes as to the point decided by it. Then the question is, what that point really is. It is that the parish to which the removal was directed to be made was not bound to receive the pauper. The Court may have come to that decision, either on the ground that the pauper was not settled in the parish to which he was sent; or that he was not chargeable, or was irremovable when the order was made. That being the effect of an order of sessions quashing an order of removal, it seems to follow that if *it [*534] be offered as evidence to prove that the pauper was not settled in the appellant parish, it may be shown by parol evidence, that the judgment proceeded upon some other ground. It is said that the sessions ought to have made a special entry of the ground on which they quashed the order of removal, and that there being no such entry, it must be presumed that they decided on the merits; but in *Osgathorpe v. Diseworth*, 2 Str. 1256, Burr. S. C. 261, there was no such entry on the face of the order, and therefore parol evidence must have been given on the trial of the second appeal to show that the pauper was a certificated man when the first order of removal was made, and consequently not chargeable. That is an authority expressly in point; and in *Rex v. Wheelock*, 5 B. & C. 511, BAYLEY and HOLROYD, Js., refused to compel the sessions by mandamus to make a special entry of the cause for which they had quashed an order of removal; and that on the ground that the party had his remedy by giving, on the trial of a second appeal, parol evidence of the distinct ground on which the order of removal was quashed. It is said that admitting parol evidence to explain such an order of sessions, will be inconvenient; but supposing the inconvenience were greater than any I can see in the case, injustice is the greatest of inconveniences, and when an order of removal has been discharged, not on the merits, but on other grounds, it would be great injustice if it could be set up as a decision on the merits, by a party who knew that they had not been inquired into.

PARKE, J. The only question referred to us by the sessions, is, whether they were right in receiving the *parol evidence. It is not for us to inquire [*535] whether they came to a right conclusion on that evidence, though I have no doubt they did; but the only question now is as to the admissibility of the parol evidence, and I think it would lead to much injustice if it were inadmissible. There are two rules applicable to this subject; one is, that an order of sessions confirming an order of removal is conclusive against all the world; the other is, that an order of sessions quashing an order of removal is conclusive between the contending parishes; but it is conclusive only as to the point which it decides, i. e. that at the time when the order of removal was made, the appellant parish was not bound to receive the pauper. It is like an acquittal upon an indictment for not repairing a road, on a plea of not guilty, where the question of liability has not been raised on the record; such acquittal is no evidence that the parish was not liable, because it may have proceeded on a different ground, viz., either that the road was not out of repair, or was not a public highway. So an order of sessions, quashing an order of removal, may have proceeded, either on the ground that the pauper was not settled in the appellant parish, or that he was not chargeable, or that he was irremovable. By analogy, therefore, such an order of sessions cannot be conclusive evidence that the pauper was not settled in the appellant parish. I think it would have been better if the Court had held, that it was no evidence at all to prove any of the facts on which the decision may have proceeded; because it does not distinctly show upon the face of it, on what ground it did proceed. The cases, however, show that it is prima

facie evidence that the pauper was not settled in the appellant parish; but it must be competent for the *respondents to show, by parol evidence, that [*536] the order of sessions was not made on that particular ground, for otherwise they would be subjected to great injustice. In some of the cases, the special ground for quashing the order of removal has appeared on the face of the order of sessions; in others, it has not. In *Osgathorpe v. Diseworth*, 2 Str. 1256, Burr. S. C. 261, the special ground was not stated on the face of the first order of sessions. *Rex v. Wheelock*, 5 B. & C. 511, is a direct authority in favor of our present decision. There the order of removal was quashed, in fact, for want of proof of the chargeability of the person removed; but that ground was not stated on the face of the order of sessions, and this Court refused a mandamus to compel the sessions to state that ground specially in their order, because the respondents might, on the trial of a second appeal, explain by evidence the particular ground on which the former order was quashed. Undoubtedly parties must have a right, either to have the ground stated on the order, or to prove it afterwards by parol evidence. As to *Mungerhunger v. Warden*, 6 T. R. 614, I doubt whether that is any authority at all: it does not appear to have been decided on the question of settlement. It is a general rule, that the judgment of a court of competent jurisdiction is never final between the parties, except as to the point on which the court has adjudicated. Now, here, the point adjudicated was merely that, at the time when the order of removal was made, the appellant parish was not bound to receive the pauper; and parol evidence was admissible to show that that was the matter really adjudged.

[*537] *TAUNTON, J. I certainly had a strong impression in the first instance, that the decision of the sessions in this case was wrong. In the course of the argument, Mr. *Erle* has removed the difficulties I entertained. I think this falls directly within the authority of one case cited, and that it is also within the scope of another. I would be the last person to disturb the general rule laid down, that an order of sessions quashing an order of removal is conclusive between the contending parishes, and that an order of sessions confirming such an order is conclusive against all the world. But, then, an order of sessions must operate with reference to the state of things existing at the time when it was made. Parol evidence, therefore, was admissible here to show the state of things when the first order was made, and explain to what extent it was intended to operate. The argument is, that if the parol evidence be admissible, it appears thereby that the ground for quashing the first order of removal was altogether temporary, inasmuch as the pauper then resided on a tenement which, being his own property, rendered him irremovable, but which was not of a sufficient value to give him a settlement; and, therefore, that the order of removal could not then be supported, it being premature: but that after 1822, a new state of things arose: the pauper sold his tenement, and was no longer irremovable: the right to remove him, which was only suspended, revived, and the sessions, in 1832, might take the new state of things into consideration. I think that view of the case correct. I rely chiefly on the case of *Osgathorpe v. Diseworth*, 2 Str. 1256; Burr. S. C. 261; I do not place so much dependence on

*Rex v. *Wheelock*, 5 B. & C. 511, because there the point now before [*538] the Court arose incidentally, and not directly. But I cannot distinguish this case from *Osgathorpe v. Diseworth*, 2 Str. 1256; Burr. S. C. 261. There the pauper, who was a certificated person, was removed before he became chargeable, and a second order of removal having been made, upon appeal the above facts appeared by evidence (which must have been given to explain the first order of sessions), and the sessions thought the first determination was not final between the parties, and made their order accordingly. On motion to quash the last two orders, on the ground that a reversal is final between the parties, the Court said: "So it would be if the special matter did not appear: a certificated person cannot be sent back until he is actually a charge: a removal before is premature: the consequence of which only is, that he must be suffered to remain

till he does become chargeable, but not to make a premature removal final for ever. The last orders must be confirmed." So in this case, as long as the pauper resided in the parish on his own property, he was irremovable; but as soon as the property ceased to be his, he became removable. If a different rule were to prevail here, the consequence would be to make a premature removal decisive. I think the evidence was properly received, and that this case is not distinguishable from *Osgathorpe v. Diseworth*.

PATTESON, J. I think we must assume that the sessions were satisfied that the first order of sessions was made on the ground of the pauper having been irremovable. If they were not so satisfied, they would not have sent *the case here. It is admitted, that if the special ground for quashing the first order of removal had appeared on the face of the order of sessions, it would not have been conclusive. The question then is, whether the parol evidence was properly received. Now on that point I cannot distinguish this case from *Osgathorpe v. Diseworth*, 2 Str. 1256; Burr. S. C. 261. I think it would be much better if the special ground for quashing an order of removal were always stated on the face of the order of sessions, because it would then be unnecessary to give parol evidence on the trial of the second appeal, which is always attended with great expense: but on the authority of *Osgathorpe v. Diseworth*, I think parol evidence may be given on appeal against a second order, to explain the ground on which the first was quashed. It appears that, in that case, the ground of quashing the first order of removal was not stated in the first order of sessions, but that it was stated to the Court on the trial of the appeal against the second order of removal. *Rex v. Wheelock*, 5 B. & C. 511, is not in point, but I am at a loss to see how the Court could have refused a mandamus, unless they had been of opinion that upon appeal against another order, parol evidence of the circumstances might be received, for otherwise it is clear that the party must have a right to have the special ground appear on the face of the proceedings, and the Court in that case would have interfered to enforce it.

Order of sessions confirmed.

*The KING v. The Inhabitants of ST. MARY NEWINGTON. [540]
Nov. 9.

A curate licensed by the bishop at a yearly salary, according to the 57 G. 3, c. 99, resided in the rectory house, which was assigned to him pursuant to the same statute, and was above the value of 10*l.* a year, for more than forty days before the passing of 59 G. 3, c. 50: Held, that this was a coming to settle within the statute 13 & 14 Car. 2, c. 12, and that a settlement was gained thereby.

On appeal against an order of two justices, whereby E. J. Sanders, his wife, and child, were removed from the parish of Saint Mary Newington, in the county of Surrey, to the parish of Saint Mary Islington, in the county of Middlesex, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper's prima facie settlement, derived from his father, was admitted to be in the parish of Islington, and the question was, whether his father had acquired a subsequent settlement under the following circumstances. In the month of October, 1818, the pauper's father, the Reverend J. B. Sanders, entered into an engagement with the Reverend J. Mitchell, the rector of St. Nicolas Cole Abbey, Old Fish Street, London, to officiate as curate of that parish; and it was agreed that he should have 80*l.* per annum, and the rectory house to reside in, free of rent and taxes; and about that time he commenced his duties as a curate. On the 12th of December following, the Reverend J. Mitchell nominated and appointed the pauper's father to be curate of the said parish, but the latter did not go to reside at the rectory house until a week after Christmas, 1818; and on the 2d of February, 1819, a license was granted him

by the Bishop of London, pursuant to the provisions of the statute 57 G. 3, c. 99, to perform the office of *stipendiary curate, in reading the common prayer, and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer; and the yearly stipend of 80*l.* was assigned to him, to be paid quarterly, for serving the said cure, with the rectory house, wherein he was directed to reside, and offices, free of rent, repairs, and taxes.

The pauper's father did all the duties of curate from October, 1818, till his death in the year 1829; and from a week after Christmas, 1818, till his death, he resided at the rectory house, which was a separate and distinct dwelling-house, worth more than 10*l.* a year, free of rent, repairs, and taxes, and receiving the yearly stipend.

The question for the opinion of the Court was, whether the pauper's father, by occupying the rectory house in the manner stated, gained a settlement in the parish of Saint Nicolas Cole Abbey, Old Fish Street, London.

Barnewall in support of the order of sessions. The question is, whether a curate, by residing in a rectory house which is above the annual value of 10*l.*, can be said to have come to settle on a tenement within the meaning of the 13 & 14 Car. 2, c. 12, s. 1. The pauper's father went to reside in the rectory house one week after Christmas, 1818; he therefore resided in it more than forty days before the 2d of July, 1819, when the 59 G. 3, c. 50, passed. Now, the lawful possession of a tenement of sufficient value, when absolute and independent, with some interest therein which is sufficiently permanent to denote a coming to settle according to the words of the 13 & 14 Car. 2, c. 12, s. 1, [*542] *confers a settlement, although the occupier be exempt from paying rent, 2 Nolan's Poor Law, 4. *Rex v. Lakenheath*, 1 B. & C. 531, is in point. There, the master of a charity school, who was removable from his office at pleasure, resided for seven years, rent free, in a house of the annual value of 10*l.*, where other parish schoolmasters had resided before, and he underlet part of the house to the parish at an annual rent: it was held, that this was a coming to settle upon a tenement of the value of 10*l.* per annum, within the meaning of the 13 & 14 Car. 2, and that the pauper thereby gained a settlement. Here it is perfectly clear that the possession was lawful, and that the curate had a permanent interest independent of the rector. By the 57 G. 3, c. 99, s. 67, the latter could not even dispossess the curate without the order of the bishop, and notice pursuant to that statute. It will be said here, that the curate took no interest except under the bishop's license, and that the house was assigned to him for the more convenient performance of the duties of his office. Now, if the curate had resided merely in virtue of the agreement with the rector, his possession would have been lawful, and the house, being of the required value of 10*l.* a year, would have given him a settlement; for, till the license was obtained, he had an interest as yearly tenant, defeasible on the bishop's refusing to grant a license. That being afterwards granted, the interest derived from the agreement with the rector continued, though it was subject to the contingency of the bishop revoking the license, or ordering him to deliver up possession.

**Thesiger* and *Tidd Pratt* contra. In *Rex v. Wantage*, 2 East, [*543] 65, the curate, who resided in a rectory house for six years, was held not to gain a settlement by serving an office, and it was not even contended that he gained a settlement by renting a tenement. [DENMAN, C. J. It does not appear there that the house was of the annual value of 10*l.*] In all probability it much exceeded that value. But here the pauper's father did not reside in the rectory house in the character of tenant, but in that of curate, the house having been assigned to him by the bishop for the more convenient performance of the duties of curate, in pursuance of the 57 G. 3, c. 99. By section 64, the bishop may, where the rector is not resident, allot, for the residence of the curate, the parsonage house during the time of the curate's serving the cure;

by section 66, the bishop may, upon three months' notice in writing, direct the curate to give up possession; and by section 32, all contracts for letting houses of residence belonging to any benefice, in which houses of residence any spiritual person shall, by order of the bishop, be required to reside, or which shall be assigned or appointed as a residence to any curate by the bishop, are rendered null and void. The pauper's father could acquire no interest in the parsonage by his agreement with the rector, independently of the bishop's license; and by that the parsonage house is assigned for the convenient performance of the duties of the living, and upon certain conditions. The curate is to give up possession on three months' notice from the bishop; and the rector cannot dispossess him without an order from the bishop. This is distinguishable from **Rex v. Lakenbeath*, 1 B. & C. 531, where great stress was laid on [*544] the circumstance that the party had underlet. Here the curate could not underlet. Several authorities show that if a tenement be assigned to a yearly servant for the more convenient performance of his service, and not in the character of tenant, no settlement is gained by the occupation of it. *Rex v. Minster*, 3 M. & S. 276; *Rex v. Kelstern*, 5 M. & S. 136; and *Rex v. Ches-hunt*, 1 B. & A. 473. [TAUNTON, J. There are cases where a settlement may be gained by a party though he is not tenant, as where a party comes under an agreement to purchase.] There, there would be a tenancy at will. [PARKE, J. In the cases cited, the occupation was considered the occupation of the master. Here the residence of the curate was not the residence of the rector; he had an interest of his own independent of that of the rector.] Then it must be contended that he is in by estate, not by coming to settle on a tenement.

DENMAN, C. J. The kind of settlement relied upon in this case has grown out of the 13 & 14 Car. 2, c. 12, s. 1, which confines the power of removal to cases where persons come to settle on any tenement under the yearly value of 10*l.*, and by implication has been held to confer a settlement on a person who comes to settle on a tenement of that value; and the lawful occupation of a tenement of that annual value by a party in his own right, has been held to satisfy the words coming to settle. The word "renting" is not to be found in the statute. It is true that this settlement is most generally considered to be acquired by renting, because the **renting* shows the occupation to be independent and for the convenience of the occupier, and not for that of [*545] the landlord; and on this principle, many of the cases, where a distinction has been taken between an occupation as tenant, and an occupation as servant, proceed: the statute, however, does not require that there should be an occupation as tenant, but a mere coming to settle; and here I think it quite clear that the pauper's father came to settle in the parish of St. Nicolas Cole Abbey.

PARKE, J. It is not clear that the curate is not tenant to the rector; but it is not necessary for the purpose of gaining a settlement that he should be so. It is sufficient if he comes to occupy as having an interest of his own, and not as servant to another.

TAUNTON, J. The statute 9 & 10 W. 3, c. 11, which makes the taking a lease of a tenement of the value of 10*l.* per annum confer a settlement, is confined to persons residing under a certificate. To satisfy that statute, there must undoubtedly be a contract for renting; but this is a case within the 13 & 14 Car. 2 c. 12, s. 1, which has been held to give a settlement to any person coming to settle on a tenement of the yearly value of 10*l.* The case of occupation is usually founded on the renting of a tenement of 10*l.* a year, yet it is not necessary that it should be under a renting, or in the character of a tenant. Here the pauper's father had a lawful possession of a tenement of the required value, and an interest therein sufficiently permanent to denote a coming to settle; and that is sufficient to satisfy the 13 & 14 Car. 2, even though the occupier is exempt **from payment of rent, or has not the character of tenant.* The case [*546] comes within the doctrine of the passage cited in the argument from Mr. Nolan's Poor Law, which, though not strictly authority, is entitled to respect.

PATTERSON, J. There was clearly a coming to settle by the pauper's father, unless the occupation of the curate is in all cases to be considered the occupation of the rector: which it clearly is not. I do not see any analogy between this case and the cases of master and servant referred to in the argument.

Order of sessions confirmed.

The KING v. The Inhabitants of STOCKTON. Nov. 9.

Two justices ordered F. C., the wife of R. C., a Scotchman, having no settlement in England, and a lunatic, to be removed from parish A., where she had become chargeable, to parish B., which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made: Held, that the order was not void on the ground that it would effect the separation of husband and wife, because it was not to be presumed that when it was made, the husband was residing in parish A., or was not residing in parish B.

On appeal against an order of two justices, whereby Frances Carstofen, and her three children, were removed from the township of Stockton, in the county of Durham, to the parish of Spalding, in the county of Lincoln, the sessions reversed the order, subject to the opinion of this Court on the following case:

On the 2d of May, 1832, Robert Carstofen, who is a native of Scotland, without settlement in England, and a lunatic, returned from Sunderland, in Durham, where he had for some time been residing, to Stockton, accompanied by his wife and her three children. Almost immediately on their arrival in that township, they applied to the assistant overseer for relief; and on the 2d and 3d [*547] of that month were relieved by him, and *ordered to quit the town and return to Sunderland. About the 19th of May, the wife again applied to the Stockton overseers for relief, whereupon she and her three children were removed to the parish of Spalding by an order of justices, which stated that, upon complaint "that Frances Carstofen, the wife of Robert Carstofen, a Scotchman, having no settlement in England, and who is a lunatic, and her three children (therein described), had come to inhabit in Stockton, not having gained a settlement there, nor producing any certificate owning them to be settled elsewhere, and that they had become chargeable to the said township of Stockton," they, the said justices, upon due proof, did adjudge the same to be true, and likewise adjudged "that the lawful settlement of her, the said Frances Carstofen, and her three children, is in the parish of Spalding;" they therefore required the churchwardens and overseers of Stockton to convey her and her three children from Stockton to Spalding.

The parish of Spalding appealed against this order; and to bring the question before the Court, the following admissions were made:—That the maiden settlement of F. C. is in the parish of Spalding, and that she was legally married to Robert Carstofen, and that the three children named in the said order are legitimate; that the said R. C. was born in Scotland; that he has not gained any settlement in England; and that he was a lunatic, and living, at the date of the order of removal.

On the hearing, an objection was taken to the form of the order, and the court of quarter sessions quashed the same, on the ground that it was bad on the face of it, as it did not contain any statement of the desertion of the wife by the husband; that the defect was in a *matter of substance which the court [*548] had not power to remedy, and that evidence could not be received for the purpose of amending the order. The township of Stockton tendered evidence for this purpose, and offered to show that the husband was not living with his wife, nor in the township of Stockton, at the time of the wife's application for relief and the order of removal being made, but that he had escaped from his family in a fit of lunacy on the preceding 4th of May, when they were all in the parish of Thirsk, in Yorkshire.

If this Court should be of opinion that the order was bad in the face of it,

and not amendable, the order of sessions was to be confirmed; otherwise to be quashed.

Ingham in support of the order of sessions. This order is bad on the face of it, and the defect was in matter of substance; the court of quarter sessions could not therefore amend it, *Rex v. Great Bedwin*, Burr. S. C. 163, nor receive evidence for that purpose. Justices have no power of separating husband and wife by removal, unless the parties consent, as in *Rex v. Eltham*, 5 East, 113, or the husband has deserted the wife, as in *Rex v. Cottingham*, 7 B. & C. 615. It ought, therefore, to have appeared on the order, or by necessary inference from it, either that no separation will be effected by the wife's removal, or that it is a case of consent or desertion by the husband. In *Rex v. Ironacton*, Burr. S. C. 153, the removal was to a parish stated in the order to be the last legal settlement of the husband; and in *Rex v. Higher Walton*, Burr. S. C. 162, the removal *was made to the place of the wife's last legal settlement; and the Court said, it must be intended that that was [*549] the husband's settlement; and *Rex v. Hinxworth*, Doug. 46, n. (13), Cald. 42, is to the same effect. Now here it cannot be intended that Spalding is the husband's settlement, because it is stated expressly on the face of the order that he was a Scotchman, and had no settlement. Nor can it be said that he may follow her there; for, by 59 G. 3, c. 12, s. 33, he must be passed to Scotland. A consent by him, if stated, would be invalid since the statute: *Rex v. Leeds*, 4 B. & A. 498.

S. Temple contra. The Court will not presume anything which will have the effect of vitiating the order of removal; and to render it void, they must presume, either that when it was made, the husband of the pauper was not at Spalding, or that the husband and wife were then living together. In *St. Michael Bath v. Nunny*, 1 Str. 544, Burr. S. C. 815, the order of removal being to the former parish, it was moved to quash it, because it did not appear that the husband was in that parish; but the Court said, they would not intend he was not there, and that if he were in the parish from which she was sent, that would vitiate the order; but as neither of these facts appeared, to satisfy them that the order was bad, they would not presume it to be so. So in *Rex v. Ironacton*, Burr. S. C. 153, the removal of the wife being to that parish, and the sessions having confirmed the order, on motion to quash both orders, on the ground that the wife was removed without the husband, and that that amounted to a divorce between the man and his wife, the Court said, that it *did not appear that the husband was not at Ironacton at that time; and in *Rex v. Higher Wal-* [*550]
ton, Burr. S. C. 162, the removal of the wife being to that parish, which was adjudged to be the place of her last legal settlement, and the sessions having confirmed the order of removal, on motion to quash those orders on the ground that it did not appear whether the woman's settlement was in her own right, or in right of the husband, and that nothing ought to be intended, the Court said that she could not be settled but where her husband was, and that they could not intend anything to vitiate the order.

DENMAN, C. J. The authorities cited show that the Court will not presume any fact in order to vitiate an order of removal. Here it is perfectly consistent with that order, that it may not have the effect of separating husband and wife; for the husband and wife may not have been living together at the time when that order was made, or he may be living at Spalding, the parish to which she is ordered to be removed.

PARKE, J. This case falls within *St. Michael Bath v. Nunny*, 1 Str. 544; Burr. S. C. 815. We cannot intend that when the order was made, the husband of the pauper was residing at Stockton, or that he was not at Spalding.

TAUNTON and PATERSON, Js., concurred.

Order of sessions quashed.

[*551] *The KING v. JAMES DAVIS and Another. Nov. 9.

An order of justices, under 11 G. 2, c. 19, s. 4, adjudging a party to pay double the value of goods fraudulently and clandestinely removed to prevent a distress, must show on the face of it that the party removing the goods was tenant: and that it is not sufficiently shown by stating that, on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent A. B. from distraining them for arrears of rent due to him for the said premises: and that, it appearing that he did so remove, &c., he is convicted thereof. Semble also, that the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord.

THE following order of justices having been confirmed on appeal to the Gloucester sessions, and afterwards removed by certiorari into this Court, a rule nisi had been obtained for quashing it, on the ground, first, that the informer was not named in it; secondly and thirdly, that it did not appear that Gyde, therein named, was landlord, or James Davis tenant:—

Whereas James Davis, of the parish of Cheltenham, in the county of Gloucester, fishmonger, on, &c., at, &c., upon a complaint in writing duly made and exhibited before R. B. C. and T. N., two of his Majesty's justices of peace for the said county, residing near the place whence the goods and chattels herein-after mentioned were removed, and not being interested in the premises whence the same were removed, was charged with having fraudulently and clandestinely removed and conveyed away his goods and chattels, not exceeding the value of 50*l.*, from certain premises at Cheltenham, to prevent William Gyde from distraining the said goods and chattels for arrears of rent due to the said W. Gyde for the said premises: and whereas John Davis, of, &c., baker, was, on, &c., at, &c., upon the said complaint duly made, charged before the said R. B. C. and T. N., with having wilfully and knowingly aided and assisted the same James Davis in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same: and the said R. B. C. and [*552] T. N. as *such justices, having summoned the parties concerned, and we, &c. (three justices for the county), having heard the said charge and examined the fact and all proper witnesses upon oath, and it appearing and being fully proved before us that the said James Davis did so fraudulently and clandestinely remove and convey away the said goods and chattels as aforesaid, being of the value, &c.; and that the said John Davis wilfully and knowingly aided and assisted the said James Davis in so removing and conveying away the said goods and chattels as aforesaid, and in concealing the same: we, &c., do therefore, this 22d day of May in the year aforesaid, at, &c., determine and adjudge that the said James Davis and John Davis are guilty of the offences with which they are charged as aforesaid, and that they are hereby convicted thereof; and we do hereby adjudge them to pay the sum of 34*l.*, being double the value of the said goods and chattels, to the said W. Gyde forthwith.¹

¹ The 11 G. 2, c. 19, ss. 1 and 2, enacts, that in case any tenant, lessee for life or years, &c., of any lands, &c., upon the demise or holding whereof any rent is or shall be reserved, due or made payable, shall fraudulently or clandestinely carry off from such premises his goods, to prevent the landlord from distraining the same for arrears of the rent so reserved, &c., it shall be lawful for the landlord to distrain the goods within thirty days, wherever found, unless sold to any person not privy to the fraud.

Section 3 enacts, that if any such tenant shall fraudulently remove or convey away his goods as aforesaid, or if any person shall aid or assist any such tenant or lessee in such fraudulent carrying away, &c., such person shall forfeit and pay to the landlord or or lessor, from whose estate such goods were carried, double the value of the goods, to be recovered by action of debt.

Section 4 provides, that where the goods so fraudulently carried off shall not exceed the value of 50*l.*, it shall be lawful for the landlord, his bailiff, servant, or agent, to exhibit a complaint in writing against such offender before two or more justices, &c., residing near the place, not being interested in the lands, &c., who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, and in a sum-

*Sir J. Scarlett and Justice now showed cause. First, the order pursues the form in Burn's Justice, 24th edit., title, Distress, which BAYLEY, J., in *Rex v. Rabbitts*, 6 D. & R. 341, stated to be unobjectionable. It states that upon complaint duly made, the parties were charged. The complaint could not be *duly* made but by the landlord or his agent. As to the second and third objections, the order shows that James Davis removed his goods to prevent Gyde from distraining them for rent due to Gyde for the said premises. [PARKE, J. It is not stated that Gyde was the landlord of James Davis. In *Rex v. Rabbitts*, the removal was alleged to be to prevent A. B., being the landlord of Rabbitts, from distraining. Here, for anything that appears in the order, the complaint may have been by any person unconnected with the landlord.] The Court will not intend anything against the order, but rather the contrary. *Rex v. Bissex*, 1 Chetwynd's Burn, 24th edit. 876; 1 Chitty's Burn, 985, n.(a); Sayer's Rep. 304; and *Rex v. Monk*, there cited. As the order alleges the removal to have been with intent to prevent Gyde from distraining for arrears of rent of the said premises, the fair inference is that the rent was due from James Davis as tenant to Gyde as landlord; and if that be so, then the order does sufficiently show that the one was landlord and the other tenant. * [TAUNTON, J. The justices must state on the face of the order sufficient to show that they had jurisdiction to make it.] [*554]

Thesiger, contra, was stopped by the Court.

DENMAN, C. J. As to the objection that the order does not state the name of the complainant, it is, perhaps, a sufficient answer that it does allege that, on complaint duly made, James Davis was charged. But it is perfectly consistent with everything stated in the order, that Gyde was not landlord, and that Davis was not tenant. This objection did not occur in *Rex v. Bissex*, 1 Chetwynd's Burn, 24th edit. 876; 1 Chitty's Burn, 985, n. (a); Sayer's Rep. 304. There the order recited a complaint stating that Clavey demised his estate to Thatcher, and that complaint was adjudged to be true. The same distinction applies to *Rex v. Rabbitts*, 6 D. & R. 341. In this case, if Gyde was not landlord, nor James Davis tenant, the magistrates had no jurisdiction to make the order.

PARKE, J. It is not shown here that James Davis was tenant. Now, justices have no summary jurisdiction, except over tenants who fraudulently remove or conceal their goods, and those who assist them in so doing; they have a special authority given to them, on the complaint of the landlord, where the goods removed or concealed do not exceed the value of 50*l.*, in a summary way to determine as to the offence, and to adjudge the offender to pay double the value. If, then, it does not appear by this order that James Davis was the tenant, it is not shown that the justices had jurisdiction. [*555]

TAUNTON, J., concurred.

PATTESON, J. I do not think it appears that James Davis was the tenant; but I should not wish it to go forth that the second objection is not tenable, for it does not follow, because rent was due to Gyde, that he was the landlord, to whom rent was reserved on the demise of the premises; he might be the superior landlord, or he might have a rent charge. Rule absolute.

may determine whether such person or persons be guilty of the offence; and to inquire, in like manner, of the value of the goods and chattels carried off; and upon full proof of the offence, the said justices, by order, may adjudge the offender to pay double the value of the said goods to such landlord, his bailiff, &c., at such time as the said justices shall appoint.

The KING v. WILLIAM GREGORY. Nov. 9.

An act of parliament prohibited the erection or continuance of any building within ten feet of the road, and declared that the footpaths should be subject to the act, and be part of the road. It further enacted, that if any such building should be erected or continued contrary to the act, it should be deemed a common nuisance. By another

clause, two magistrates were empowered to convict the proprietor and occupier of such building, and to make an order for the removal thereof:

Held, that notwithstanding the latter clause, the party who erected or continued a building contrary to the act might be indicted for a nuisance.

Held also, that an open shop, having its front built on the foundation of an old wall immediately adjoining the footpath, and connected by a roof with the front of a house which was more than ten feet from the road, was a building within the meaning of the act.

INDICTMENT charging the defendant with a nuisance, by unlawfully continuing a certain erection or building by the side of a certain road leading from the south end of Blackfriars Bridge to the Obelisk in St. George's Fields, and thence along the London Road to Newington, the said building being within ten feet of the said road, and being contrary to the provisions of an act of parliament of 3 G. 4. c. cxii. Plea, not guilty. At the trial before TINDAL, C. J., at the [*556] Spring assizes for the county of Surrey, 1833, a verdict for the *crown was taken by consent, subject to the opinion of this Court on the following case:—

The road in question is one of the roads in the county of Surrey, which are under the superintendence and control of "The trustees of the Surrey new roads." It was made and set out under the provisions of an act passed in the 9 G. 3 (c. 89), and, including the footpaths, is of the width of sixty feet, the centre or carriage way being forty feet wide, and the footways on each side ten feet. By the statute 26 G. 3 c. 131, s. 34 (passed in the year 1784), certain distances are prescribed, within which the erection of buildings is prohibited: these distances vary in respect of different parts of the roads; and as to the road where the alleged nuisance is situated, it is enacted, "that no building shall be erected by any proprietor or occupier of the lands adjacent to such part of the said roads as lies between the south end of Blackfriars Bridge and Newington, and from the Circus to the Dog and Duck, within ten feet on either side of the said roads; and if any such buildings shall hereafter be erected contrary to the true intent and meaning of this act, the same shall be deemed a common nuisance." By the act 3 G. 4, c. cxii., s. 126 (which passed in 1822), the several distances, within which buildings are prohibited by the 26 G. 3, are recited; and it is there enacted, "that no erection or building shall be erected, built, or continued by any such proprietor or occupier of lands adjacent to the said roads or any of them, within the distances aforesaid or any of them; and that if any such erection or building shall hereafter be erected, built, or continued contrary to the true intent and meaning of this act, the same shall be deemed a common [*557] nuisance." By sect. 128, of the same statute, it is further *enacted, "that for the more speedy conviction of any such proprietor or occupier, and the removal of any such building, it shall be lawful for two justices of the peace to summon before them such proprietor and occupier, and upon proof by oath of two credible witnesses, or by confession of the party, of any such erection or building having been so built or continued contrary to the true intent and meaning of the said act, to convict such persons so offending, and make such order for the removal of such erection or building, as to such justices shall seem proper." The statute then gives a right of appeal to the quarter sessions, whose decision is to be final and conclusive to all intents and purposes whatsoever. And it also provides, "that no order, verdict, assessment, judgment, or other proceeding, made touching or concerning any of the matters aforesaid, or touching the conviction of any offence against this act, shall be removed or removable by certiorari, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster."

The indictment was preferred by the trustees appointed by virtue of the above mentioned acts of parliament. The alleged nuisance is situated on land, on part of which, in 1791, a chapel was erected, and the remainder of which was enclosed for a burial-ground, by a high brick wall which immediately adjoined the footpath. The chapel itself was built several feet within this inclosure, and

the space between the front of the chapel and the footpath was occupied by a portico and flight of steps leading to the chapel, the foot of the steps being in a line with the brick wall by which the burial-ground was enclosed. There was also, under the steps, an entrance from the footpaths *to vaults under the chapel, and there was a door in the brick wall, opening from the foot- [*558] path into the burial ground. In that state the property continued from 1791 to 1830, when it passed into the hands of the present proprietor, who erected two new houses on part of the burial-ground, the fronts of which houses ranged with the front of the chapel. To one of these houses the defendant made an addition, which is the nuisance complained of. The brick wall has been pulled down to a level with the ground, and on the same foundation an open shop-front has been placed, and a roof added, which connects the shop-front with the front of the newly built house. The shop thus formed is not higher than the brick wall was, nor does it project beyond the line upon which the brick wall formerly stood, and upon which the portico and steps of the chapel always have been and still are. The footpath itself is of the uniform width of ten feet, and that space is now left clear between the front of the shop and the carriage road. Soon after the above alteration was made, the trustees of the roads complained of it as an infringement of the act of 3 G. 4, and applied to two justices to abate it as a nuisance, under the provisions of that statute; but the justices declined to do so, and the trustees subsequently preferred the present indictment, and removed it by certiorari into this Court.

The questions for the opinion of the Court were: 1st, Whether under the circumstances above stated, the trustees could legally prefer the present indictment, and remove it into this Court?

2dly, Whether the alteration made in the property as above described, constituted a building within the meaning of the above-mentioned statutes?

*3dly, Whether, if it were a building within the meaning of those statutes, if it were or were not within the distance from the road pre- [*559] scribed by the statutes?

Thesiger for the crown. First, the erection complained of constitutes a building, for it is a fabric erected upon a foundation, and has a roof. 2dly, It is a building erected within the distance prohibited by the legislature. The road was made pursuant to the provisions of 9 G. 3, c. 89, which direct that it shall be sixty feet wide, and that no building shall be erected by any proprietor or occupier of lands abutting upon or adjacent to the road, within the distance of ten feet from the said road, and that if any building shall be erected within ten feet, the same shall be deemed a common nuisance. That act says nothing as to the relative width of the carriage road or foot road, but the road, including both carriageway and footway, was to be sixty feet wide; and it appears by the statement that the road, including both, was made of that width. The legislature manifestly intended that the space free from building should be eighty feet. The provision against building within the prohibited distance is repeated in the 26 G. 3, c. 131, s. 34. There can be no doubt that under these acts the footpaths were to be deemed part of the road; but the 116th section of the 3 G. 4, c. cxii., from abundant caution, enacts, that the footpaths adjoining to the roads shall be deemed part of the road to be repaired by the trustees. Then section 126 provides that no erection or building shall be erected, built, or continued within certain distances. If the portico and steps, with the wall, had remained as they were before the alteration, it might have been contended they could *not be continued; but it is unnecessary so to argue here, because an en- [*560] tirely new building has been erected within the prohibited distance. The object of the legislature was twofold, to establish a uniform line of building, and to prevent encroachments on the road.

Then, as to the mode of proceeding, it will be said, that inasmuch as before the passing of these acts it was not an offence to build within the prescribed limits, and as by 3 G. 4, c. 112, s. 128, a summary proceeding before magis-

trates is given, an offender against the act cannot be prosecuted by indictment. But these acts make an erection within the prescribed distance a common nuisance; and then it falls within the rule laid down by DENISON, J., in *Rex v. Wright*, 1 Burr. 545, "that where an offence is not so at common law, but made an offence by act of parliament, yet an indictment will lie where there is a substantive prohibitory clause in such act of parliament, although there be afterwards a particular provision, and a particular remedy given; but it is otherwise where the act is not prohibitory but only inflicts the forfeiture and specifies the remedy." The same rule is laid down by ASHHURST, J., in *Rex v. Harris*, 4 T. R. 205, and is supported by the authorities referred to in Mr. Serjeant Williams's note to *Rex v. Dickenson*, 1 Saund. 135, b.

Bodkin, contrâ. If the shop in question be indictable as a nuisance, the portico and steps, which have been erected more than forty years, are equally so. They, however, are not per se a building, but additions to the other building, [*561] and the shop also is a mere addition, *and the case terms it so. The circumstance of its being connected with the adjoining house by a roof makes no difference. The portico might have been enclosed; and the wall, or even an iron railing, might be connected with an adjoining building by a roof. [DENMAN, C. J. According to your argument, if there were a wall at the extremity of a man's garden, he might build a house up to it.] If the act were literally construed, a man could not enclose his own land by building a wall at the extremity. [PARKE, J. A wall would not be a building within the meaning of the act; that was so held in a case from Yorkshire, which arose on an inclosure act.] Then, as to the second point, it is true the 9 G. 3, c. 89, directs the road to be made sixty feet wide, and a space of sixty feet was set out accordingly; but in 1822, when the 3 G. 4, c. cxii. passed, the state of things was different. The carriage road had been made forty feet wide. The footpath was the same in width as the prohibited distance, viz., ten feet; and the legislature must have regarded the state of things at that time. The word road is used in its popular sense, and was intended to prohibit building within ten feet of the carriage road. The 116th section of the 3 G. 4, c. cxii. enacts, that "the footpaths on the sides of or adjoining to the said roads by the act authorized to be repaired, shall be, and they are hereby declared to be, subject to the regulations of that act, and to be part of the said roads, and shall be repaired and amended by the said trustees by such ways and means and in such manner as the said roads are and shall be repaired and amended." The footpaths, therefore, are [*562] distinct from the roads: they *are not the same for all intents and purposes. The act imposes a penalty on persons riding on the footpath, which shows that the footpath and the road are not the same. The 110th section provides that the surveyors may remove all annoyances on any part of the roads, or on the sides thereof. Section 111 authorizes the trustees to give the owners or occupiers of houses, &c., on the side of the said roads, notice to remove signs, bow-windows, show-boards, &c., projecting over any part of the said footpaths, or sides of the said roads, and all other annoyances whatsoever on the said footpaths or sides of the said roads; and authorizes the trustees to remove them if the owners will not. This latter clause is quite inconsistent with the supposition that the legislature intended that there should be ten clear feet between the houses and the footpath. Then as to the mode of proceeding. This case falls within the rule laid down by Lord MANSFIELD in *Rex v. Wright*, 1 Burr. 544, viz., that "Where newly-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued. For otherwise the defendant would be liable to a double prosecution: one upon the general prohibition, and the other upon the particular specific remedy."

¹ As to footpaths being part of the road, generally, see *Loveridge v. Hodsell*, 2 B. & Ad. 602, judgments of PARKER and TAUNTON, Js.

DENMAN, C. J. I have not the least doubt in this case. The acts expressly say that there shall be a road sixty feet *wide, and that no building shall be erected within ten feet of that road. The erection in question is [*563] clearly a building within the acts, and it is within the prohibited distance. As to the proceeding by indictment, it is true that the act of 3 G. 4, gives a summary proceeding before magistrates, but it also declares that the erection of a building within the prohibited distance shall be deemed a common nuisance, and every common nuisance is an indictable offence.

PARKE, J. This is a very plain case. The shop in question is clearly a building within the meaning of the act of parliament. The legislature did not intend to distinguish between a building and an addition to a building. It is also a building erected within the prohibited distance. The acts require the road to be sixty feet wide, and that no building shall be erected within ten feet of the road; it is therefore required that there should be eighty feet free from building. Here, if the shop be continued, there will be but sixty feet. The only clause which created the least doubt in my mind was the 111th, which authorizes the trustees to take down signs and bow windows, projecting over any of the foot-paths or sides of the said roads. That, however, may have been intended to meet every kind of annoyance, and to give a cumulative remedy by the summary removal of the encroachments there mentioned. At all events, it does not raise any uncertainty as to the meaning of the previous sections.

TAUNTON, J. I am of opinion that the shop is a building within the acts. The second question is, whether it is within the prohibited distance. Now, the 9 G. 3, c. *89, directs that the road shall be sixty feet wide. It does not say how much of this sixty feet shall be used as a carriage road, and [*564] how much as a foot road; but it provides, that no building shall be erected within ten feet of the said road. Then any building erected within ten feet of this road (sixty feet wide) would be within the prohibited distance. This sixty feet of road was afterwards divided into a carriage road of forty feet, and foot roads on each side, of ten feet each. That was the state of things when the 3 G. 4, c. cxii. provided that the footpaths should be deemed part of the road. The whole, therefore, is one road, whether it be used by carriages or foot passengers; and this building is within ten feet of that road, and therefore within the prohibited distance. Then it is argued, that by the 111th section of the 3 G. 4, a special power is given to the trustees to remove projections over the footpaths, and that the footpaths are therefore distinguished from the roads; and, consequently, that a building may be erected within ten feet of the footpaths. Now, this may have been intended as a cumulative provision, but at any rate it is not necessarily to be implied from the introduction of this clause, that the ten feet mentioned in the previous clauses are not to be reckoned from the road, the footpaths being included in that term. To the objection, that this is not an indictable offence because a particular remedy is pointed out, the answer is, that the statute declares it to be a common nuisance, and as such it is indictable.

PATTESON, J., concurred.

Judgment for the crown.

*The KING v. W. MORTON PITT, Esq. Nov. 9. [*565]

By an inclosure act it was declared, that all the allotments to be set out to the several persons having right of common upon the moor, should be deemed to be situate within the same townships and places respectively, wherein the lands lay in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of W. P. to certain coal mines under the said moor: Held, that the first clause affected only those portions of the soil which were allotted to the commoners, and not the coal mines under those allotments; and, therefore, that such coal mines were rateable to the relief of the poor in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere.

UPON an appeal against a poor rate for the township of Kyo, in the county

of Durham, by which W. Morton Pitt, Esq., was assessed 12*l.* 10*s.* for coal mines, the sessions confirmed the rate, subject to the opinion of this Court on the following case :—

By an act of parliament, 40 G. 3, c. 25 (private), entitled, “An act for dividing, allotting, and inclosing a common called Tanfield Moor, in the parish of Chester-le-Street, in the county of Durham,” after reciting that the Marquisses of Bute and Hertford, and the Earl of Windsor, were seised of or entitled to the soil of the said common, and to the quarries of stone, and all other mines and minerals, except the coal mines and seams of coal within and under the same, as tenants in common, in the shares and proportions therein mentioned, and that W. M. Pitt, Esq., was seised of or entitled to the collieries and coal mines, and seams of coal, as well opened as not opened, lying and being within and under the said common, together with certain liberties in and over the same for the winning, working, managing, and carrying on the said collieries, and for leading and carrying away the coals; and that certain persons therein named, and several other persons, as owners of messuages, lands, tenements, and hereditaments, were entitled to right of common in and upon [*566] the said common, it was enacted that the commissioners therein *named, after deducting so much of the said moor or common as was by the said act directed to be set out for public highways, roads, and drains, and for a common quarry or quarries, common watering places or wells, should set out, allot, and appoint unto and for the said Marquisses of Bute and Hertford, and Earl of Windsor, one full sixteenth part in value (quantity, quality, and situation considered), of the said residue of the said common as a compensation for their right to the soil of the said common or moor, and for their consent to the division and inclosure thereof, which said sixteenth should be deemed, and was thereby declared, to be within the township of Tanfield; and after the said sixteenth part should be so set out and allotted, should set out and allot the remaining part of the said common unto and among the several persons having right of common upon the said common, in proportion and according to the rents or values of their respective messuages, lands, or tenements, in respect whereof they were severally entitled thereto as aforesaid, in the proportions therein mentioned. And it was further enacted, “that all the allotments to be set out to the several persons having right of common upon the said moor or common, should be deemed and were thereby declared to be situate within and parcel of the same townships and places respectively wherein the lands or estates lie in respect of which such allotments should be made.” And it was enacted, “that all such lands and grounds as should by virtue of the said act be allotted to any person or persons for or in right of their respective messuages, mills, lands, or tenements, should be held by such person or persons respectively in the same [*567] manner, and should be of the *same nature and tenure as their respective messuages, mills, lands, or tenements, in right or in respect of which such allotments should be made, were holden respectively.” And it was also enacted, that nothing therein contained should be construed to defeat, lessen, prejudice, or anywise affect the right or interest of W. M. Pitt, his heirs or assigns, of, in, and to the coal mines and seams of coal, as well opened as not opened, within and under the said common, but that the said W. M. Pitt, his heirs and assigns, should for ever thereafter have, hold, work, and enjoy all and every the coal mines and seams of coal, as well opened as not opened, lying and being within and under the said common.

Pursuant to the said act, the common was divided, allotted, and inclosed. At the time of the passing of the act the whole of the common was situated within the chapelry of Tanfield. The lands or estates in respect of which allotments were set out are of various tenures, some being freehold, some copyhold, and some leasehold; and several of such lands or estates are situate within the township of Kyo, and other adjoining townships; and by the clauses in the said act before stated, such allotments became and now form part of the re-

spective townships in which the lands or estates, in respect of which such allotments were set out, are situated, and are of the same natures and tenures as such lands or estates in right or respect of which they are respectively holden. Previous to, and for some time after the said division, the coal under the said common was rated to the relief of the poor of the chapelry of Tanfield; but some time ago, the coal under the allotments set out in respect of estates in the township of Kyo, and also in another adjoining township, *was rated to the poor rates for those townships. The coal mines for which the ap- [*568] pellant was rated are within and under allotments of the said common, allotted in respect of lands situate within the township of Kyo.

Rogers (with whom was *Hadleigh*) in support of the rate. The question, whether the defendant was rateable in respect of his coal mines, depends on that clause of the inclosure act, which provides, "that all allotments to be set out to the several persons having right of common upon the said common, shall be deemed to be situate within and parcel of the townships and places respectively wherein the lands lie, in respect of which such allotments shall be made." Those words, of themselves, are sufficient to transfer the whole soil into the township where the lands are in respect of which the allotments are made; and the question is, whether there be anything in the act to contravene those words as far as the coal mines are concerned. *Lewis v. Branthwaite*, 2 B. & Ad. 437, shows that a copyholder, having the surface of the land, has also possession of the sub-soil, although he may have no property in it. [*PARKE, J.* Have the persons who take these allotments any right to the coal? for the act only transfers what is allotted to the commoners. *TAUNTON, J.* And the allotments are to follow the nature of the soil in lieu of which they are made.] *Townley v. Gibson*, 2 T. R. 701, shows that the whole soil was transferred into Kyo. In that case, by the terms of an act for inclosing the wastes of a manor, a certain allotment was to be made to the lord in lieu of his right and interest *in the soil; and the residue was to be allotted to the several tenants [*569] in fee, discharged from all customary tenures, &c. There was a proviso reserving to the lord all seignories incident to the manor, and all rents, fines, services, &c., and all other royalties and manorial jurisdictions whatever; and it was held that this clause did not reserve to the lord mines under the allotments made to the tenants, though it appeared there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. [*PARKE, J.* There the lord received an allotment in lieu of his right to the soil. *TAUNTON, J.* And there was no express reservation of mines as there is here.] The words of the enactments are sufficient to transfer the whole soil, and therefore the coal. The reservation in favor of Mr. Pitt was to prevent the act operating on his right of property, but was not intended to prevent the transfer from having its legal effect. It is only to protect his private right, and that is not affected. He may work the mines equally well, in whatever parish they are. [*TAUNTON, J.* The transfer of his property to another parish might very much affect his right: the rates might be different.] In *Townley v. Gibson*, 2 T. R. 706, *BULLER, J.*, says, "The general object of this inclosure act was to extinguish all the antecedent rights of the several parties interested, and to create others in lieu of them." Here the antecedent rights are destroyed.

Cresswell, *contra*, was stopped by the Court.

DENMAN, C. J. The allotments to be set out to the general persons having right of common are to be transferred *to the townships and places [*570] wherein the lands lie, in respect of which such allotments are made. Now, first, it does not appear that Pitt had any right of common. The soil is reserved to him in all respects as it was before the act, and his coals were then in the chapelry of Tanfield. Then the words of the enacting clause cannot have the operation contended for.

PARKE, J. Before the act, the coal and soil were all in the township of Tanfield. By the act of parliament, the allotments set out to the several persons

having right of common are taken out of that parish, and are to be deemed situate in the townships and places where the lands lie, in respect of which the allotments are made: what is allotted to the commoners, and no more, passes out of the township. The coals were not allotted to the commoners; the commissioners only set out the surface of the soil, which does not include the coals. It is expressly enacted that Pitt's right in them shall not be affected; but it would be so by the transfer contended for.

TAUNTON, J. The land substituted for the right of common is made of the same tenure and quality, and is to be deemed as having such local situation, as the land in respect of which such right of common originally existed; that is the whole enactment; and it has nothing to do with the coal. Pitt's right is expressly reserved in all particulars. I have not the smallest doubt that the coals are rateable in the same place as they were before the act. This was the construction first put upon the act, for the coals were rated in Tanfield. Why that was changed, I cannot say. The first construction was right.

[*571] *PATTESON, J. I agree in the general doctrine, that the owner of the surface is the owner of the soil, down to the centre; but the question here turns on the meaning of the word allotment. The act says that the allotments to the commoners shall be deemed to be situate in the place wherein the land lies, in respect of which they are made. Now what is allotted? Not Mr. Pitt's coal mines, for his rights in them are expressly reserved. It is quite clear, therefore, that the locality of his coal mines is not operated upon by the act.

Order of sessions quashed.

The KING v. The Inhabitants of ST. GEORGE, HANOVER SQUARE. Nov. 9.

In a parish governed by a select vestry, public notice was given that the vestry would meet to elect an organist for a newly erected chapel. At the meeting C. S. was elected, and it was entered in the minutes of vestry, that she was appointed organist at 60*l.* per annum. She performed the office for several years, receiving the salary half-yearly, and residing in the parish, till, on complaint made against her by the congregation, she was dismissed by an order of vestry:

Held, that the office of organist so held by C. S., was not a public annual office, by which a settlement could be gained under 8 W. & M., c. 11, s. 6.

ON appeal against an order of two justices, whereby Catherine Seaman was removed from the parish of St. George, Hanover Square, to the parish of St. Peter, Paul's Wharf, in the county of Middlesex, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The parish of St. George, Hanover Square, is governed by a select vestry, consisting of 101 persons. In the year 1827, a chapel was erected in North Audley Street, in the said parish, and on the 21st of January, 1828, the vestry of that parish took into consideration what name should be given to the chapel, then nearly finished, and resolved that the same should be called St. Mark's Chapel, and that advertisements should be [*572] published, stating that the vestry would meet on the 11th of February to appoint an organist for the chapel. On the 11th of February, 1828, an election took place at the Board Room, in Mount Street, by the select vestry, of an organist to the said chapel, on which occasion there were about forty candidates, and the election fell upon the pauper, as appears by the following minute: "11th of February, 1828. The vestry, pursuant to their resolution of January 21st, proceeded to the election of an organist for St. Mark's Chapel, and appointed Miss Catherine Seaman to that situation, to commence when the organ was in readiness for use, at a salary of 60*l.* per annum." In May, 1828, the organ being completed, she entered upon her duty, and continued to perform it and to reside in the respondent parish, and received her salary from the vestry, through the vestry clerk, half-yearly (with the exception of the first payment, which was 25*l.* only, from

May to Michaelmas, 1828), until the 31st of March, 1832, when she was discharged by the vestry, as appears by the following entry in their minutes: "At a meeting of the vestry, held on the 31st of March, 1832, much discontent having been expressed by the pew-renters from time to time to the Rev. Allen Cooper, the minister of St. Mark's Chapel, of the total inefficiency of the present organist, resolved that she be removed, and that the Rev. Mr. Cooper be requested to look out for and recommend a competent person to succeed her, upon the same salary as is now enjoyed by her, it being understood that the person to be appointed shall continue to pay her her salary up to Midsummer next." The question for the decision of the Court was, whether under these circumstances the pauper gained a settlement in St. George, Hanover Square.

**Adolphus and Payne* in support of the order of sessions. The pauper gained a settlement in St. George, Hanover Square, by 3 W. & M. [*573] c. 11, s. 6, which enacts, "That if any person who shall come to inhabit in any town or parish, shall for himself and on his own account execute any public annual office or charge in the said town or parish, during one whole year, he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published, as is hereby before required." The notice previously required by the statute (sect. 3), was intended to prevent the inconvenience which had arisen under the statute 13 & 14 Car. 2, c. 12, by persons coming into parishes and remaining there without the knowledge of the officers, till they were irremovable. But the execution of a public annual office was by its notoriety considered equivalent to a notice, and was therefore allowed by the statute as a substitute for it; and it was very early held, in cases under the act 3 W. & M. c. 11, that it was not material what the office was, so that it was a public annual office, notoriety being the object mainly contemplated by the statute, *Rex v. Hammond*, 2 Bott. p. 173, pl. 233; *Bissham v. Cook*, 2 Bott. p. 173, pl. 234, 6th ed. The offices of parish clerk, *Gatton v. Milwich*, Salk. 536: but see *Rex v. Stogursey*, 1 B. & Ad. 795; *hog-ringer, Rex v. Whittlesea*, 4 T. R. 807; *bellman, Rex v. St. Nicholas, Hereford*, 10 B. & C. 832, have been held sufficient. *Rex v. Mersham*, 7 East, 167, where the master of a workhouse was held not to acquire a settlement by serving an office, may be cited on the other side, but there "there was no appointment in writing, nor any entry in the parish *books;" it was rather a contract with the parish officers (pursuant to 9 G. 1, c. 7, s. 4), than the [*574] nomination to an office: and LE BLANC, J., observed, that it was an employment created by the parties themselves, which they might put an end to whenever they pleased. [DENMAN, C. J. Was not this so too?] The parishioners here, by determining to appoint an organist, had agreed upon a certain mode of performing a part of the church service; to abolish the office would have altered that; and at least it could not have been done without the express consent of the parishioners. As it was, the pauper was not dismissed till there had been a complaint on their part, and a vote passed in vestry. There is nothing to compel the keeping of a parish clerk; and there are many other offices which might be abolished, but which, while they exist, are held to confer settlements, because they give the requisite notoriety to the residence of the parties executing them. Here the office was clearly public, for it was advertised as an object of competition; and the mode in which the payments of salary were regulated, shows that it was annual.

Sir *James Scarlett*, contra, was stopped by the Court.

DENMAN, C. J. The principle on which this kind of settlement rests is notoriety, but that must be attained by serving an office within the meaning of the statute. The question is, whether the present be a case in which that has been done. I think it comes within the objection which prevailed in *Rex v. Mersham*, 7 East, 167. According to the argument which has been urged, a settlement *would be gained in every case where the party had executed an annual office which was notorious. But I think an office [*575]

created by the parties themselves who agree upon the employment, and which they may put an end to at pleasure, does not come within the meaning of the statute.

PARKE, J. I am of the same opinion. If a settlement was gained in this case, it might be said that the fiddlers and bassoon-players in a country church, or even the pew-openers, executed offices within the statute.

TAUNTON, J. The office of organist does not necessarily give notoriety, for when persons hear the organ, it does not follow that they know who plays it.

PATTESON, J., concurred.

Order of sessions quashed.

DOE dem. REED v. SOPHIA TAYLOR.

Livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having title, unless the child was placed there for the purpose of representing that party. If there be several co-parceners, and only one be in actual possession, a feoffment executed by her to a stranger, of the whole premises, will oust the other co-parceners. In the absence of evidence to the contrary, the entry of such co-parcener will be presumed to have been a general entry, and not for herself alone, or for herself and the other co-parceners.

THIS was an ejectment brought to recover an undivided fifth part of a house and land in the parish of Berkeley, in the county of Gloucester. At the trial before LITTLEDALE, J., at the spring assizes for the county of Gloucester, 1832, the following appeared to be the facts of the case:—

[*576] James Taylor, the grandfather of the lessor of the plaintiff, was owner of the entirety of the premises in question, and died in or about the year 1815, not having made a will, leaving five daughters his co-heiresses. The lessor of the plaintiff was the son and heir of one of the co-heiresses. The defendant, Sophia Taylor, one of the other co-heiresses, was in the occupation of the premises before and at the time of the trial and of the feoffment hereinafter mentioned, and still is so. In Hilary term, 1822, she levied a fine with proclamations of the whole premises to James Player, and in May, 1822, she executed a feoffment, with livery of seisin, to Player. The defendant contended that this fine and feoffment with livery operated as an ouster and disseisin of the other persons as to the whole, and not to a fifth part only, of the premises. It appeared that before seisin was delivered to Player, Sophia Taylor turned all the persons off the premises, except as after mentioned; and that having been done, she delivered seisin to Player. Before the executing of the feoffment, there was a child between four and five years old living with Sophia Taylor in the house, and it was doubtful whether the child was in the house at the time of the livery of seisin or not. It did not appear in evidence whether or not the child was related to any of the co-heiresses. The plaintiff contended, that if the child was in the house at the time of the livery of seisin, the livery of seisin would be void, and the plaintiff was entitled to a verdict, on the authority of 2 Black. Com. 315, where the manner of delivering seisin is thus described:—"The feoffor, if it be land, doth deliver to the feoffee, all other persons being out of the ground, a clod, or turf, or a twig or bough there growing; [*577] but if it be of a *house, the feoffor must take the ring or latch of the door, the house being quite empty," &c.

The jury being of opinion that the child was in the house at the time seisin was delivered, the learned judge, on the authority cited from Blackstone, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. A rule nisi having been obtained for that purpose,

Ludlow, Serjt., and *Talfourd* showed cause in Hilary term last.¹ The rule on this subject is thus laid down in *West's Symbolography*, lib. 2, part i. sec.

¹ Before LITTLEDALE, TAUNTON, and PATTESON, Js.

tion 251 :—" All persons having any lawful possession or seisin in the thing of which seisin is to be delivered, ought either to join together in making the livery of seisin, or to be removed thence, as lessees for years or life, for every livery ought to bring an immediate possession to the feoffee." The defendant's co-parceners here were constructively in possession. That, in order to constitute a good livery of seisin, all persons should be removed off the premises, is shown by 2 Black. Com. 315; Perkins's Prof. Book, s. 209; Shep. Touch. p. 214. And Fitz. Abr. tit. Assize, 418, is precisely in point, to show that the child's remaining in the house in this case was a sufficient continuance of possession to make the livery void, see page 580, post: and that authority is cited in Bro. Abr. Feoffments de Terres, pl. 80. In Bettisworth's case, 2 Co. 31 b, the lessor made a feoffment of the house and land, and gave livery on the land, the lessee remaining in the house and not assenting; and it was held that the livery was not good.

Secondly, the livery was void, because the co-parceners, *who were [*578] then possessed, did not join in the feoffment. In contemplation of law [*578] all the co-parceners were in possession of the house, for the possession of one co-parcener is the possession of another. In Com. Dig. tit. Parcener, A. 3, it is laid down, that "if one parcener enters into the whole land, generally, and takes the profits, it shall be the entry of both, and does not divest the moiety of her sister. Or, if both enter, and afterwards one takes all the profits, this does not divest the moiety of her sister without an actual ouster and disseisin." Now, here, the feoffee could not act both parts: she could not oust the co-parceners and enfeoff at the same time. If Sophia Taylor had first disseised her co-parceners, she might afterwards enfeoff; but, here, at the very moment she gave livery of seisin, she was holding for her sisters. The possession of one joint tenant is the possession of the other, so as to bar the statute of limitations; and if one joint tenant levies a fine, it severs the jointure, but does not amount to an ouster of his companion. *Ford v. Lord Grey*, 1 Salk. 285; 6 Mod. 44.

Sir *J. Campbell* (Solicitor-General) and *John Evans*, contra. The fine, supported by the feoffment with livery, created an ouster and disseisin. As to the first objection, which was the only one made at the trial, the language of BLACKSTONE, J., must be understood to refer to the vacancy of the possession, not to the necessity of removing from the house or land any stranger who may be found there, but who neither claims nor possesses any interest in the premises. If it were otherwise, it would be impossible to make livery of a public inn, or of a house in which there was a sick person; or the livery might *be [*579] rendered void, by having a person concealed on the premises, or, where the estate was large, in a remote part of it. The correct rule is laid down in Shep. Touch. 213 :—"That, in the making of every livery of seisin, it is necessary that all persons that have any lawful estate and possession in the thing whereof livery is to be made, as lessees for life, years, and such like, join in the making thereof, or be removed thence; for every livery ought to bring an immediate estate of possession to the feoffee, donee," &c. The authorities cited on the other side to show the necessity of removing all persons apply only to those who were of the family of the person sought to be ousted by the feoffment, or may be considered to represent such person.

It is now further objected, that the feoffment by the defendant did not work an actual ouster of the other co-parceners, inasmuch as the possession of one co-parcener is, in law, the possession of all. In answer to this objection, *Townsend and Pastor's case*, 4 Leon. 52, is expressly in point. There, it was held that a feoffment in fee by one co-parcener of the whole estate held in co-parcenary, operated, as to her own share, by rightful conveyance, and, as to that of her co-parcener, by disseisin. So, as to joint tenants, it is said in Perkins, s. 220 :—"If two joint tenants are in fee, and one of them doth enfeoff a stranger of the whole, against the will of his companion, being upon the land, nothing passeth by this

feoffment but the moiety only." The plain inference from this is that if the other joint tenant had not been upon the land, the entire estate would have passed.

Cur. adv. vult.

[*580] *LITTLEDALE, J., now delivered the judgment of the court. After stating the facts, and the grounds of the motion, his Lordship said:—On cause being shown against the rule, it was admitted that a fine alone would not have the effect of creating an ouster and disseisin: Peaceable dem. Hornblower v. Reed and another, 1 East, 568. Besides the authority from Blackstone, the plaintiff relied on Perkins, s. 209, where it is said, that to deliver seisin, the manner is to remove all persons off the land. And also Sheppard's Touchstone, p. 214, where, after describing the deed of feoffment, &c., it is said, the manner of making livery is, that the feoffor, if it be a house, do take the ring, latch, or hasp of the door (all the people, men, women, and children, being out of the house), or if it be of a piece of ground, do take a clod of the ground, or a bough or a twig of a tree or bush growing thereupon, and (all the people being out of the ground) the same ring, &c., clod, bough, &c., with the deed, do deliver to the feoffee, &c., and in the delivery of seisin do use the words there mentioned.

In Fitzherbert's Abridgment, Tit. Assize, 418, one S. was seised in fee of a messuage, and made a lease for years to M. and afterwards gave the same messuage to one K. and delivered seisin to him, M. being out of the house at the time of the livery of seisin; but it appeared that M. had a *garson* within when seisin was delivered and therefore the livery of seisin was held to be void.

And this case is cited in Brooke's Abridgment, Feoffments de Terres, pl. 80, that a man may make livery of seisin of the land of the termor in his absence, [*581] *notwithstanding the termor has chattels on the land, but otherwise if he has a *garson* on the land.

In Dyer 18, b, a man was seised of a messuage, and of a close adjoining the messuage, and made a lease of the messuage for a term of years, or for life, and afterwards made a feoffment of the messuage and close, and delivered seisin in the messuage (the termor being at market, and his wife and children in the house) in the name of all; and the question was, whether the house passed. And it seems not, inasmuch as the continuance of the wife and children of the lessee saved the right and possession of the lessee.

In these cases from Fitzherbert, Brooke, and Dyer, there was somebody remaining in the house who was of the family of the termor, who was in the actual possession of the property, and whose right was sought to be taken away by the feoffment and livery in his absence; and that falls within the principle of what is said in Sheppard's Touchstone, p. 213, that in the making of every livery of seisin "it is requisite that all persons who have any lawful estate and possession in the thing whereof livery is to be made, as lessees for life, years, and such like, join in the making thereof, or be removed thence; for every livery ought to bring an immediate possession to the feoffee, donee, &c."

With regard to the livery in question, if the child was a part of the family of one of the co-parceners intended to be ousted, and was placed in the house to represent such co-parcencer, then we think he ought to have been put out of the house before the livery. But, unless he had been placed to represent one of such co-parceners, we think that the child being suffered to remain in the house [*582] would not make the livery invalid, *even if he had been a descendant of one of the co-parceners, if he was a mere inmate of the family of Sophia Taylor.

Another objection was made to the feoffment, that though, if Sophia Taylor had entered on the land on a vacant possession, and taken the whole profits adversely, then, if she had made the feoffment, that would have been a disseisin; yet, as it was contended, she was not in lawful possession of the whole, but was bailiff and servant to the other co-parceners as to part; and they, in contemplation of law, must be taken to be in possession, and therefore Sophia Taylor could

not, by any feoffment, deprive them of their right. But we are of opinion that this does not constitute an objection.

In *Perkins*, s. 220, it is said, that "if two joint tenants are in fee, and one of them doth enfeof a stranger of the whole against the will of his companion, being upon the land, by this feoffment but a moiety passeth; *causa patet*;" but that seems to imply, that if he was off the land the feoffment would bind him. And the same rule is stated in *Sheppard's Touchstone*, p. 208. "If one joint tenant make a feoffment of the whole land, his companion being then upon the land; by this there doth pass no more but a moiety, and the feoffment is void as to the moiety of his companion, for the feoffment doth not give his moiety."

The reason seems to be, that, as to the other moiety, he has not the possession and, therefore, as to that moiety the livery is void. But we think, that if the other joint tenant is not on the land, the feoffment will amount to a disseisin.

What is before stated is as to joint tenants; but the same principle seems to apply to co-parceners. In *Townsend and Pastor's case*, 4 Leon. 52, it [*583] was holden in the Common Pleas by all the justices, "that where two co-parceners are in the use of a manor, after the statute of 1 Ric. 3, the one of them enters and makes a feoffment in fee of the whole manor, that this feoffment is not only of the moiety of the manor whereof she might lawfully and by the said statute make a feoffment, but also of another moiety by disseisin."

In *Gerry v. Holford*, Cro. Eliz. 615, an *ejectione firmæ* was brought, and a special verdict found that there were two co-partners of a house: the one entered generally, and made a lease for life by the name of "all that his house," &c.; the question was, whether all or the moiety only of the house passed. *POPHAM* and *FENNER* held, that the entire house passed; for when he saith, "all that my house," &c., that intended the whole house; and by his livery made he gained the entire and gave the entire, although, by his general entry, it is not intended that he entered into more than to what he had a right. *GAWDY* è contrâ. For, as his entry *primâ facie* doth not gain more than he had a right to demand, no more shall this lease. *Foster*, at the bar, cited that it was adjudged in this Court in *Reignold's case*, according to the opinion of *POPHAM*.

In these last two cases, the co-parcener is stated to have entered, and the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all; for entry generally shall always be taken according to right. Several cases to this effect will be found in 9th Viner's Abridgment, Title Entry F., where many authorities in 1 Roll's Abr. 740, are *incorporated. But notwithstanding this general rule, in both the above [*584] mentioned cases the other co-parcener was taken to be ousted.

There is no evidence in what way *Sophia Taylor* entered into the premises; whether it was a general entry, or a special one for herself and the other co-parceners, or for herself alone. In the absence of proof, it must be intended to be a general entry.

Upon the whole of this case, we are of opinion that a verdict should be entered for the defendant. Rule absolute.

DAWSON v. DYER, Baronet. Nov. 8.

Premises were demised for a term, at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days: the lessee covenanted to pay the rent, and the landlord covenanted that he, paying the rent at the appointed times, should quietly enjoy, &c.:

Held, that the lessee, having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued the rent had been in arrear more than twenty-one days; for that the payment of rent was not a condition precedent to the performance of the covenant for quiet enjoyment.

COVENANT by lessee against lessor. The declaration stated a demise by the

defendant to the plaintiff, habendum, for fourteen years, yielding and paying the yearly rent, of, &c., by four equal payments, on, &c.; and that the defendant covenanted that the plaintiff, his executors, &c., paying the yearly rent thereby reserved on the several days and times, &c., and performing all the covenants, conditions, and agreements in the said indenture contained, and on his part and behalf to be performed, according to the true intent and meaning thereof, should and lawfully might peaceably and quietly have, hold, occupy, and enjoy the premises thereby demised, with the apurtenances, for and during the term thereby granted, without any let, suit, trouble, denial, eviction, [*585] or interruption of, from, or by the said *defendant, his heirs, &c., or any person lawfully claiming or to claim by, from, or under him or them.

Averment, that the plaintiff entered and performed all things, &c., but that he the plaintiff did not peaceably and quietly have, hold, &c., without any let, suit, &c., but on the contrary, after the making of the indenture, and during the said term, to wit, on the 8th of January, 1833, H. B., then and there lawfully claiming by, from, and under the defendant, entered upon the premises, and there seized and took divers goods and chattels, to wit, &c., of plaintiff, as a distress for rent due to H. B. from one J. A. for use and occupation of the said premises, and remained on the premises for a long time, &c. The indenture was set out on oyer, containing a covenant by the plaintiff in the usual terms to pay the rent on the stated days; and a further covenant by him to insure the premises immediately after the execution of the indenture, and to keep the same insured: there was likewise a proviso that the landlord should be at liberty to re-enter if the rent should be unpaid for twenty-one days, or if default should be made as to any of the other covenants: and the covenant by the defendant for quiet enjoyment corresponded with the statement in the declaration. The defendant pleaded, among other pleas, that after the making of the indenture and during the term, and before the supposed breach of covenant, to wit, on the 26th of December, 1832, 40% of the rent therein mentioned, for a quarter of a year ending the preceding day, had become due from the plaintiff to the defendant, but the plaintiff did not nor would pay the same on the day on which it was reserved and appointed to be paid by the said indenture, but then and thence- [*586] forth continually for a long time, to wit, hitherto, *neglected to pay the same or any part thereof. The defendant also pleaded in like manner that the plaintiff did not insure. Demurrer assigning for cause, that the plaintiff's covenants in the pleas mentioned "are independent of the covenant of the defendant in the said declaration mentioned, and do not in any wise qualify, or constitute a condition precedent to the performance by the defendant of that covenant." Joinder in demurrer. The demurrer came on to be argued in this term, Nov. 8th, and *Follett*, for the plaintiff, having mentioned the cases of *Hays v. Bickerstaffe*, 2 Mod. 34, and *Warren v. Asters*, Sir T. Jones, 205, the Court called upon

Barstow in support of the pleas. The earlier decisions, which have turned upon the distinction between covenants and conditions, do not furnish any precise rule upon the subject; as is said in *Platt on Covenants* (p. 71). "So refined and subtle are the distinctions on which they have proceeded, that it is almost impossible to draw from them any reasons, as a guide to discover with certainty whether covenants are dependent or not. Some of the determinations have incurred the censure of outraging common sense; others of deciding contrary to the real meaning of the parties and the true justice of the case;" and cases are there referred to which support this observation. In modern times the disposition of the courts has been to look, not at the particular clause only, but at the whole deed, and to collect from it the intention of the parties. Looking to that, and to the reason of the case, it will be evident here that the payment of rent was intended to be a condition precedent to the landlord's performance *of the covenant for quiet enjoyment. That covenant is [*587] introduced for the purpose of limiting the liability of the landlord, who

would otherwise be bound to warrant to the lessee an undisturbed possession generally. *Nokes' case*, 4 Rep. 80, b; Cro. Eliz. 674. The covenant in this case confines the landlord's liability to the acts of persons claiming under him; and also makes it dependent on the lessee's performance of everything covenanted by him. The landlord reserves to himself the right of re-entry if the rent should be in arrear more than twenty-one days, which is admitted to have been the case here. The defendant might after that time have brought ejectment against the plaintiff; and it cannot have been intended by the deed of demise that the plaintiff should have an action against the defendant for disturbance of his possession at the very time when the defendant was entitled to treat him as a trespasser. [DENMAN, C. J. According to that argument, the tenant, if evicted while the rent was so in arrear, could not have maintained an action, though the landlord had waived the forfeiture.] The waiver might perhaps have been matter of reply, if the forfeiture had been pleaded. As to the cases; in *Hays v. Bickerstaffe*, 2 Mod. 84, there was no clause of re-entry. In an Anonymous case, 4 Leon. 50, pl. 130, the decision of two judges is in point for the present defendant. And in *Simpson v. Titterell*, Cro. Eliz. 242, where land was let for years, "proviso semper, and it is further covenanted, that the lessee shall not assign his term" except in manner specified, the court held that the words amounted to a condition. [PARKE, J. The reason given there is against you; for it is said by the court, that a proviso always implies a condition, *if there be not words subsequent which may change it into a [*588] covenant; as where there is a penalty annexed for non-performance. The proviso in the present case is introduced to reserve a power to the landlord on the particular occasion specified; if he, or any person claiming under him, enters on the tenant except by virtue of that power, the landlord is liable on the covenant for quiet enjoyment.]

Per Curiam,¹

Judgment for the plaintiff.

¹ DENMAN, C. J., PARKE, TAUNTON, and PATTESON, Js.

MITCHELL v. JENKINS, Clerk. Nov. 11.

In an action for a malicious arrest, malice is a question of fact for the jury, who are at liberty, but not bound, to infer it from the want of probable cause; and where a creditor had caused his debtor to be arrested for 45*l.*, knowing that there was a set-off to the amount of 16*l.* 5*s.*, but instructed the bailiff who made the arrest, to allow the set-off in case the debtor would settle the debt; and the Judge, upon the proof of these facts, was of opinion that there was no probable cause for the arrest, and that there was malice in law, inasmuch as the act of causing the party to be arrested for a larger sum than he owed was wrongful, and therefore told the jury that the only question for them was the amount of damages; the Court granted a new trial, on the ground that it ought to have been left to the jury to find whether there was malice or not.

CASE for maliciously and without any reasonable or probable cause of action against the plaintiff to the amount of 45*l.*, having caused him to be arrested and held to bail for that sum. Plea, not guilty. At the trial before TAUNTON, J., at the Summer assizes for the county of Devon, 1832, the following appeared to be the facts of the case:—The plaintiff at Lady-day, 1831, became indebted to the defendant as vicar of Sidmouth, in the sum of 45*l.* for one year's composition of tithe. On the 15th of April, Jenkins applied by letter for payment of the tithes, and offered to allow to the plaintiff a set-off, if produced and found to be correct. The plaintiff, not *having produced any such set-off, [*589] Jenkins sued out a latitat endorsed for bail for 45*l.*, the gross amount of his demand, without allowing any deduction. The sheriff's officer who made the arrest for 45*l.*, told Mitchell that he was authorized to allow a deduction of 16*l.* 5*s.* Mitchell gave a bail bond. On the 16th of July, Jenkins's agents wrote the following letter to Mitchell's agents:—"It having been discovered that the defendant was arrested for the sum of 45*l.*, the amount of the original

debt, without allowing for any set-off, and as you may be defending this cause with reference to the statute 43 G. 3, c. 46, s. 3, we are requested by the plaintiff's attorney to state, that the arrest for such sum was without any intention to harass or annoy the defendant, but through an inadvertence, which he regrets. If the defendant, on being allowed his claimed set-off of 16*l.* 5*s.*, and his costs to the present time, will immediately pay the balance, we are authorized and prepared to receive such balance as a settlement of the action." Mitchell's agents declined the proposition, without offering any other terms of compromise; and upon this the action was discontinued and the costs paid by Jenkins. It was proved on the part of Mitchell that he had a right of set-off, to the amount of 16*l.* 5*s.* Upon these facts it was contended at the trial, that it was a question for the jury, whether Jenkins had acted *bonâ fide* under a mistake in law. On the other hand it was maintained, on the authority of *Bromage v. Prosser*, 4 B. & C. 247, that the arresting of Mitchell for a larger sum than was actually due from him, was an unlawful act, from which malice in law was of necessity to be implied. The learned judge was of opinion, that as there existed a set-off, which reduced *Jenkins's demand, Mitchell ought not to [*590] have been arrested for more than the balance; and that Jenkins, therefore, had no reasonable or probable cause for arresting him for the sum of 45*l.* As to the question of malice, he said there were two kinds of malice,—malice in law and malice in fact; and that in this case there was malice in law, inasmuch as the act of causing Mitchell to be arrested for a larger sum than was due was wrongful; and that the only question for the consideration of the jury, was the amount of damages. The jury found a verdict for the plaintiff, damages 20*l.* A rule nisi having been obtained for a new trial, on the ground that the question whether Jenkins acted maliciously ought to have been left to the jury,

Follett now showed cause. The learned judge was correct in withdrawing the question of malice from the jury, because Jenkins's causing Mitchell to be arrested for a larger sum than was due, was a wrongful act, done intentionally, without just cause or excuse, and therefore malicious in the legal sense of that word. The jury under those circumstances were bound to infer malice. The term malice in common acceptation means ill-will against a person; but, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse. This was laid down by BAYLEY, J., in *Bromage v. Prosser*, 4 B. & C. 255; and it was there decided that in ordinary actions for slander, malice in law is to be inferred from publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions of slander *primâ facie* excusable on account of the cause of publishing the slander, malice in *fact must be proved. The same rule must hold in an [*591] action for a malicious prosecution or arrest. [PARKE, J. A man who utters slander of another does an act *primâ facie* wrongful, but a man who arrests another for debt is pursuing a legal right in a legal mode; his act is therefore *primâ facie* rightful. The doctrine that malice must of necessity be inferred where there is a want of probable cause, is at variance with that laid down by Lord MANSFIELD and Lord LOUGHBOROUGH in their printed reasons for their judgment in *Johnstone v. Sutton*, 1 T. R. 545. There it is said, "In this case" (*viz.*, an action for a malicious prosecution), "to support the verdict, there was nothing necessary to be proved but that there was no probable cause, from whence the jury *might*" (*not must*) "imply malice, and might imply that the defendant knew there was no probable cause." This case does not fall within the rule laid down in *Ravenga v. Mackintosh*, 2 B. & C. 693, that where a party acts upon legal advice, he is excusable; for here it does not appear that Jenkins, before he made the arrest, took any such advice. In *Parrott v. Fishwick*, Bull. N. P. 14, cited in 9 East, 362, it is stated to have been ruled, "that where the facts lie in the knowledge of the defendant himself, he must show a probable cause, though the indictment be found by the grand jury; or the plaintiff shall recover without proving express malice;" but there is the follow-

ing note of that case in 9 East, 362. "In an action for a malicious prosecution in preferring an indictment for perjury, where the bill of indictment was found and the plaintiff acquitted by verdict, Lord MANSFIELD in summing up, said, it was not necessary to prove express malice, for *if it appeared that there *was no probable cause*, that was sufficient to prove an implied malice; [*592] which was all that was necessary to be proved to support this action." If that be so, the Judge here was bound to tell the jury that there was sufficient evidence to imply malice, and would be so again; and therefore it will be useless to send the case down to second trial. In *Gibson v. Chaters*, 2 Bos. & Pul. 129, it was held that in an action for maliciously holding to bail, it was not sufficient to prove that the writ was sued out after payment of the debt, where the circumstances precluded any inference of malice; but it is sufficient to say that that is not so here. It has been held under 43 G. 3, c. 46, s. 3, that proof of the want of reasonable or probable cause was sufficient to entitle a party to his costs for a malicious and vexatious arrest, *Donlan v. Brett*, 10 B. & C. 117: so in *Forster v. Weston*, *Ibid.* 527, where the arrest was for one side of an account, it was held that the defendant was entitled to his costs under that statute. In *Austin v. Debnam*, 3 B. & C. 139, the defendant having arrested the plaintiff for the amount of one side of an account, without deducting what was due on the other, the plaintiff brought an action for a malicious arrest, and it was held by this Court that such arrest was malicious, and without probable cause.

Coleridge, Serjt., and *Bere*, contra. In *Austin v. Debnam*, 3 B. & C. 139, Lord TENTERDEN left the question of malice to the jury, and that case was decided expressly on the authority of *Dronefield v. Archer*, 5 B. & A. 513, which turned entirely upon the 43 G. 3, c. 46, s. 3. That act gives costs *to [*593] a defendant where the plaintiff holds him to bail for any greater amount than he recovers, without reasonable or probable cause, but does not require that the arrest should be malicious. In *Snow v. Allen*, 1 Starkie's N. P. C. 502, a plaintiff who, acting under what he conceived to be sound advice, took the defendant in execution after he had taken the defendant's bail in execution, was held not to be liable to an action for a malicious arrest, although, previous to the arrest, he had notice from the defendant that his proceedings were irregular; and there the plaintiff was nonsuited for want of proof of malice; *Ravenga v. Mackintosh*, 2 B. & C. 693, was a similar case. Here there was fair ground for the jury to presume that Jenkins, when he made the arrest, was acting *bonâ fide* under the idea that the law authorized him so to do; for he instructed the sheriff's officer to accept the balance due, and not the sum named in the writ. At all events, the question of malice ought to have been submitted to the jury.

DENMAN, C. J. Every arrest by a creditor for more than is due, is, in some sense, a wrongful act. By statute, if it be made without reasonable or probable cause, though with an entire absence of malice, the party arresting may be deprived of his costs, and at common law, if the party arrested has suffered damage to a greater extent than those costs, he may, if the arrest was also made maliciously, bring his action on the case. In that action, however, it is still incumbent on the plaintiff to allege and to prove malice as an independent fact; though it may in some instances *be fairly inferred by the jury from [*594] the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide, as a matter of fact, whether there be malice or not. I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the Court, and malice to be altogether a question for the jury. Here, the question of malice having been wholly withdrawn from the consideration of the jury, there ought to be a new trial.

PARKE, J. I am also of opinion that there ought to be a new trial, on the ground that the learned Judge withdrew altogether from the consideration of

the jury the question of malice. I have always understood, since the case of *Johnstone v. Sutton*, 1 T. R. 510, which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz., that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the Judge. I can [*595] conceive a *case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. That would not be the case where, there being an unsettled account, with items on both sides, one of the parties, believing *bonâ fide* that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting *bonâ fide* under a wrong notion of the law and pursuant to legal advice. The question of malice having in this case been wholly withdrawn from the jury, I think the rule for a new trial must be made absolute.

PATTERSON, J. The whole argument for the defendant may be shortly summed up thus:—The question of malice ought to have been submitted to the jury, who might have inferred it from the want of probable cause; but they were not bound of necessity so to do. Here it was not left to the jury to infer malice: if the jury are to be told that where a want of probable cause is proved, malice must necessarily be inferred, it will, in future, be only necessary in every case to prove want of probable cause; whereas, it is essential for a plaintiff to prove [*596] facts from which the Judge may decide that there is *want of probable cause, and the jury that there is malice.

TAUNTON, J. At the trial I acted upon the decision in *Bromage v. Prosser*, 4 B. & C. 47. That was an action of slander, and it was held, that although malice was the gist of the action, there were two sorts of malice,—malice in fact and malice in law; the former denoting an act done from ill-will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse; and that in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but that in actions for slander *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved. It appeared to me that the present defendant Jenkins, having sued out a bailable writ for 45*l.*, knowing that there was a set-off to the amount of 16*l.* 5*s.*, had been guilty of a wrongful act, and therefore that malice in law ought to be presumed. It struck me that there was no distinction (in this respect) between an ordinary action for slander and an action for malicious arrest; but I am now satisfied that in this latter form of action malice is a question of fact, which ought to be left to the jury. The rule for a new trial must therefore be made absolute. Rule absolute.

*The KING v. The Inhabitants of FRIESTON. Nov. 11. [*597]

Where the quarter sessions have improperly decided against an appeal on a preliminary objection, the Court of K. B. will grant a mandamus to them to enter continuances and hear the appeal; but where an objection has been made, during the trial of an appeal, to the reception of a particular piece of evidence, and the sessions have held such objection valid, in consequence of which the appeal has been dismissed, this Court will not interfere, unless the sessions send up a case.

FLANAGAN moved for a rule calling on the justices of the Isle of Ely, to show cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal against an order of removal, in which the inhabitants of the parish of Frieston, in the county of Lincoln, were the appellants, and the inhabitants of Tydd St. Giles, in the Isle of Ely, respondents; and to receive evidence of a certain written agreement which had been tendered for the appellants at the trial of the appeal at the last October sessions for the Isle of Ely, and rejected. It appeared by the affidavit in support of the application, that, the respondents having proved a *prima facie* settlement, the appellants' counsel proposed to give a subsequent settlement by renting a tenement. The renting was under a written agreement, and on the document being put in, the respondents counsel objected that it was not receivable, because, though it purported to be an agreement by both parties, it was signed by the tenant only. These sessions, on this ground, held the writing to be inadmissible, and they refused to hear parol evidence of the tenancy. The appeal was therefore dismissed, and the bench declined granting a case.

Flanagan now proposed to show from authorities that the agreement ought not to have been rejected. [Lord DENMAN, C. J. Suppose the sessions have made a mistake, but have refused to take the opinions of this Court *on this question: can we interfere?] The Court has interfered in such cases, [*598] without any application from the sessions. *Rex v. The Justices of Wiltshire*, 18 East, 404; *Rex v. The Justices of Lancashire*, 7 B. & C. 691; *Rex v. The Justices of Gloucestershire*, 1 B. & Ad. 1. In the last-mentioned case the appeal had been partly gone into, when an objection was taken, upon which the sessions dismissed the case. Lord TENTERDEN there said, "I think that the appeal was not heard, and that the grounds of refusal were insufficient;" and BAYLEY, J., observed, "It is true there is here the form and ceremony of hearing a witness, but then an objection is taken, which is in fact a preliminary one, and goes to prevent the Court from exercising any jurisdiction." Here the objection was one which prevented the merits of the appeal from being gone into, and it cannot be contended that the sessions, having dismissed an appeal on such a ground, may exclude the interference of this Court, by refusing a case.

Lord DENMAN, C. J. In the present instance the appeal was, in fact, heard. It is said the justices were mistaken in their decision; but if they were, they are the judges of the law, and we cannot grant a new trial. The cases where this Court has interfered have turned upon matters of preliminary practice, and have arisen where the Court thought the practice not, in its own nature, legal, or not consistent with the rules by which the sessions themselves professed to be guided. The present objection was not a preliminary one, in the sense in which that word was used in one of the cases referred to; it was indeed preliminary to the reception of a *particular piece of evidence; but where there is merely a wrong judgment on a point of that description, this Court has no jurisdiction to correct it unless the sessions send a case. I therefore think that all the authorities cited fall short of the point now contended for, and that the rule cannot be granted.

TAUNTON, J.¹ I am of the same opinion. This is not one of the cases

¹ PARKE, J., having been appointed a member of his Majesty's Privy Council, was sitting on the Judicial Committee of that body, constituted by stat. 3 & 4 W. 4, c. 41, s. 1.

where the sessions have refused to hear, and this Court has therefore granted a mandamus. Here the sessions have refused to admit a piece of evidence, erroneously, as it is said; but, at all events, they have heard the appeal, and they have not sent up a case.

PATTESON, J. It cannot be contended that if the sessions have merely given a wrong judgment on a point of evidence, this Court can review it without a case being sent up. It is true that, where they have dismissed an appeal on a preliminary objection, this Court may overrule their decision; but the objection here, though it was preliminary to the admission of certain evidence, was not preliminary to the hearing of the case. There is no instance in which the Court has granted a mandamus under such circumstances. Rule refused.¹

¹ See *Rex v. The Justices of the West Riding of Yorkshire*, post.

[*600]

*LOCK v. VULLIAMY. Nov. 11.

No precise form of words is necessary to constitute an award; it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. But where an arbitrator, to whom a dispute between an architect and his clerk, respecting a claim by the latter for wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not show experience or ability to the extent to justify a demand for remuneration under the circumstances; but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10*l.*: Held, that the latter part of the letter was a mere suggestion of the arbitrator, and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and, therefore, not a good award.

INDEBITATUS assumpsit for wages or salary due and payable for the service of the plaintiff, as the hired servant of defendant, in his business of a surveyor and architect. The defendant pleaded the general issue, and paid 10*l.* into Court. At the trial before PATTESON, J., at the Middlesex sittings, in Easter term, 1833, it appeared that an action was brought to recover wages for the plaintiff's services as a clerk or assistant to the defendant, a surveyor and architect. The defence was, that on the 9th of January, 1832, it had been agreed between the plaintiff and defendant to refer the matter to one Goldcutt, and that he had made his award. Goldcutt, being called as a witness, stated, that Lock having claimed wages of Vulliamy, and the claim being disputed, it was verbally agreed that the differences between them should be referred to him, and that, after he had examined some plans and sketches made by Lock for the defendant, while in his office, and heard both parties, he wrote the following letter, addressed to the defendant:—"I have examined the drawings made by Mr. Charles Lock, with an account of his time, in his presence, at Mr. Vulliamy's, which does not bear testimony of experience or ability to the extent to justify him in making a demand for remuneration, under the circumstances in which he came to that gentleman's office. But in consideration of his services out of the

[*601] office on some occasions, and to meet the circumstances of the case in a liberal manner, I propose Mr. Vulliamy should pay Mr. Charles Lock 10*l.*" This letter Goldcutt sent to the defendant, but the plaintiff had no notice of it until after action brought. The learned Judge thought that Goldcutt's letter was not an award, that it bound nobody, and therefore that it was no answer to the action; and he observed that the employment of the plaintiff was *prima facie* evidence of his being entitled to wages, and that there was no proof of any agreement that he was not to receive any, and he left it to the jury to say if he was entitled to any, and to how much. The jury found for the plaintiff, damages 16*l.* A rule nisi for a new trial having been obtained, on the ground that the subject-matter of the action had been decided by the arbitrator,

F. Pollock, in this term showed cause. The letter is not an award on the points submitted. At all events, it was not published before the present action

was brought. It was merely sent to one of the parties. If the award was not complete at the time when the action was brought, the bringing of the action by one of the parties to the submission, determined the authority of the arbitrator. If it be an award that Vulliamy owed Lock 10*l.*, and was published after action brought, it should have been pleaded specially. But in fact it is not a decision that 10*l.* was due. It is a mere proposal or suggestion made by the arbitrator, to the defendant, that he should pay the plaintiff 10*l.*

Sir *James Scarlett* and *R. V. Richards*, *contra*. No specific form of words are necessary to constitute an award. *It is sufficient if the words used amount in substance to a decision of the points submitted. In *Matson v. Trower, Ryan & M.* 17, an arbitrator stated that he was of opinion that one party was entitled to claim of the other a given sum for non-performance of a contract for fifty puncheons of brandy, and Lord TENTERDEN held that to be a good award. Here, the arbitrator meant to say that in his opinion and judgment Lock was entitled to recover nothing for his services in Vulliamy's office, but that he was entitled to recover 10*l.* for his services out of the office. The delivery of the award to the defendant was a sufficient publication. [DENMAN, C. J. The Court have no difficulty on that point.] [*602]

DENMAN, C. J. I think the letter in question is not an award. It appears by it that the plaintiff sought to recover for two sets of services; first, for services in the office, and, secondly, for services out of the office. The arbitrator seems to have thought that the instruction received by the plaintiff was a compensation for the first set of services; but as to the second, he has come to no decision, but merely makes a proposal that the defendant, to meet the circumstances in a liberal manner, should pay 10*l.* That is a mere suggestion to the defendant to pay that sum, if he is disposed to act liberally. It is not an expression of an opinion that Lock was entitled of right to recover that sum. I agree that no precise form of words is necessary to constitute an award. It is sufficient if the language be such as to show clearly that the arbitrator has come to a decision upon the points submitted to him. In *Matson v. Trower, Ryan & M.* 17, the award was good, for the arbitrator, there, expressed a decisive opinion upon the matters submitted to him. Here the arbitrator has not decided, but merely suggested that the one party, if he meant to do a liberal thing, should pay 10*l.* to the other. [*603]

PARKE, J. The rule must be discharged. I am quite satisfied that the latter part of the instrument does not amount to an award. I agree that no precise form is necessary to constitute such an instrument. It is enough if it appear that the arbitrator has finally decided on the matters submitted to him. If it had appeared in this case that the arbitrator had decided that the one party should recover so much and no more, it would have been sufficient. On the motion for the new trial, I thought the meaning of the arbitrator might be, that the plaintiff had no claim whatever for his out-door services; but, on further consideration, I think that that cannot have been his meaning;—where he intends to decide, he has used apt words for that purpose; for, in the first part of the instrument, he has expressed a decided opinion that the plaintiff had no claim for remuneration for the work done in the office under the circumstances in which he came into it; but, as to his services as an out-door clerk, it does not seem to me clear that he meant to decide that the plaintiff had or had not a claim to compensation.

TAUNTON, J. The first part of this letter, in which the arbitrator says that the plaintiff is not entitled to make any demand for remuneration under the circumstances in which he came to the defendant's office, is decisive on that point, and, therefore, as to that, a good award; but the latter part, which relates to the services out of the office, contains no more than a suggestion on the part of the arbitrator to the defendant to meet the case liberally and pay 10*l.* That is not a decision that the plaintiff was or was not entitled to recover anything in respect of those services. The arbitrator only submits it for [*604]

consideration. As to those services, therefore, it was no award. The case is wholly different from *Matson v. Trower*, Ryan & M. 17. There the instrument did not contain a mere recommendation by the arbitrator, but a decisive opinion that the plaintiff was entitled to recover so much for breach of contract.

PATTESON, J., concurred.

Rule discharged.

[*605] *TIBBITS, Gent., One, &c., v. YORKE. Nov. 12.

A river navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person seized in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls, &c., to a trustee, to secure the annuities, and to permit her to hold the conveyed premises and the profits thereof to her own use, till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to Y., together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation; and out of the several receipts and profits to defray the costs and expenses necessary for carrying the trusts into effect, to pay up, and, if possible, discharge the annuities, to pay off certain creditors, and to hold the surplus, if any, for her benefit.

The trustee under the last-mentioned deed entered into receipt of the tolls, appointed a collector, and represented himself to the commissioners as a mortgagee of the tolls, and as having a control over them and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary:

Held, that it lay upon the trustee, having conducted himself as above stated, to show that he was not a proprietor within the meaning of the act: Held further, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee, to secure the annuities.

The act, passed in 1794, required that certain notices should be given in the Northampton and Cambridge newspapers. There was at that time one newspaper published at each place. A newspaper was subsequently established, called the *Huntingdon, Bedford, and Peterborough Gazette*, and Cambridge and Hertford Independent Press; and it was published (among other places) at Cambridge: Held, that the publication of the notices in the former papers was sufficient.

DEBT. The first count of the declaration stated that the defendant, on the 18th of January, 1831, was the proprietor of the tolls arising from the navigation of the river Nene, in Northamptonshire, between Oundle North Bridge and Thrapston Bridge, and in the eastern division of the navigation of the said river from Northampton to Peterborough, mentioned in an act of 34 G. 3, which the declaration recited: that at a meeting of the commissioners of the said navigation, duly holden under and by virtue of the said act, on the 3d of February, 1830, the said commissioners appointed the plaintiff their clerk: that he took upon himself the office, and executed the duties: that at a meeting of the commissioners, on the 18th of January, 1831, his accounts for attendance, labor, &c., were examined, and the amount of 174*l.* allowed, one moiety thereof to be paid

[*606] by the proprietor or proprietors of the navigation *between Oundle North Bridge and Thrapston Bridge, of which the defendant, on, &c., had notice, and thereby, as such proprietor, became liable to pay, &c., and that he was, on, &c., requested to pay, but did not do so. The second count was similar; but the demand alleged was on William Summers, the defendant's agent. The third count stated, generally, that the defendant, as such proprietor, &c., was indebted to the plaintiff, as clerk to the said commissioners, duly elected by virtue of the statutes in such case, &c., in the sum of 87*l.*, the moiety of the sum of 174*l.* before then duly allowed to the plaintiff by certain of the said commissioners duly assembled, &c., the same being a reasonable sum for his attendance, labor, &c., as clerk, and to be paid to the plaintiff by the defendant so being the proprietor, &c., when he should be thereunto afterwards requested; whereby and by reason of said sum of 87*l.* being wholly due and unpaid, an action had accrued, &c. The fourth count was on an account stated

between the defendant as proprietor and the plaintiff as clerk, on which accounting the defendant as proprietor was found indebted, &c., whereby and by reason of the last-mentioned sum being unpaid, an action, &c. Breach, that the defendant, although often requested, hath not paid, &c. Plea, nil debet. At the trial, before LITTLEDALE, J., at the Northampton Summer assizes, 1831, the plaintiff had a verdict for 87*l.*, subject to the opinion of this Court on the following case:—

The commissioners, acting under three statutes, viz., 12 Ann. st. 2, c. 7 (private), for making the river Nene from Northampton to Peterborough navigable, and 11 G. 1, c. 19, and 34 G. 3, c. 85, for amending former enactments as to the said navigation, gave notice of a *meeting, to be holden on the 3d of February, 1830, for the purpose of electing a clerk. The notice was [*607] inserted in the Northampton Mercury, a newspaper printed and published at Northampton, and the Cambridge Chronicle, a newspaper printed and published at Cambridge. Besides these papers, which were established before the passing of 34 G. 3, c. 85, and were the only newspapers then printed or published at Northampton and Cambridge, there is another paper printed and published at Cambridge, which commenced in the year 1817, called The Huntingdon, Bedford, and Peterborough Gazette, and Cambridge and Hertford Independent Press, published at the offices at Huntingdon, Bedford, Cambridge, and Hertford; at the conclusion of which paper there is the following memorandum:—“Printed by the editor, Weston Hatfield, and published at the office, Sidney Street, Cambridge.”

At the meeting advertised as above mentioned, the plaintiff was elected and appointed clerk to the commissioners acting in the eastern division of the said navigation, and a deed of appointment was executed in conformity with the order. The plaintiff performed the duties till the 18th of January, 1831. The case further stated, that the plaintiff had been appointed to the same office at a previous meeting, purporting to be a meeting of commissioners of the said navigation, viz., on the 20th October, 1829, at a salary to be fixed at a future meeting; and it sets forth particulars with respect to the appointment of some of the commissioners who acted on that occasion, which it is unnecessary to state here.

At a meeting of the commissioners, appointed for the 4th of January, 1831, and adjourned to the 18th, the *plaintiff produced his accounts and bill for business done. The bill was allowed, and an order made for payment of one moiety thereof by the defendant, as stated in the declaration. [*608]

About thirteen years ago, William Summers was by the defendant appointed collector of the said tolls on the navigation between Oundle North Bridge and Thrapston Bridge, for certain annuitants and creditors of Elizabeth Cheyne and Dorothy Squire, as hereinafter mentioned, and has ever since collected and received the same, defraying from time to time, out of the amount thereof, the costs, charges, and expenses of the repairs of the said navigation, and the defendant from time to time settling the said Summer's accounts. There was a balance in hand of 230*l.* at Christmas last, and 75*l.* the preceding Christmas, after paying for the said repairs; and there is also a balance in hand at present; but the defendant never received anything from tolls. The money goes in repairs.

At a meeting of the commissioners which took place subsequently to the appointment of the plaintiff as clerk, the defendant represented himself to be the mortgagee of the said tolls, but declared his determination not to obey any order of the said commissioners with reference to paying the plaintiff's salary, and alleged as a reason for such determination that the said tolls were insufficient completely to pay his interest and those repairs which he, the defendant, chose to have done.

By indentures of lease and release, July 22d and 23d, 1782 (a copy of which accompanied the case), reciting that Dorothy Squire was then seised in fee of the said navigation between Thrapston Bridge and Oundle North Bridge, and of all and every the tolls, *duties, and payments arising therefrom, subject to a rent-charge of 100*l.* a year, payable to Elizabeth Cheyne, [*609]

during her life, the said D. S. and E. C. conveyed the said navigation, and the said tolls, &c., and all the profits, authorities, &c., arising out of the same, and also other real and personal property, to the defendant and to three other persons, creditors to D. S. and E. C., upon trust to raise 7000*l.* by sale of the navigation and tolls, according to a contract stated to have been entered into with one T. Squire, and out of that sum and of the other property, and the debts and sums assigned by that deed, when received, in the first place to deduct and retain such costs and expenses as the trustees should necessarily be put to in or about the execution of the trusts, and afterwards (among other things) to apply the residue of the moneys to be raised, in satisfying the annuitants, and paying the above three creditors, and such others as should execute the indenture.¹ All the persons appointed trustees under the said deed are dead, except the defendant. The said deed was given in evidence by the defendant, and likewise two other deeds, one of the 27th and 28th of November, 1778, and the other of the 23d of April, 1779 (copies of which accompanied the case), whereby the said D. S. and E. C. granted to Mark Sprot and Thomas Pitt Smith, certain rent-charges on the said tolls, &c., and conveyed the said tolls, &c., to one William Smithson for a term of lives and a term of ninety-nine years, in trust, to secure the payment of those rent-charges, and to permit D. S. and her assigns to hold and enjoy the hereditaments and premises so charged, and receive the rents, issues, and *profits to her and their own use, subject to the former rent-charge to E. C., and until default of payment of the other rent-charges. All the annuitants mentioned in the said deeds, are dead, but a considerable arrear of the annuities remains unpaid.

The following points were taken by the defendant:—First, that the notice given of the meeting of the 8d of February, 1830, for electing a clerk was insufficient, being inserted only in the Northampton Mercury and Cambridge Chronicle, whereas there was at the time another newspaper published at Cambridge; and by 34 G. 3, c. 85, s. 6, such notice is to be given “in the Northampton and Cambridge newspapers, if any such shall be printed; if not, then in the London Gazette.” (The second objection was abandoned on the argument.) Thirdly, that the appointment of the plaintiff on the 8d of February, 1830, was invalid, inasmuch as he had been already appointed at the meeting of the 20th of October, 1829; and by 13 Ann. st. 2, c. 7, s. 20, no appointment of the commissioners is to be reversed or altered, unless the whole, or the majority, of the commissioners who made such order shall have notice of the meeting for the purpose of reversing or altering the same, which did not appear to have been given in the present instance. Fourthly, that the defendant was not a proprietor of the tolls; that the deeds of lease and release of July, 1782, [611] showed him to be a trustee on behalf of the creditors of the proprietors, Cheyne and Squire; three of the parties to the said release of the third part being such creditors, acting for themselves and others of the said creditors, and as trustees for the purposes in that deed specified; and the parties of the fourth part being such of the other creditors as should execute the said indentures. Fifthly, that the legal estate in the navigation was outstanding in the representatives of the mortgagee under the deeds of 1778 and 1779, and a considerable

¹ See further as to the contents of this deed, p. 617, post.

² By 34 G. 3, c. 85, s. 7, it is enacted, that one moiety of the money to be allowed to such clerk shall be paid by the proprietor or proprietors for the time being of the tolls and duties arising from the said navigation between Peterborough and Oundle North Bridge; and the other moiety thereof by the proprietor or proprietors for the time being of the tolls and duties arising from the said navigation between Oundle North Bridge and Thrapston Bridge.

Sect. 9 enacts, that if any or either of the proprietors of the said tolls and duties shall neglect or refuse to pay the sums allowed and due to the clerk, on demand made of such proprietor or his agent who receives the tolls, such sums may be recovered by action of debt in the name of such clerk, against the proprietor of such tolls or duties who ought to pay the same under the directions of this act; and that if such proprietor cannot be found, the action may be brought against his agent in the receipt of the tolls.

amount of the arrears remained unpaid; and that the trustees under the deed of 1782 (of whom the defendant was the survivor), had only the equity of redemption in the navigation.

Miller, for the plaintiff, was desired by the Court to confine himself to the question, whether or not the defendant was a proprietor. The "proprietors," who by 34 G. 3, c. 85, s. 7, are to pay the clerk, are the same persons with the "undertaker," mentioned in 18 Ann. st. 2, c. 7, s. 1; and the latter, by that clause, are the person or persons (approved and appointed by the commissioners) who are to make the river navigable, to build locks, &c., "where the said undertakers, their heirs and assigns, shall think fit," and to do all other necessary matters and things for the improvement and maintaining of the navigation. The act 34 G. 3, *c. 85, s. 1, expressly speaks of the said "undertakers,"—"being the proprietors of the respective parts of the said navigation;" and section 2 continues the powers, &c., granted by the former act, except as they are repealed by this. The defendant therefore comes under the description of a proprietor within the meaning of the statutes. And, as the surviving trustee under the deed of 1782, who alone has a right to receive the tolls on the line of navigation in question, he is substantially the proprietor. The transactions of Summers, his admitted agent, the statement of the defendant himself to the commissioners that he was mortgagee, and his other declarations on the same occasion, show clearly the situation in which he stands. If he is the proprietor for the purpose of receiving the profits and regulating the expenditure on repairs, he is so for that of paying the clerk.

Follett, contra. It is not clear from the statutes, that the proprietors of the tolls are the same persons with the proprietors or undertakers of the navigation; and assuming that they are so, the plaintiff here does not trace his title from any of the persons recognised by the act of 34 G. 3, c. 85, as "undertakers, being the proprietors," of the navigation. The alleged acts or admissions of the defendant are not conclusive, if, upon reference to the deeds under which he has taken the tolls, it does not appear that he is a "proprietor" within the meaning of the acts. The result of the several deeds is, that the defendant merely had what may be termed the equity of redemption of the property, and that not for his own use but for the general benefit of the persons mentioned as creditors and incumbrancers in the deed of 1782. It was not a matter of necessity that the action should have been brought against the defendant; for, by section 9 of 34 G. 3, c. 85, if the proprietor cannot be found, the agent who receives the tolls may be sued. The formal objection with respect to the notices in the newspapers is also valid. The words of the act do not import that such notices shall be given in a part only of the Northampton and Cambridge papers. [PATTERSON, J. There were only two such papers when the act passed.] Supposing both of those had been discontinued and others established, the notices must then have been given in papers which were not extant when the act passed.

Miller in reply. The plaintiff is not bound to trace the defendant's title to any proprietor or undertaker. He is entitled to insist on the liability of the defendant under the deed of 1782, which he has himself put in. In executing the trusts of that deed he must, at all events, pay the expenses of the navigation, and, among others, the clerk's bill. [PATTERSON, J. There is no appropriation clause in any of the acts.]

DENMAN, C. J. The real question in this case is, whether the defendant is proved to be a proprietor of that part of the Nene navigation which lies between Oundle North Bridge and Thrapston Bridge. It is stated in the case that, about thirteen years ago, this defendant appointed a person to be collector of the said tolls. [His Lordship here read the paragraph of the case as to the employment of Summers, and the account rendered by him to the defendant; and also that part which stated the representation of the defendant that he was mortgagee, his refusal to pay the plaintiff's salary, and the reason assigned by him.] Now, the clerk being appointed by the com- [614]

missioners in a manner which is free from objection, and having done certain things for these commissioners, he had by 34 G. 3, c. 85, s. 7, to look for his remuneration to the proprietors of this part of the navigation: and supposing that there was nothing more in the case than that the defendant had represented himself to have the power of appointing a collector, and received the tolls, and dealt with and controlled them, in the manner stated, it appears to me that that would be sufficient to maintain this action, as between the clerk, who under the act of parliament looks for his remuneration to the proprietors, and this defendant, who represented himself by his conduct as such proprietor. But then it is said, there is nothing to show, in point of fact, that he was a proprietor, and that the deeds disprove it. Now I am not quite sure we have all the deeds before us, and there certainly is a great deal of confusion in this respect. But supposing that the deeds present the case correctly, then it seems to me that within the meaning of the act of 34 G. 3, c. 85, and for the purpose of paying the persons employed in the execution of the works, among whom the clerk of course is a very essential person, the defendant may be very properly considered a proprietor; because by the deed of 1782, which he appears to have executed, he is appointed to receive the tolls and to hold the navigation and the profits arising therefrom, subject to certain claims; and he is to act as trustee in the disposal of the moneys so arising: he is to do what is just with them, to pay the parties employed in the works, to pay interest to other parties, and to exercise control over the repairs which are to be done. I think that by that deed, and by the possession he

[*615] has *taken and the control he has exercised, under it, he must be considered as a proprietor. I never can hold that a party employed as the plaintiff was, by a person acting as the defendant has done, shall be bound to ascertain with nicety where the legal estate lies, to balance the equities, and to find out who has in the greatest degree the beneficial interest in the property. If he finds a party invested with such an authority as was given by this deed, and adopting it by his acts, I think he is justified in treating him as a proprietor; and that the defendant is so, under the statute, for the present purpose.

PARKE, J. I am of the same opinion. In this case several objections have been taken. The first is, that the plaintiff was not duly appointed clerk, because he had been appointed at a previous meeting to that alleged in the special counts in the declaration, viz., in the year 1829. That objection, however, has been disposed of, and it is clear in my mind that the plaintiff is entitled to recover under the general counts in the declaration, provided the defendant be a proprietor: if he is the clerk to the commissioners, whether he was appointed at a meeting in 1829 or the one in 1830, is wholly immaterial. There is another objection which applies only to the meeting of the 8d of February, 1830, viz., that that meeting was not duly advertised in the Northampton and Cambridge papers. It does not appear to me to be necessary under this act of parliament that there should be an advertisement in every paper published at those places; but supposing it was requisite, I am not satisfied, looking at the title of the paper, that this paper printed and published at Cambridge is a Cambridge paper within the meaning of the acts of parliament. The plaintiff, [*616] therefore, is the clerk to the *commissioners; and they having adjudicated that he is entitled to a sum of money to be paid by the proprietor of the tolls in question, the point comes to be: Who is the proprietor of those tolls?

Now with respect to the title to the tolls, it appears that they were vested in Mrs. Squire, subject to an annuity of 100*l.* payable to Mrs. Cheyne: that in 1778, there was a grant of annuity made by Mrs. Squire and Mrs. Cheyne to two annuitants, Mr. Sprot and Mr. Smith; and, in order to secure these annuities, there is a grant of all Squire's and Cheyne's interest in the tolls to Mr. Smithson for a term of lives, and of 99 years. The effect of that deed would be that the legal estate vested in Smithson, and that if the plaintiff had had to

bring an action against the owner of the legal estate, his remedy would have been against Smithson, and not against the defendant; but it appears to be quite clear that the meaning of the act of parliament is not that. Supposing that no other deed had been executed but this grant of annuities, and that the trustee had not taken possession for the term granted to him, then if Mrs. Squire and Mrs. Cheyne had still continued in receipt of the profits of the navigation, doing all the repairs and paying all the expenses, they, notwithstanding the existence of the mortgage charge, would unquestionably have been the proprietors of the navigation within the act, 34 G. 3, c. 85. They would have been the persons in the receipt of the rents and profits, and one application of these is to do the repairs of the navigation, and another application, equally necessary, to pay the expenses of the clerk appointed under the navigation acts. It being then clear that Mrs. Squire and Mrs. Cheyne, in the case supposed, would be the responsible persons, notwithstanding the grant of annuities, which *is merely a charge on the profits affecting the legal estate, let us see the effect of the deed of 1782. That deed does not recite the charge of 1778, [*617] but another indenture of 1781; and it is perfectly clear to me that this deed of 1778 had been done away with, and for the two annuities of 100*l.* each to Sprot and Smith, there had been substituted an annuity of 180*l.* to Sprot and 170*l.* to Smith. No doubt there had been some further advance in the mean time. There is besides a further grant of annuity by bond not secured on the tolls, to a Mrs. Palmer. This deed also recites that there had been a contract entered into between Mrs. Squire and Mrs. Cheyne and Thomas Squire to sell the whole of the tolls for 7000*l.* Then what are the trusts of this deed? They are, in the first place, to carry into effect the contract, in the next place to sell some other real estate conveyed by this deed, and in the third place to sell all the personal property of Mrs. Squire and Mrs. Cheyne, all being vested in the trustees: they are to receive the 7000*l.* under the contract with Squire (which however did not take effect); and out of that sum, and the profits to arise from the sale of other property, and out of the tolls, which the trustees are also to receive, to pay all the costs, charges, and expenses necessary for carrying the trusts into effect. The repairs of the navigation are one part of these charges and expenses, and the payment of the clerk's allowance is undoubtedly another. Having paid these several charges and expenses, their next duty is to compound with the annuitants if they can, at all events to keep them off the estate, and prevent its being burdened with them, and to pay the creditors; and then, if there is any surplus, to hold it in trust for Mrs. Squire and Mrs. Cheyne. The effect of that deed is to put the *trustees in the same situation as [*618] Mrs. Squire and Mrs. Cheyne would have been in, if they had continued in possession; and the whole estate which they had, subject to the mortgage charge, is vested in the defendant, the defendant being the survivor of these trustees. No other person can be said to have a distinct equitable title to the estate. He has to receive the profits to pay off the incumbrances, to enter into such contract as he thinks fit with the annuitants, and to pay the different creditors: the effect of the deed is to place him, clear of these liabilities, in the same situation as Mrs. Squire and Mrs. Cheyne would have stood in, supposing the deed had never been executed at all. We cannot attend to the circumstance of an outstanding legal estate being in another person in trust to secure the annuities. It appears to me, therefore, that the defendant must be treated as the proprietor of these tolls, and if so, that this action is maintainable.

TAUNTON, J. I am of the same opinion: and, my brother PARKE having gone so minutely into the different conveyances, I do not think it necessary to enter particularly into the intricacies of these deeds. The act of parliament provides that the clerk shall be paid by the proprietor of the tolls; and I am of opinion that the defendant may be treated as the proprietor so as to be liable in this action, because he has held himself out to the world as such, and has done various acts which no other person but a proprietor was competent to do. For

instance, he has stated that he would only pay for such repairs as he himself should order to be done, thus assuming himself to be the person who had the power of controlling the expenditure, and directing the repairs. He has also [*619] appointed a person to collect the *tolls; he has checked the accounts of that person, and the collector under his authority has paid the current expenses of the navigation. I do not mean to say that these various acts would, at all events, make him liable as a proprietor under the act; but I think they throw upon him the burden of proving that, notwithstanding he has been the visible and ostensible proprietor, yet the real proprietor is some other person. Has he done this? The only other person whom there is any pretence for calling the proprietor is the representative of Smithson, under the deeds of 1778; but, although the legal estate passed to Smithson for the purpose of securing the annuities mentioned in the deed, still those annuities were only a charge upon the estate: the legal estate was not given to Smithson in the character of proprietor of the navigation in the sense in which the word "proprietor" appears to me to be used in the act, but merely to secure these annuities. I think, therefore, the legal title outstanding in Smithson's representative is no bar to this defendant being considered a proprietor within the act. Then, by the deed of 1782, the whole interest is conveyed to the defendant and three other persons whom he has survived, subject to the terms granted to Smithson; everything except that which was outstanding in Smithson is conveyed to them, and the trusts are to pay the creditors, and defray the expenses of the navigation and the general charges incident thereto. We are not running counter to the declared objects of that deed in saying that the defendant is liable to the charge now in question. And, looking at all the deeds, there is nothing to show that, although Mr. Yorke may have been the ostensible proprietor, some other person [*620] remains concealed, who *ought to be considered the real proprietor. I think, therefore, that enough appears to support the present action.

PATTESON, J. I am entirely of the same opinion. The formal objections are clearly answered; and the only question is, what is the meaning of the word "proprietor" under the act of parliament? The argument, that a person, to be such proprietor, must have the legal estate, appears to me wrong; I think the word proprietor is not used in that strict sense in the act. The facts are, simply, that Mrs. Squire having an interest in the tolls, grants annuities to two persons in 1778, and for the purpose of securing these annuities she leases the tolls to Smithson for life and for ninety-nine years. In 1779, she grants two further annuities by another deed to the same persons; and it is clear there must have been a subsequent deed in 1781, which is not set out in the case, by which the four annuities are consolidated; for such a deed is recited in the deed of 1782. Under that deed of 1782 the defendant takes all the interest that was left in Mrs. Squire. She certainly must be considered to have been a proprietor of these tolls, though she had granted a lease of them for securing the annuities: it was, in fact, merely a charge upon the tolls: in substance she was a proprietor. Why, then, is not the defendant, who takes all her interest, a proprietor? He is, in truth, the proprietor of the tolls, taking them for her benefit, and to distribute among her creditors, and having the equitable interest vested in him for that purpose. The case seems to me to come directly within the meaning of this act of parliament. Judgment for the Plaintiff.

[*621] *DOE dem. JOHN ANDREW GALLINI v. FRANCIS ALBERT GALLINI.

Testator being seised in fee of lands, devised to trustees in fee, upon trust, as to part, to permit his eldest son to receive the profits for life, and as to other parts, to permit his two daughters to receive the profits for life; and also, upon trust, during the lives of his said children, to preserve contingent remainders:
And after the decease of any or either of his said children, he devised the estate to him

or them limited for life as aforesaid, unto all and every his, her, or their child or children living at the time of his, her, or their parents' decease, or born in due time afterwards, for their lives as tenants in common: but, nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one, and any of them should die without leaving issue, the child or children of each of the said sons and daughters taking the rents and profits of his, her, or their parents' estate only:

And from and after the decease of all the children of each of his said sons and daughters without issue, he devised the estates to them respectively limited as aforesaid, unto and among all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining:

And for default or in failure of issue of any of his said sons and daughters, he devised the estates so limited to him, her, or them dying without issue, unto the survivors of his said sons and daughters, during their respective lives, in equal shares as tenants in common; and after their respective deaths he devised the same to the children of the survivor of his said sons and daughters, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters:

And for default or in failure of issue of all his said sons and daughters except one, he devised all his said estates unto his only surviving son or daughter in fee.

Held, that under this will, the eldest son of the testator did not take an estate tail (unless in remainder), but an estate for life; that his children took estates tail in undivided shares, as tenants in common.

The doctrine that, in construing a devise, the general intent is to be preferred to the particular intent, is incorrect and vague; the true rule of construction is, that technical words or words of known legal import, must have their legal effect, even though the testator use inconsistent words; unless the inconsistent words are of such a nature as to make it clear that the technical words are not used in their proper sense.

EJECTMENT for manors, lands, &c., in the county of Berks. Plea, not guilty. At the trial before BOSANQUET, J., at the Summer assizes for the county of Berks, 1832, the jury found a special verdict, stating as follows:—

Sir John Andrew Gallini, Knight, being seised in fee simple of the manors and other hereditaments, one-fifth part whereof is sought to be recovered by the lessors of *the plaintiff in this action, duly made and published his [*622] last will and testament in writing, bearing date the 19th day of October, 1799, and thereby devised unto certain trustees and their heirs, all his manors, farms, lands, tenements, and hereditaments situate at Yattendon or elsewhere in the county of Berks; also two messuages in Hanover Square in the county of Middlesex, in the several occupations of Dr. Osborne and William Mainwaring, with the appurtenances; and also his estates in France, therein described; habendum to the uses or upon the trusts, and for the intents and purposes thereafter expressed; that is to say, as for and concerning his manors, lands, &c., in the county of Berks, upon trust to permit his son Francis Cecil Gallini to receive the rents, issues, and profits thereof (except certain timber) for his natural life, his said son thereout paying or providing for the maintenance, support, and necessities of testator's wife Lady Betty Gallini, for her life; and as for the messuage in Hanover Square, in the occupation of W. M., upon trust to permit testator's daughter Jesse to receive the rents and profits for her life; and as for the messuage in Hanover Square, in the occupation of Dr. Osborne, upon trust to permit testator's daughter Louise to receive the rents and profits for her life; and as for his estates in France, upon trust to permit his son John to receive the rents and profits for his life, subject to interest on the mortgage thereof. The will then proceeded as follows:—

“And from and after the determination of the several and respective estates of my said sons and daughters of and in the said manors, farms, lands, messuages, tenements, and hereditaments in England, and the said estates *in [*623] France, I give and devise the same estates unto the said trustees and their heirs during the several lives of my said children, upon trust to preserve the contingent remainders hereinafter limited from being defeated or destroyed

&c. ; but nevertheless to permit and suffer my said sons and daughters to receive and take the rents, issues, and profits of the several estates devised in trust for them respectively for and during their natural lives (except in the case of the forfeiture hereinafter declared) : And from and immediately after the decease of any or either of my said children Francis, Jesse, Louise, and John, or in case of such forfeiture, I give and devise the estate or estates to him, her, or them respectively limited for life as aforesaid, unto and among all and every, his, her, or their child or children lawfully begotten, which shall be living at the time of his, her, or their decease, or born in due time afterwards, for and during their natural lives, as tenants in common and not as joint tenants ; but nevertheless with an equal benefit of survivorship among the rest of the said children, if more than one, and any of them shall die without leaving issue ; the child or children of each of my said sons and daughters taking the rents and profits of his, her, or their parent's estate or estates only : And from and after the decease of all the children of each of my said sons and daughters without issue, I give and devise the estate or estates to them respectively limited as aforesaid, unto and among all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively so long as there shall be any stock or offspring remaining : And for default or in failure of issue [*624] of any of my said *sons and daughters, I give and devise the estate or estates so limited to him, her, or them dying without issue, unto the survivors of my said sons and daughters during their respective natural lives, in equal shares as tenants in common, subject to the forfeiture hereinafter declared ; and after their respective deaths, I give and devise the same to the children of the survivor of my said sons and daughters during their respective lives as tenants in common, with such benefit of survivorship as aforesaid ; and after the decease of all of them, to the issue of such children in like manner as I have before devised the original estate of each of my said sons and daughters ; and for default or in failure of issue of all my said sons and daughters except one, I give and devise all my said freehold estates unto my only surviving son or daughter, to hold to him or her, and his or her heirs and assigns for ever."

"Provided always, and I do hereby declare it to be my will, and direct, that my said sons and daughters, or any of them, or any of their issue, shall have no power or authority whatsoever, either at law or in equity, by virtue of this my will, or the trusts thereof, to bargain, sell, assign, release, or convey their respective interests in my said freehold estates for their respective lives, or any other term, right, or interest therein, either by way of sale and purchase, mortgage or otherwise, neither shall any annuity, yearly rent-charge, or any other sum or sums of money whatsoever be granted, assigned, or made payable out of the said freehold estates, or any parts or shares thereof to which they may become eventually entitled, or the rents and profits thereof, or any part thereof, by my said sons and daughters, or any or either of them, or the issue of any or [*625] either of them, to any *person or persons whomsoever, for their respective lives, or any shorter term therein, for any sum or sums of money, or any other consideration, or upon any other account, or in any other shape or manner whatsoever ; or in the event of any of my said sons and daughters, or the issue of any of them, doing or suffering anything to be done contrary to the true intent and meaning of this my will, I do hereby declare that their estate and interest of and in the said manors, farms, lands, messuages, hereditaments, and premises shall cease and determine and be immediately forfeited." The testator gave the trustees, and also his said sons and daughters, power of leasing for twenty-one years, upon the terms in the will mentioned ; and he devised the timber above-mentioned to the trustees, upon certain trusts declared in that behalf.

The testator died on the 5th of January, 1805. On a trial at law in Trinity term, 1807, on an issue directed by the Court of Chancery, a verdict was found

in favor of the will; and by a decree of the said Court, dated the first of August, 1810, it was declared that the said will ought to be established. There was issue of the testator living at the time of his decease, Francis Cecil Gallini, in the said will called Francis Cecil Gallini, his eldest son and heir-at-law, and two daughters, Jesse and Louise. John Gallini and Lady Gallini died in the lifetime of the testator. At the time of the testator's decease, there was lawful issue of the said Francis C. Gallini living, viz., John Andrew Gallini, the lessor of the plaintiff, and eldest son of the said Francis C. Gallini; Mary Gallini, Arthur Gallini, and Frances Ann Penelope Harriet Gallini.

*Francis Cecil Gallini died on the 19th of May, 1815, intestate as to the real estates, leaving issue the said John Andrew Gallini, and the said Mary Gallini, and Arthur Gallini; and also the defendants, Alfred Lambert Gallini, and Francis Albert Gallini, and they have all since attained the age of twenty-one years. Frances Ann Penelope Harriet Gallini died under age in the lifetime of her father. [626]

The said Jesse Gallini and Louise Gallini are both living unmarried and without issue.

The premises comprised in the declaration in ejectment are the premises in the county of Berks, devised by the will of the said Sir John Andrew Gallini. Francis Cecil Gallini, the testator's eldest son, was in possession of the Berkshire estates under the said will at the time of his decease.

The lessor of the plaintiff is the heir-at-law of Francis Cecil Gallini and of the testator, and also heir of the body of the said Francis C. Gallini, and attained the full age of twenty-one years on the 13th of March, 1822, when, under an order of the Court of Chancery, he was put into, and has ever since been in possession and in the receipt of the rents and profits of one undivided fifth part of the said estates.

Under another order of the said Court of Chancery, the defendant, Francis Albert Gallini was, on his attaining the age of twenty-one years, namely, on the 17th of January, 1827, put in possession and receipt of one other undivided fifth part of the said estates, claiming to be entitled thereto under the said will, and still is in possession of the same. The ejectment is brought to recover the said fifth part of the estates in *Berks, so in possession of Francis Albert Gallini. Such possession by him has been and is adverse to the lessor [627] of the plaintiff.

On the 14th of May, 1832, the lessor of the plaintiff made an actual entry upon all the devised premises in Berkshire.

The case was argued in Trinity term, 1833.¹

Lynch for the lessor of the plaintiff. The testator's object was twofold. First to continue his estates in his descendants from generation to generation, while any of the stock should remain. This was a legal object. Secondly, to continue them so that his descendants should take for their lives, only from generation to generation. That was an illegal object. The devisees, from whom stocks were to arise, are the sons and daughters. The testator gives them only an estate for their lives; and it is not to go over to the ultimate devisee until there is a total failure of their issue. The result in law is, that the sons and daughters took estates tail. That construction is necessary to effect the legal and paramount intention of the testator. The general rule is, that where an estate is devised to a person for life, with a devise over which is not to take effect while there is any issue of the devisee for life, if there be no words in the will under which the issue can take as purchasers, then, in order to carry the manifest general intent of the testator into effect, the particular intent is disregarded, and the estate devised for life is enlarged into an estate tail, so as to let in all the issue of the first devisee: *Robinson v. Robinson*, 1 Burr. 38; 2 Ves. 225; *Doe v. Applin*, 4 T. R. 82; **Jesson v. Wright*, 2 Bligh. 51; *Doe v. Smith*, 7 T. R. 531; *Doe v. Cooper*, 1 East, 229; *Bennett v. Lord* [628]

¹ Before DENMAN, C. J., LITLEDALE, PARKER, and PATTESON, Js.

Tankerville, 19 Ves. 170; *Wood v. Baron*, 1 East, 259; *Frank v. Stovin*, 3 East, 548; *Pierson v. Vickers*, 5 East, 548; 2 Smith, 160; *Doe v. Harvey*, 4 B. & C. 610. Nothing can be more striking than the different modes of disposition made use of by testators to carry their intentions into effect. But for the doctrine that the particular intent was to yield to the general intent, it would have been impossible that all of these decisions should be as uniform as they have been. To carry into effect the general intent, the particular disposition has been disregarded. Let this principle be applied to the present case. The intention of the testator, that the estate should not go over until a general failure of issue of his sons and daughters, can only be carried into effect by giving the sons and daughters an estate tail. It is settled by the decisions, that when the intention of the testator appears to be to provide for all the lineal descendants of the devisee, and that the estate is not to go over until a total failure of the issue of such devisee, the devisee shall take an estate tail notwithstanding the inaptitude of the words used for that purpose. Particular expressions used by the testator, which might have the effect of counteracting the general object; dispositions made by him, militating against that object; modifications endeavored to be introduced by him into the descent; have all been overlooked in favor of the general intention. It will be contended in this case, that the surviving sons and daughters of F. C. Gallini [*629] take estates tail. In answer to this, *it is only necessary to say, that the words of the will do not warrant such a construction; for the estates given to the grandchildren surviving, are only given for their lives; as in like manner, the estates to the sons and daughters are only given for their lives. Besides, suppose a son to have died in the lifetime of the testator, and to have left issue, that issue, according to the construction contended for on the other side, would be disinherited. The general intention, therefore, cannot be effected, except by holding that the sons and daughters of the testator took estates tail. The words, "without issue," in the devise to the grandchildren, after the death of their parents, must be rejected as insensible; for the testator afterwards directs that the estates are to descend to the issue of such child or children during their lives, and so on to the issue of his sons and daughters, so long as there shall be any stock or offspring remaining; and for default of issue of his sons and daughters, he gives the estates so limited to him, her, or them dying without issue unto the survivors of his sons and daughters for life, in equal shares as tenants in common, and after their death, to the children of the survivors during their lives, as tenants in common; and after the decease of all of them, to the issue of such children. The words, "without issue," in the devise to the grandchildren, if retained, must be read as if they were "leaving issue;" and then the effect will be that the estate left to each of the sons and daughters, will go to the whole line of issue of those sons and daughters respectively, and only on failure of that issue go over. The word issue there must be construed as a word of limitation. Unless it be so construed, the be- [*630] quest over to the issue will be too remote. A devise to the children *of the sons and daughters unborn in the lifetime of the testator would be void, *Jee v. Audley*, 1 Cox, 324; *Leake v. Robinson*, 2 Mer. 363; and if that limitation be too remote, every other limitation is so. At all events, the words, "without issue," when applied to the grandchildren surviving, ought not to have a greater effect in enlarging their estates to estates tail, than the same words when applied to the sons and daughters in the subsequent part of the will. Give the words "without issue" that effect when applied to the sons and daughters, and no descendant will be disinherited, and the general object of the testator will be carried into effect. This case is not distinguishable from *Murthwaite v. Jenkinson*, 2 B. & C. 357; and *Wollen v. Andrewes*, 2 Bing. 126. In the first of those cases, the devise was to the testator's three nieces equally for their respective lives, and after the decease of each, the lawful issue of each to have his or her mother's share for life in like manner, and if either of the nieces should die in the lifetime of the others or other of them without issue,

her share was to go equally to the survivors for their lives, and afterwards to the lawful issue of the survivors in like manner; and if all the others and their issue save one should die without issue, then the survivor was to have the whole for her life; and after her decease, the lawful issue of such surviving niece, if more than one, to have the whole equally; and if but one, then such one should have the whole of such part as was personal to his or her own use; and to hold such part as freehold to them and each of them, if more than one, their and his or her heirs and assigns as tenants in *common; if but one, then to such one, his, or her heirs and assigns for ever. The Court of King's Bench decided that, if the devise had been of the legal estate, the three nieces would have been tenants in tail. They also held that there were no cross remainders in tail among the nieces; and it was decided that an only child of one of the nieces, if he survived his mother and two aunts, and they should have no other child, would be tenant in tail of the freehold. In *Wollen v. Andrewes*, 2 Bing. 126, the words child or children are used in the gift to the grandchildren, as in this will, and the gift to them is for life only, with a gift over, in like manner, to their children, and the estate tail was raised on the gift over to the other children of the testator in the event of any of his children dying without issue. *Mortimer v. West*, 2 Sim. 274, is also a case nearly resembling the present.

Talfourd, Serjt., for the defendant A. Gallini.

The lessor of the plaintiff cannot succeed unless he satisfy the Court that Francis, the eldest son of the testator, took an estate tail. It is sufficient for the defendants to establish that this is not so. But the construction they contend for is, that the named sons and daughters of the testator took respectively estates for life in the several premises devised to them, with remainders in tail to their children who should survive them respectively, with cross remainders in tail among their respective issue. The first step towards arriving at the true construction of the devise is to disentangle it of the confused terms in which it is couched. It is obvious that there is something omitted *or inserted by mistake, or some words used out of their ordinary grammatical construction. Now, first, it may be fit to refer to the parts of the will preceding the clause on which the question arises. The testator, having devised all his estates to the trustees in terms sufficiently large to give them a fee, proceeds to designate the parties in whose favor the devise is made. He first gives to his son Francis an estate in Berkshire, to his daughters Jesse and Louise estates in Hanover Square respectively, and to his son John an estate in France, in terms which clearly denote only estates for life, unless by legal implication they are enlarged into estates tail. He next interposes a trust estate to preserve contingent remainders, thereby strongly confirming his intention to give to his sons and daughters, whom he has named, estates for life only. Then, in case of the death of any of his named children, or the forfeiture of their estates, he gives the estates, limited to them for life, to the children of each who shall be living at the time of the parent's decease, or born in due time afterwards,—estates, in terms, for life only, in the premises antecedently devised for life to their respective parents; all such children to take as tenants in common, with benefit of survivorship if any one shall die without leaving issue. The words "without leaving issue" will probably enlarge the estate of these the devisors's grandchildren, who have survived their parents, into estates tail. So far there is no obscurity or legal difficulty. But the next clause proceeds,—“And from and after the decease of all and every the children of each of my said sons and daughters without issue.” The question is, what the word each means here;—it cannot mean if all the children of each of his sons and daughters shall *die without issue, then the lawful issue shall take, for the race would be extinct. But each must be read distributively; as, “any,” or, [633] “either.” Then it will read thus:—“And from and after the decease of all the children of any of my said sons and daughters without issue, I devise the

estate or estates to them respectively limited as aforesaid, unto the lawful issue of such child or children." But the word such cannot refer back to the children who have died without issue; it must have relation to something subsequent, and it must be read as implying "as shall have issue," thus providing for the cross remainders among the issue of the respective children, and so on for all time. The first takers then have estates for life, with remainder to their surviving children in tail, with cross remainders in tail among the issue of each of the grandchildren. It is observable, that in speaking of the grandchildren the testator uses the term children, which is a word of purchase, whereas, in speaking of the succeeding generations, he uses the term issue, which is a word of limitation.

The difficulty in the way of the present construction is, that the testator has followed out the grandchildren before he has provided for the death of the children without issue. But his mind, carried beyond its immediate purpose, now reverts to it again. He provides for the failure of issue of either of his sons and daughters, by devising the estates of those dying without issue to the survivors during their respective natural lives, in equal shares, as tenants in common. "And after their respective deaths, then to the children of the survivor:" that must mean survivors. Then to the issue of the children. And [*634] for default of issue of all except one, then to the sole *survivor of all for ever. The words "dying without issue" may be resorted to to enlarge the estate of the first takers; but that is not their meaning here. Looking to the whole will, the term "dying without issue" must mean "dying without such issue." *Ginger dem. White v. White*, Willes, 348; and *Blackborn v. Edgeley*, 1 Peere Williams, 600, show that "without issue," may mean "without such issue." In *Morse v. The Marquis of Ormond*, 1 Russell, 382, the words "after failure of issue" were construed to mean "the failure of the issue aforesaid." If the words without issue are so read here, the limitation contended for on the other side fails. But supposing the expressions relied on denote an estate tail, it does not follow that this is an estate tail in Francis in possession, to the effect of entirely defeating the gift to his children as tenants in common. Suppose one object of the testator was to embrace all the issue of Francis, without defeating the express estates given to the children of Francis who should be living at the time of his death and their issue, this object may be effected and under these terms, by giving to Francis an estate tail in remainder, expectant on the determination of the estates tail to such of his children as may survive him. To hold that the first takers take an estate tail in remainder removes the difficulty suggested in case of a son dying in the lifetime of the testator.

This case is distinguishable from *Murthwaite v. Jenkinson*, 2 B. & C. 357; and *Mortimer v. West*, 2 Simons, 274; because, here, the intention of the testator is to provide for the children of his children who should be living at the time of their parents' death. In the former case, it is obvious that the [*635] *nieces were the stirpes from whence the issue was to spring; and to them, therefore, an estate tail was given by implication, on account of a devise over on failure of issue. In this case, it is equally obvious that the children of the first takers, living at the time of their parents' deaths, are the stirpes. All the arguments in *Murthwaite v. Jenkinson* tend to show not an estate tail in Francis, but in the children of Francis, who are in the situation of the nieces. So in *Mortimer v. West*, 2 Simons, 274, the relative position of the children of Martha Davies, who were held to take estates tail, is not to the first takers here, but to the present defendants. The first devise there, is to trustees for the life of Martha Davies. Martha Davies, then, stands for Francis; and then the trust is after her death and that of the testator's wife, to pay and divide the rents among the named children of Martha Davies, or such of them as shall be living at the time of the testator's decease, or born, &c., share and share alike for their several lives; and from and after the decease of every of

the said children leaving issue, the limitations are as in the present case. In construing a will, the permanent intent is to guide, but the rule also is (as laid down by Lord REDESDALE in *Jesson v. Wright*, 2 Bligh, 57), "that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise."

Cootte was also heard for Alfred Lambert Gallini, who was defendant in another case in which a similar verdict had been taken. The rule is, not that the particular intent shall be sacrificed to the general intent, but that "the general intent shall be carried into effect, having regard to the particular intent, so far as it is consistent with the rules of law. The observations which fell from Lord KENYON in *Doe dem. Bean v. Halley*, 8 T. R. 9, show that he understood the rule in this sense. That case in some material points resembles the present. There, the devise was to the testator's nephew A. and his assigns for life, without impeachment of waste, and after his decease, to the eldest son of his said nephew A. lawfully to be begotten, and the heirs of such eldest son, upon condition that such eldest son should be christened by the name of F., and in default of issue male of his said nephew, then over to his nephew B. and his eldest son in like manner. The Court of King's Bench held that the evident intention being that B. and his issue should not take until the male issue of A. should have become extinct, A. took an estate tail by implication, and then the limitations were to be read, to A. for life, remainder to his eldest son in tail male (and not in fee as had been contended), remainder to A. himself in tail male, remainder over. In that case the devise was to a particular class of children, i. e., the eldest sons of the first takers, and not to all their sons generally. In the present case, also, the limitation is to a particular class of children, viz., to children living at the death of the tenants for life, and not to all the children. In *Parr v. Swindells*, 4 Russ. 283, a gift of real estate to A. for life, with remainder to her children (without any words of limitation) as tenants in common, and in case A. should die without leaving lawful issue, then with remainder over, was held to be a gift to A. for life, with remainder to "her children for life, with remainder to A. in tail. It has been argued that [637] the will must be construed, in one part, as if the words "without issue" were "leaving issue;" but the Court will not change the words of the will unless it be clear that the legal intent of the testator will thereby be effected. Now, here the testator first gives estates for life, with remainder to children living at the death of their parents, with benefit of survivorship, if any of them die without issue. His attention would naturally be next drawn to the supposition that all such children might die without issue; and the next sentence in the will is consistent with that supposition. He then certainly introduces a clause which is inconsistent with that idea, viz., a limitation to the issue of such children after the decease of all of them without issue; and it must be further argued that the words "after the decease of all," are to be altered into "after the decease of any;" so that a double alteration would be in the will, the effect of which would be to let in limitations which are in themselves contrary to law, as too remote. But although a court of justice, in construing a will, may, from what is expressed, necessarily imply an intent not particularly specified in words; yet it cannot, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omissions. Per Lord MANSFIELD in *Chapman v. Brown*, 3 Burr. 1634. Here, the best course will be, to allow the will to stand as it is written, and put such construction upon it as the words will admit of. And the result of such a construction will be, that F. C. Gallini will take an estate for life; to go over, if he dies "without issue, which, in other words, is an estate tail. In reference to the gift [638] over on a general failure of the issue of the testator's sons and daughters, it may be observed that in the case of *Bennett v. Lowe*, 7 Bing. 535, where there was a devise to D., L., V., and S. (females), and in case any of them died leaving a daughter or daughters, her share to go to such daughters in seniority,

but if any of them, D., L., V., and S., should die without issue in the lifetime of M., C., A., and W., the share of her and them so dying to go to F. and others in succession, all the rest and residue of the devisor's estates to go to D.: it was held that D., L., V., and S., and their daughters, took estates for life only, notwithstanding the limitation over on a general failure of issue, and that D. had a remainder in fee in the whole. Therefore, it is not so clear, that under the general limitation over, in default of issue of any of the testator's children, as contained in this will, an estate tail must be implied, as contended on the other side, inasmuch as the word *such* might, if necessary, be implied. But the construction of the children of the testator taking an estate tail (even if admitted), would not be inconsistent with a prior gift to their own children as purchasers for life or in tail. In *Mortimer v. West*, 2 Simons, 274, the authorities do not appear to have been considered, and the issue dying in the lifetime of the first takers, were not excepted as in the present case. If the will is permitted to remain as it is framed, Alfred Gallini takes an estate tail as proposed; if it be altered, there will still be enough to give him an estate for life; and in either view of the case the plaintiff must be nonsuited.

[*639] **Lynch*, in reply. *Parr v. Swindells*, 4 Russ. 283, is distinguishable, because there was no devise to the issue of the grandchildren, who took life estates only as tenants in common; and, if not, it is at variance with *Jesson v. Wright*, which was not cited. In *Doe v. Halley*, 8 T.R. 5, an estate of inheritance was given to the nephew's eldest son; here, no estate of inheritance is given to the testator's sons and daughters, and their children. Besides, in *Doe v. Halley*, the testator gave the estate on condition that his name should be taken by the eldest son, thereby showing the intention to found a family. Stress has been laid upon the fact, that in this case the limitation, after the sons and daughters, is only to a particular class of children, viz., those living at the deaths of the sons and daughters; but *Langley v. Baldwin*, 1 P. Wms. 59, note, 1 Equity C. Abr. 185, furnishes an answer to that observation. The intent here was to confer an estate on all the issue of the sons and daughters. When the testator refers to the survivorship among the sons and daughters, he refers to the failure of issue, not such issue, and the gift over is on failure of issue generally; and it was so in *Mortimer v. West*, 2 Simons, 274. *Cur. adv. vult.*

DENMAN, C. J., now delivered the judgment of the Court, first stating the will and the facts of the case.

In this ejectment the lessor of the plaintiff cannot succeed, unless he establishes that Francis, the eldest son, took the estate tail in the whole of the Berkshire property; in which case, that estate tail would have descended on the [*640] lessor of the plaintiff, as eldest son *and heir of the body of Francis. If the defendant, and the other brother and sister of the lessor of the plaintiff, took estates for life, or estates tail in undivided shares, as tenants in common, the defendant is entitled to our judgment; and we are of opinion that he is, either on one of these grounds or the other.

For the plaintiff it was contended, that in order to effectuate the general intent of the testator, the particular intent must be sacrificed: and that here, the general intent was, that all the heirs of the body of the devisee Francis, should take before his sister and brother; and, therefore, that he took an estate tail under the will.

The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late; as being, as a general proposition, incorrect and vague, and likely to lead in its application, to erroneous results, see *Powell on Devises*, 3d ed., c. 27, vol. 2, p. 552. In its origin, it was merely descriptive of the operation of the rule in *Shelley's case*; and it has since been laid down in others, where technical words of limitation have been used, and other words, showing the intention of the testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of

construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord REDESDALE in *Jesson v. Wright*, 2 Bligh. 57. This doctrine *of general and particular intent ought to be carried no further than this; [*641] and thus explained, it should be applied to this and all other wills. Another [*641] other undoubted rule of construction is, that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject.

We have now to apply these rules to the instrument in question, which is a very inaccurately penned will, and to some part of which it is impossible to give any meaning at all in the ordinary mode of reading it.

It is perfectly clear, that the testator meant to give a remainder, after the death of his eldest son Francis, to his (Francis's) child or children living at the time of his decease, or born in due time afterwards, as purchasers, as tenants in common, and not as joint tenants; and if the limitation to the children had stopped there, there is no doubt it would have given them estates for life. The will then proceeds to give an equal benefit of survivorship among the rest of the said children, if more than one, and any of them shall die without leaving issue: if it stood there, as the testator did not mean another child to take until failure of the issue of the first, each child would have an estate tail in his undivided share. Then follows a clause which is unintelligible, and the language of which must be varied, in order to give it some meaning. On the part of the plaintiff, it is proposed to read, instead of the words "without issue," the words "leaving issue."

Assuming that alteration to be right, the argument founded upon the whole will is, that the testator means the estate left to each of his sons and daughters to go to the whole line of issue of those sons and daughters *respectively; [*642] and only on failure of the whole line of issue to go over: and this on account of the use of the term issue of the sons and daughters, which word issue is here to be considered (as it generally is), a word of limitation, and equivalent to the term "heirs of the body," and embracing the whole line of lineal descendants; and, therefore, it is contended, that each son and daughter took an estate tail in the portion left to him. But if the term "issue" is here a word of limitation, why is it not equally so in the part in which the estate is given over to the surviving children of the sons and daughters, if any of them shall die without leaving issue? From which it is clear that the testator does not mean the survivors to take, till failure of all the issue of the deceased children. If the term "issue" has here the same meaning, then the children living at the time of the death of the sons and daughters respectively must take estates tail, as tenants in common, in their respective shares, with cross remainders either for life or in tail (which, it is unnecessary to decide), and that question will depend upon the construction of the very ambiguous passage already referred to; with remainder to the sons and daughters in tail, in their respective shares, and remainders over: and this construction makes the least sacrifice of the testator's declared intention; it preserves estates to all his grandchildren living at the death of his sons and daughters, as tenants in common, which it is clear the testator intended to give: and it also includes the descendants of a grandchild dying in the son's or daughter's lifetime, though the estate to them is postponed to that to the children; and it includes all the issue of each son and daughter before the estate goes over. The estate tail in the sons and daughters takes effect, not in derogation of, but by way *of remainder on, the express estates given to the [*643] children of the sons and daughters; in which respect it resembles the case of *Doe dem. Bean v. Halley*, 8 T. R. 5. It is true that these grandchildren cannot take estates for life, as the testator intended, for the rule in *Shelley's case*

prevents it; nor the children of those children estates for life as tenants in common, for the rule of law against perpetuities prevents that; but this is unavoidable, and no construction can carry into effect all the testator wished.

It is, however, said, that the term "issue," as applied to the children, is not to be read as a word of limitation, including all the descendants, but is explained by the context to mean the children of the children to whom estates for life are before given; but if the word *issues* means children in one part, what reason is there why it should not have the same meaning in another? for it is perfectly clear that the testator intends the estate to go to the issue of the sons and daughters, in the same *manner* as to the issue of the children; and the same description of persons must take under that denomination in both cases. Hence, if the word *issue* is to be construed as "children," it is to be so construed in both cases: and then the eldest son, the father of the plaintiff, certainly did not take an estate tail, and the plaintiff cannot succeed.

The case, therefore, is reduced to this point: the plaintiff must fail unless he took an estate tail; and he could not take an estate tail unless in remainder, the defendant and his brothers and sisters having previous estates tail in the property in question.

[*644] The cases upon which the plaintiff principally relies, *are that of *Murthwaite v. Jenkinson*, 2 B. & C. 357, which is contended not to be distinguishable from the present, and *Wollen v. Andrews*, 2 Bing. 126. In the first-mentioned case the devise was to the nieces, and, after their decease, to the *lawful issue* of them for life; and, if either of the nieces should die in the lifetime of the others without issue of her body, the share of the niece dying without issue, should go to the survivors, and the lawful issue of the survivors. This case is an example of the proper construction of the word "issue," which was considered as a word of limitation, embracing all the descendants, and in which the inconsistent intent, that all those descendants should take for life, formed no reason why they should not take at all, and why the word should not be construed in its proper and legal sense. Here the term *issue* is not used in the devise in remainder after the death of the son and daughters; but the estate is expressly devised to *the children living* at the death of the sons and daughters, which circumstance completely distinguishes that case from the present.

In the other case relied on, *Wollen v. Andrews*, 2 Bing. 126, the devise was to the children of the testator, of one-sixth part each for life; after their deaths, to all and singular their child and children in equal parts, and so on from children to children; and if any of his children should die without leaving issue, then to the survivor. It was held that the children of the testator took an estate tail. This differs from the present case in two respects: Here, the devise is not to all the grandchildren, but there is a *selection* of lives with trustees [*645] to support. There, there was no alternative, but to hold that there *was to be a series of estates for life, or an estate tail in the children. Here, there is, by giving an estate tail to the grandchildren.

Thinking, therefore, that this mode of construing the will gives effect to the greater part of it, and as far as the rules of law will permit, the whole, whilst that contended for on the part of the plaintiff strikes out altogether the devise to the grandchildren, our opinion is, that the former ought to be preferred, and that our judgment must be for the defendant. Judgment for the defendant.

ELIZA KELLY v. PARTINGTON. Nov. 14.

Declaration in slander. The second count stated that the defendant, contriving and intending to injure the plaintiff as a shop-woman and servant, maliciously spoke of her, as such, the following words: "She (meaning the plaintiff) secreted 1s. 6d. under the till; stating, these are not times to be robbed." The declaration alleged as special damage, that one S. by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held, that the words in the

second count, if actionable at all, were so only by reason of the special damage, and, therefore, that the plaintiff, if entitled to recover, ought to have full costs: Held, secondly, on motion in arrest of judgment, that the words in that count were not defamatory in their nature, and therefore were not actionable, even though followed by special damage.

SLANDER. The declaration began with the usual averment of the plaintiff's good conduct and character, and stated that the defendant, contriving and intending to injure the plaintiff in her good name, &c., as a shopwoman and servant, falsely and maliciously spoke certain words mentioned in the first count. The second count stated that the defendant, further contriving and intending as aforesaid, falsely and maliciously spoke and published of and concerning her, as such shopwoman and servant, these other false, scandalous, malicious, and defamatory words following: that is to say, "she (meaning the plaintiff) secreted 1s. 6d. under the till; *stating, these are not times to be robbed." The declaration concluded with an allegation of special damage, that one ^[2845] Stenning, by reason of the speaking of the words, refused to take the plaintiff into his service. See *Kelly v. Partington*, 4 B. & Ad. 700. The jury found a general verdict for the plaintiff with 1s. damages, and the Master having declined to allow the plaintiff more costs than damages, a rule nisi had been obtained for taxing the plaintiff her increased costs in the cause, against which

Sir *James Scarlett* and *Kelly* now showed cause. The statute, 21 Jac. 1. c. 16, s. 6, which enacts, that in actions for slander where the jury assess the damages under 40s., the plaintiff shall recover no more costs than damages, does not extend to cases where the special damage is the gist of the action: *Savile v. Jardine*, 2 H. Bl. 531. But here, all the counts contain words actionable in themselves. [*Campbell* (Solicitor-General) intimated that he should rely on the second count.] The words in that count necessarily import a charge of felony, and even if they were ambiguous, they must be taken, after verdict, to have been used in that sense.

Sir *J. Campbell* (Solicitor-General) contra. The 21 Jac. 1, c. 16, takes away costs in actions for words, if the damages be under 40s.; but *Savile v. Jardine*, 2 H. Bl. 531, shows that if there be any one count for words not actionable in themselves, and special damage is laid referring *to all the counts, and the plaintiff has a verdict on the whole declaration, though the ^[2847] damages be less than 40s., he is entitled to full costs. The words in the second count would not be actionable but for the special damage: they do not, of themselves, impute a charge of felony; they rather import that the plaintiff exercised great caution in taking care of her own property. [*PARKE, J.* If the words are to be taken in that sense, can it be said that the damage resulted from them, and ought not the judgment to be arrested?]

DENMAN, C. J. The question is, whether there be any count in the declaration, which contains words not actionable in themselves. It seems to me that the second count does contain such words, for they may undoubtedly be considered as having been spoken in the sense ascribed to them by the Solicitor-General.

PARKE, J. It is impossible to understand the words in any other than their grammatical sense; and so construing the words in the second count, they are not actionable in themselves; for they do not, necessarily, charge the plaintiff with a crime. What the effect of that may be ultimately, it is unnecessary to say.

TAUNTON, and PATERSON, Js., concurred.

Rule absolute.

Sir *James Scarlett* then obtained a rule nisi for arresting the judgment, on the ground that the words in the second count, taken in their grammatical sense, were not disparaging to the plaintiff; and, therefore, that no special damage could result from them.

* It appears that the latter words, "stating," &c., were, in fact, part of the expressions supposed to have been used by the defendant himself, but had, by mistake, been inserted in this count, as if alleged by him to have been spoken by the plaintiff.

*648] *The Solicitor-General in Hilary term following showed cause. The words in the second count (as the Court has already decided) are not actionable without special damage. The question is, whether they are actionable even with special damage. [DENMAN, C. J. It is contended that the words import that the plaintiff secreted her own money from excessive caution.] The words may not be actionable of themselves, but such words, if a jury find them to have been spoken with a malicious intent to injure the plaintiff, as charged in this declaration, are actionable by reason of special damage. COMYNS, J. B., in his Digest, tit. Action on the Case for Defamation, D. 80, after having stated, under the previous heads, many instances of words actionable in themselves, says, that an action may be maintained for "any words by which the party has a special damage." Even, therefore, if the words in question bore the sense ascribed to them, yet being spoken falsely and maliciously with intent to injure, and followed by special damage, they are actionable. And these were in fact not innocent, but disparaging words, or at all events equivocal; and it was for a jury to find in what sense they were used. The word secreted is used in a bad sense, it usually imputes some bad motive. If the words, "stating, these are not times to be robbed," apply to the plaintiff, they are ambiguous; they may have been used by her as a pretence for secreting money belonging to another, and that question was for the jury. [LITLEDALE, J. Suppose a man had a relation of a penurious disposition, and a third person knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?] If the words were spoken [*649] *falsely with intent to injure, they would be actionable. At all events, if the words are not laudatory, but will bear a bad sense, and a jury might find (as they did here) that they were used in that sense, and an injury is stated to have ensued in consequence, they are actionable.

Sir James Scarlett, contra. It does not appear by the words themselves, or by any innuendo, whose property the 1s. 6d. was. It may have been that of the plaintiff, and if so, it is clear that the words do not import a charge of felony. They cannot amount to such a charge unless it be assumed that the property meant was that of the defendant or some third person. It is not true that an action may be maintained for words of praise (not used ironically) if followed by special damage. No case can be cited to that effect. An action is only maintainable for special damage when it is the natural result of a wrongful act. The uttering of words not defamatory of another is not wrongful; and, therefore, even when followed by special damage, gives no ground of action. The words being innocent in themselves, there is no ground for presuming malice, and a jury cannot infer it.

DENMAN, C. J. The declaration alleges that the defendant, intending to injure the plaintiff, maliciously spoke these words: "She (the plaintiff), secreted 1s. 6d. under the till; stating, that these are not times to be robbed," by reason whereof a damage ensued to the plaintiff. The words do not of necessity import anything injurious to the plaintiff's character, and we think that the judgment must be arrested unless there be something on the face of the declaration from which *the Court can clearly see that the slanderous matter [*650] alleged is injurious to the plaintiff. Where the words are ambiguous, the meaning may be supplied by innuendo; but that is not the case here. The rule for arresting the judgment must therefore be made absolute.

LITLEDALE, J. I cannot agree that the words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In Comyns's Dig., tit. Action on the Case for Defamation (D) 30, it is said generally, that any words are actionable by which the party has a special damage, but all the examples given in illustration of that rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporal

punishment. In all the instances put, the words are injurious to the reputation of the person of whom they are spoken. The words here are extraordinary; if they had stood merely, "she secreted 1s. 6d. under the till," they might perhaps have been actionable, but coupled with the subsequent words, which appear only to import great caution on the part of the plaintiff, I think we cannot say that they impute anything injurious to the plaintiff.

TAUNTON, J. I am of the same opinion. The expression ascribed to the plaintiff, "these are not times to be robbed," seems like saying that times are so bad I must hide my money. If Stenning refused to take the plaintiff into his service on this account, he acted without reasonable cause; and in order to make words actionable, they must be such that special damage may be the fair and natural result of them.

*PATTESON, J. I have always understood that the special damage must be the natural result of the thing done. The words here are "The plaintiff secreted 1s. 6d. under the till; stating, these are not times to be robbed." There is no innuendo stating whose money it was that she secreted; it might be her own. Then it is said that the words are actionable, because a person after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory, see *Vicars v. Wilcocks*, 8 East, 1. Rule absolute.

RICKMAN and Another v. CARSTAIRS.

Valued policy of insurance on ship and goods, at and from the coast of Africa to the ship's port of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and wheresoever; to trade backwards and forwards in any order, and to call at or proceed to the Azores, Madeira, &c., and all African islands; beginning the adventure on the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa, including the risk in boats in loading and unloading, with the liberty to load, unload, sell, barter, or exchange with any ships or factories wheresoever she might call.

1. The policy does not protect an outward cargo shipped before the vessel's arrival on the coast of Africa.
2. A considerable proportion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy: Held, that the valuation was opened, and that, although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assured could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss.

ASSUMPSIT on a policy of insurance on the ship *Mary* and cargo. The declaration set out the policy hereafter described, and alleged that the defendant had assured to the amount of 200*l.*; that goods to the value of 4800*l.* were shipped; that goods to the value of *of 1000*l.* were lost in a boat by perils of the sea; and that the best bower anchor, of the value of 50*l.*, was lost by perils of the sea; that other goods, to the value of 3000*l.*, being a part of the said cargo in the said policy mentioned, were taken by thieves; and that afterwards the ship, with goods to the value of 10,000*l.*, being the cargo in the said policy of assurance mentioned, was lost by perils of the seas. At the trial before DENMAN, C. J., at the Guildhall sittings, December, 1832, the policy was proved, and purported to be "at and from [the coast of Africa to her port or ports of discharge in the United Kingdom of Great Britain, with liberty to touch at all ports and places whatsoever and wheresoever, to trade forwards and backwards and backwards and forwards, and in any order, and with leave to call at or proceed to the Azores, Madeira, Canaries, Cape de Verdes, St. Thomas's, Princes, and Anabona, Ascension, and all African islands, and all rivers wheresoever, for any purposes.] Upon any kinds of goods and merchandises, and also

upon the body, tackle, &c., of the ship [Mary]; beginning the adventure upon the said goods and merchandises, from the loading thereof aboard the said ship [twenty-four hours after her arrival on the coast of Africa] upon the said ship, &c., [including the risk in boats and craft in loading and unloading], and so shall continue, &c., until the said ship, with all her ordnance, &c., and goods and merchandises whatsoever, shall be arrived at [her port of discharge in the United Kingdom], upon the said ship, &c., until she hath moored, &c., and upon the goods and merchandises, until the same be there discharged, &c.; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, * [and wheresoever, [*653] with liberty to dock or heave down, to load, unload, sell, barter, and exchange, all or either, goods and property, with any ships, boats, craft and factories, wheresoever she may call at or proceed to, also with liberty to take on board and load passengers, without being deemed deviation and] without prejudice, &c." The ship was valued in the policy at 1200*l.*, and the cargo at 4800*l.*, average to be paid on each species of goods as if separately named. The words above included in brackets were inserted in the printed policy in writing. The loss occurred on the coast of Africa many months after the arrival of the Mary on the coast; and at the time of the loss, she had on board a part of the outward cargo, shipped in England, which the plaintiff's witnesses valued at 800*l.*, and a homeward cargo taken on board, valued by the plaintiff's witnesses at 4150*l.* This last value was estimated upon the prices of the goods in London. Other goods, bespoken for the homeward cargo, had not been shipped, the value of which, estimated in the same way, was about 600*l.*; and evidence was also given that some goods, which had actually been shipped on board for a homeward cargo, had been taken on shore by the captain, and had been there stolen. The defendant's counsel admitted the total loss of the ship and cargo on board,¹ and the underwriter's liability to the extent of the valuation of the ship. But he contended that the policy on the goods did not cover the outward cargo, and that therefore no part of that cargo could be taken into account in estimating [*654] the value of the goods lost; and, further, *that the value put on the goods in the policy, related only to the homeward cargo intended to be shipped after the ship's arrival on the coast of Africa, and that therefore the policy would be opened, on account of the proposed homeward cargo having, as to a part, never been shipped, and, as to another part, been unshipped at the time of the loss. Fraud was not imputed. The Lord Chief Justice was of opinion, that the policy was not opened; but he desired the jury to say, on the supposition of its being opened, whether there were goods on board to the value of 4800*l.* at the time of the loss; telling them that, on the above supposition, the outward cargo must be included. The jury found expressly that the cargo on board was of the value of 4800*l.*; and gave a verdict for the whole 200*l.* Sir John Campbell, Solicitor-General, obtained a rule nisi for a new trial, in Hilary term, 1833; against which, in Trinity term, 1833,

Sir James Scarlett, F. Pollock, and Blackburne showed cause.¹ First, the outward cargo was protected by the policy. It will be contended on the other side that the words "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa" limit the protection to such goods as were not put on board till after her arrival on the coast of Africa; and Robertson v. French will be cited, 4 East, 130 (2d point). The words of the policy, in that case, were "beginning the adventure upon the goods and merchandises from the [*655] loading thereof aboard the said ship at all, any, or *every port and place where and whatsoever on the coast of Brazil, and from the 17th day of September, 1800;" and the Court held that there was no intention to insure an

¹ Some property was in fact shown to have been saved: but the defendant's counsel, in moving for the rule, admitted, for the purpose of the present case, a total loss.

² Before DENMAN, C. J., LITLEDALE, PARKER, and PATTERSON, J.

outward adventure which was not wound up at the time of the loss; and that the indemnity extended to such goods only as were shipped on the coast of Brazil. There the loading was expressly limited to the place; and that decision cannot be questioned. Then came the case of *Spitta v. Woodman*, 2 Taunt. 416. There the words are "beginning the adventure upon the said goods from the loading thereof on board the said ship," not saying where; but, in the earlier part of the policy, the ship was insured "at and from Gottenburgh to," &c. The Court held that goods were not protected which were shipped before the vessel arrived at Gottenburgh; and Sir J. MANSFIELD's reason appears (2 Taunt. 423, 424, and see note (a) on *Nonnen v. Kettlewell*, 16 East, 188) to have been, that, by a contrary construction, the underwriter might become liable to an average loss occurring before the ship reached Gottenburgh. That reasoning has been shaken by more recent dicta. In *Gladstone v. Clay*, 1 M. & S. 425, BAYLEY, J., answered Sir J. MANSFIELD's argument (that the underwriters might be liable for damage antecedent to the voyage insured) by saying, that the assured would be bound to prove that the damage occurred during the voyage covered by the policy, and could not otherwise recover.

In *Hunter v. Leathley*, 10 B. & C. 858, the policy was at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch and stay, and trade at all or any port or *places whatsoever and wheresoever, in the East Indies, Persia, or elsewhere, &c., upon goods in certain vessels, beginning the adventure from [*656] "the loading thereof aboard the said ships as above." The question was, whether goods taken on board after the ship left Batavia, at Sourabaya, a port in the East Indies not expressly named in the policy, to which the ship went in the prosecution of the adventure, were protected. The Court held that they were. In *Bell v. Hobson*, 16 East, 240, the policy (which was "at and from Gottenburgh"), differed from that in *Spitta v. Woodman*, 2 Taunt. 416, in the circumstance that the ship was at liberty "to take in and discharge goods wheresoever the ship might touch at," and that, at the foot, there was added, "in continuance of five policies," which were described by dates and amounts; and these policies had the words "at and from Virginia to her port or ports of discharge in the United Kingdom, or any port or ports, place or places, in the Baltic;" and the percentage was to vary according as the voyage ended at Gottenburgh or elsewhere. The Court there held, that goods shipped at Virginia, before the arrival of the ship at Gottenburgh, were protected by the policy upon which the action was brought, although the defendant had not underwritten the five other policies: 16 East, 243; and Lord ELLENBOROUGH said that the construction adopted in *Spitta v. Woodman*, 2 Taunt. 416, was not to be favored, and still less to be extended; and that anything indicating that a prior loading was contemplated by the parties, would release the case from that strict construction. In *Gladstone v. Clay*, 1 M. & S. 418, the *policy was at and from Pernambuco to Maranhão, and at and from thence to Liver- [*657] pool, beginning the adventure upon the said goods from the loading thereof on board the ship, wheresoever, &c.; and it was held, that goods shipped before the ship arrived at Pernambuco, and lost after such arrival, were protected. The words here are, beginning the adventure upon the goods from the loading thereof aboard the said ship, "twenty-four hours after her arrival on the coast of Africa:" the latter words being in writing. It is not as if the insurance had been "from the loading of the goods on the coast of Africa:" and the liberty of touching at all ports, and trading backwards and forwards, given by the written words of the earlier part of the policy, show that the parties looked to a trading voyage, and to a risk continued from preceding policies on the same subject-matter, as in *Bell v. Hobson*, 16 East, 240; for a policy on goods outwards usually limits the risks to twenty-four hours after the ship's arrival. It could not be supposed that the outward cargo was to be unshipped within twenty-four hours of the arrival. If the words "loading thereof" are to be

strictly connected with the words "twenty-four hours after her arrival on the coast of Africa," goods shipped within less than twenty-four hours after the ship's arrival, and lost thirty-six hours after, would not be protected, since there is as much ground for applying the time to the loading as the place. The twenty-four hours are named for the purpose of defining the time at which the [*658] risk commences, and do not refer at all to the printed *words "from the loading thereof:" indeed, the policy might be construed as if these printed words were struck out. If they be inconsistent with the written words, the latter must control the contract. Brokers never strike out words from the printed forms, but only add. [PATTERSON, J. You do not say the goods would be protected in case of a loss within twenty-four hours.] That would be out of the protection for a different reason; the risk on the policy would not have commenced at all, in consequence of the limitation as to time, whatever goods the policy related to. Then, as to the written words, "including the risk in boats and craft in loading and unloading," if these be applicable to the unloading of the outward cargo, they are sufficient, being written, to control the unwritten part of the policy; and it cannot be said that the unloading is confined to goods laden on the coast of Africa only, for the arrival is all that can be read as connected with Africa. [PARKE, J. In *Park v. Hammond*, 2 Marsh. 189, S. C. 6 Taunt. 495, where goods were shipped from Malaga, and the owner desired his broker to insure them from Gibraltar to Dublin, saying that he would take on himself the risk from Malaga to Gibraltar, the Court of Common Pleas held it to be clear that a policy on the goods, "at and from Gibraltar to Dublin," not stating them to have been laden at Malaga, did not protect them, and was not in compliance with the order.]

Secondly, the policy is not to be opened on the ground of a part of the cargo not being on board at the time of the loss. There is no pretence of fraud [*659] here; the jury have found that, if the policy be open, there was enough on board to cover the value insured. Lord KENYON, in *Shawe v. Felton*, 2 East, 114; and see *Le Cras v. Hughes*, cited, *Ibid.* 113, expressed himself strongly against opening valued policies; and the Court, in that case, would not allow the consumption of the ship's stores, which had taken place during the voyage, to be deducted from the value, no fraud being shown. The true effect of such policies is explained in the judgment of Lord MANSFIELD, in *Lewis v. Rucker*, 2 Burr. 1171, from which it appears that the value fixed is conclusive, unless fraud be shown. In *Forbes v. Aspinall*, 13 East, 323, a ship had gone out on a seeking voyage, and had not obtained a cargo; and it was held that the valued policy on the freight did not attach. That is not like the present case; and in *Montgomery v. Eggington*, 3 T. R. 362, a valued policy was supported, where a cargo had actually been obtained, of which, however, a part only was on board, the jury having found that the insurance was not colorable, and the policy not a wager. If the policy can be opened, though in the absence of fraud, by reason of a part of the intended cargo not being shipped, the omission of the most trifling part would open the policy. Indeed, if *Forbes v. Aspinall*, 13 East, 323, be applicable, the consequence would be, that on an insurance of freight valued at 5000*l.*, the freight on the intended cargo being 5100*l.*, the policy would be opened, if the cargo corresponding to the 5000*l.* only were shipped.

Sir J. Campbell, Solicitor-General, and Maule, contra, were desired by the [*660] Court to confine themselves to the *second question. The underwriter is bound by the valuation on the freight and goods, only where all the cargo, which was the subject of the contract, is on board. On any other construction, the effect of the policy would often be, not to indemnify, but to confer a positive profit. Suppose there were only 100*l.* worth on board, of a cargo valued at 3000*l.*, could the underwriters be called on to pay the 2900*l.*? It is true that, in the case of stores, the underwriters are not allowed to deduct for the consumption *de die in diem*, and this is all that *Shawe v. Felton*, 2 East,

109, establishes. There the whole subject-matter was on board at the commencement of the risk. The present insurance is on goods; and the cargo to which the contracting parties looked never was on board. There is no distinction between insurance on freight and on goods; and, therefore, *Forbes v. Aspinall*, 13 East, 323, which was on freight, is in point. In that case, both *Shaw v. Felton*, 2 East, 109, and *Montgomery v. Eggington*, 3 T. R. 362, were considered; and in *Marshall on Insurance*, b. i. ch. 7, § 5, it is stated as the result of later cases, "that the insured can only recover, whether on an open or a valued policy, for the freight of goods actually put on board, or of which the shipment has been contracted for;" and *Forbes v. Cowie*, 1 Camp. 520, and *Forbes v. Aspinall*, 13 East, 323, are referred to. [PARKE, J. Then comes the difficulty, what is a cargo sufficient to entitle the jury to say that that has been shipped, to which the valuation in the policy refers? that was not considered in *Forbes v. Aspinall*, 13 East, 323.] The jury might consider what was a reasonable quantity to be carried as a cargo. [PARKE, J. Supposing the policy *to be opened, two terms are unknown of the proportion by which the average is to be estimated.] [*661] The cargo contemplated may be estimated by the outward cargo; for, in an African voyage, we may presume that the whole outward cargo was intended to be bartered, or evidence might be given as to the intention of the assured, or the capacity of the ship, so as to show what is the full cargo on which the proportion is to be estimated. [PATTESON, J. By treating this as an open policy, you raise a difficulty as to the first point; for much of the outward cargo will be unprotected, if the valuation in the new policy do not attach till the ship be finally laden with her homeward cargo. Then may not the circumstances, that there is a valuation on the face of the policy, be a ground for inferring that this was inserted to protect the outward cargo? For all the difficulty would vanish, if the parties meant to apply the valuation to whatever might remain, at any time during the trading voyage, of the old, and whatever might be then shipped of the new.] That difficulty might arise, if it were assumed that the outward cargo is to be unshipped by a bargeful at a time, and exchanged piecemeal for a homeward cargo: but the ship may exchange the whole outward cargo, for a complete homeward cargo at once. Besides, there is no ground for assuming the existence of an outward insurance terminating in twenty-four hours. The outward insurance, if there were one, might be on the usual terms, to determine on the safe landing of the goods: and, if so, there would be a double insurance, supposing the new insurance to protect the outward cargo. It cannot be contended that, whenever the loss happens, the cargo on board is *protected: [*662] for suppose all the outward cargo to have been discharged, and none of the homeward shipped; in such a case, the valuation could not be supported. But, then, if the valuation be not conclusive in all cases, it follows that it will be opened by the subtraction of a part of the homeward cargo. [PATTESON, J. If there were no goods on board, there could be no loss of goods.] Then suppose only one bale on board. Even supposing the policy to be opened, the valuation will not be altogether inoperative; for it will prevent any dispute as to the value of the whole contemplated cargo. Thus, if a valued policy on sugar be opened, on the ground of only four-fifths of the intended cargo having been shipped and lost, the underwriter will pay, not a value to be now put on the lost sugar, but four-fifths of the sum underwritten. *Cur. adv. vult.*

DENMAN, C. J., in this term, delivered the judgment of the Court.

After stating the facts, his Lordship said:—In this case it is with regret that we find ourselves obliged to come to the conclusion that the plaintiffs are not entitled to recover for a total loss; because it appears very likely that the assured intended by this policy to insure both the outward and homeward cargo, and to have valued both; inasmuch as a great part of the outward cargo would, in such a voyage, remain on board, and would be continually varying in the course of barter, and nothing is more probable than that the entire cargo should be valued, to prevent difficulty of valuation in the case of loss. Unfortunately, how-

[*663] ever, they have used words which will not, we think, *effectuate that intention. The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used.

The cases of *Robertson v. French*, 4 East, 130, *Spitta v. Woodman*, 2 Taunt. 416, *Horneyer v. Lushington*, 15 East, 46, *Langhorn v. Hardy*, 4 Taunt. 630, and others, have established that where the policy is upon goods, "from the loading thereof," either at a particular place, or in blank upon a voyage from one place to another, it does not attach upon goods previously on board; but this, being a strict construction, has been relaxed where there was anything upon the face of the instrument to satisfy the Court that the policy was intended to cover goods previously on board. Thus in *Bell v. Hobson*, 16 East, 240, where the policy was declared to be "in continuation of others," which were upon a voyage to the port from which the risk insured began, and in *Gladstone v. Clay*, 1 M. & S. 418, where the words used were "wheresoever, &c.," it was held that the assurance was not confined to goods put on board in the course of the voyage insured.

The question then is, whether there is anything disclosed upon the face of this policy by which the Court can be convinced that it was intended to attach upon the outward cargo, the nature of the voyage, of which the underwriter must be presumed to be cognizant, being also taken into consideration.

The only circumstance which can have this effect, is the memorandum, which [*664] declares the insurance to be "on the cargo valued at 4800*l*," and it occurred at one time to a part of the Court, that this raised a presumption that the parties contemplated such a cargo to be the subject of the assurance as was capable of being valued at the full amount insured, when the policy attached, i. e. when the ship had arrived twenty-four hours on the coast of Africa, and that the entire cargo, consisting of outward and homeward goods, would alone answer that description. If this were clearly the meaning of this clause, we agree that we might reject or qualify the words, "from the loading thereof aboard the said ship," as we certainly might have done if it had been said expressly in the memorandum, that the insurance was on the cargo both outward and homeward, valued at 4800*l*. But the difficulty is to make out that this is clearly the meaning of the memorandum in question.

Suppose the words of the memorandum had been, "on the homeward cargo," valued at the same sum, would there have been any inconsistency in making such a valuation, and would the fact therefore of making such a valuation enable the Court to say, that the word *homeward* must be rejected, and the insurance applied to the whole of the goods on board? Or suppose that in the early part of the policy, the insurance had been "upon any kind of goods and merchandises, laden on board, after twenty-four hours after arrival on the coast of Africa," would the valuation by the memorandum in any way have qualified or varied the subject of assurance? If it would not, neither can it in the present case; for the declaration in the policy, that the adventure is to begin from the loading thereof [*665] *aboard twenty-four hours after such arrival, is in effect the same thing, and confines the insurance to the homeward cargo.

It is very true that there will be some difficulty in making the proper calculation as to the sum to be paid, on the supposition that the subject of insurance is the full homeward cargo; because, on such a voyage, it is not easy to say what the value of a full home cargo will be; nor what proportion of a full cargo is on board at the time of the loss. That difficulty occurred, and nearly to the same extent, in *Forbes v. Aspinall*, 13 East, 323, though it does not seem to have been brought to the attention of the Court; but it cannot enable us to reject the words which cause the policy to attach on the homeward cargo only, and to declare that the policy was meant to include both.

We think, therefore, that there should be a new trial; but it will be much better to refer the average loss, as the plaintiffs are clearly entitled to recover it.

Rule absolute.

*The KING v. HEMING. Nov. 14.

[*666]

A party who applies to the Court for a criminal information against a defendant for a breach of duty as a magistrate as well as an individual, must, before motion, give notice to the defendant of his intended application.

A RULE nisi had been obtained for a criminal information against the defendant, on affidavits stating, that at an election for members of parliament for the northern division of the county of Warwick, at Nuneaton, one of the polling places of that division, a riot had taken place, and that the defendant, a magistrate of the county, had neglected his duty, by refusing to call in the military, or to establish a sufficient force to repress the riot, and also that he, defendant, had taken an active part in the riotous proceedings.

Sir J. Campbell (Solicitor-General) now objected that notice of the application to the Court had not been given to the defendant, before the criminal information was moved for.

Sir James Scarlett, contra, contended that the defendant was charged with an offence, including a breach of his duty as an individual as well as a magistrate, and therefore that the want of notice was no answer to the application.

DENMAN, C. J. It is an established rule of practice, that no application for a criminal information can be made against a magistrate for anything done in the course of his office, without previous notice. It is true, that in this case, some acts attributed to the defendant are such as any individual, not a magistrate, might be indicted for. Whether we should have *granted a criminal information for such acts alone may be doubtful. As some of the acts [*667] stated in the affidavits do affect this defendant in the character of a magistrate, the case falls within the general rule which requires notice. The rule for the criminal information must be discharged.

Rule discharged.

The KING v. The Justices of the West Riding of YORKSHIRE. Nov. 14.

(BOWER v. The Accounts of the Commissioners of MELTHAM Inclosure.)

By statute, parties were enabled in certain cases to appeal to the quarter sessions for a particular district, giving ten days' notice. The act said nothing as to further notice in the event of such appeal being respited, nor did it appear that there was any rule of practice on the subject at those sessions. An appeal under the statute of which due notice had been given, was respited, and came on at a subsequent session, pursuant to the respite. The appellant was called upon to prove that he had given notice of trial of the respited appeal, and on his failing to do so the appeal was dismissed:

Held, that the sessions were wrong in requiring such notice, and that the case was one in which this Court might overrule their decision. Mandamus granted to hear the appeal.

A RULE nisi had been obtained for a mandamus calling upon the Justices of the West Riding to enter continuances and hear the appeal of James Bower against the accounts of Frederick Robert Jones and Joseph Taylor, the commissioners for inclosing lands in the manor of Meltham in the said riding, which accounts purported to have been examined and signed by certain justices of the riding, on certain days in 1831 and 1832. It appeared by the affidavit in support of the rule, that the accounts were passed under an act, 11 G. 4, and 1 W. 4, c. 49, private, for amending a former act respecting the Meltham inclosure. By the act of W. 4, it is provided (sect. 20) that "if any person shall think himself aggrieved by anything done, or omitted to be done, in pursuance of this act or the said recited acts, or either of them, he may *appeal to any [*668] general or quarter sessions of the peace, to be holden for the west riding of the county of York, within four calendar months next after the cause of complaint shall have arisen, giving to the said commissioners, and to the party or

parties concerned, notice in writing of such appeal and of the matter thereof, ten days at least before such general or quarter sessions (except with respect to the accounts of the said commissioners), which, notwithstanding the same shall have been examined and published as aforesaid, may be appealed against at any time within six calendar months after the date of the award of the said commissioners, on giving to the said commissioners such notice as last aforesaid." Notice of the present appeal was given in due time for the quarter sessions holden at Wakefield in January, 1833; and due notice was afterwards given that the appellant would move at those sessions, that the appeal might be respited to the next general quarter sessions to be holden at Pontefract, and also that the said accounts might be referred to a justice of peace, or some other person, to be by him examined and balanced. The respite was moved for and granted, but the respondents would not agree to refer the accounts. The Pontefract sessions were holden on the 8d of April, and the 11th of that month was appointed for hearing the appeals. On the said 8d of April the appellant gave notice to the respondents, that he should again move to respite the appeal till the following sessions, on the grounds that the commissioners had not passed the whole of their accounts, and that the bills of their clerk had not been delivered in and taxed. The respondents on being served with such notice did not say that they should prepare to try the appeal, or should oppose the respite.

[*669] The motion for a respite *was made on the 11th of April, and adjourned to the 12th, when it was renewed, and the appellant again proposed a reference of the accounts, which the respondent would not agree to. The chairman intimated that the appeal must be called on in its turn, and that if the appellant was not prepared to try, it must be struck out. The appeal was then called on, and the majority of the bench having refused to respite, and the respondents declining to refer, except upon terms disapproved of by the appellant, the appellant's counsel said he would go on with the appeal. The respondents then called upon him to prove his notice of appeal for the Pontefract sessions. No such notice had been given, or considered necessary, by the appellant; and the sessions, in consequence, dismissed the appeal. In an affidavit made by one of the respondents in opposition to the rule, it was stated that the appeal was originally entered and respited at the October sessions, 1832; that the deponent on receiving notice of a motion to be made at the Pontefract sessions for a further respite, gave no intimation that he should not prepare to try, and did in fact so prepare; that the appellant's counsel in the course of his application to the court at Pontefract on the 12th of April, admitted that he was unprepared to try; and that although one of the counsel for the respondents called upon the appellant's counsel to "prove his notice," the point as to notice of appeal to the then sessions was not raised or decided, and the appeal did not go off on that ground, nor was the trial of the appeal at all pressed on the court.

F. Pollock, Milner, and Dundas, now showed cause. There was no real hardship on the appellant in this *case being dismissed, for it is evident [*670] he had not intended, and was not prepared to try. He was bound, if he intended proceeding, to give ten days' notice before the Pontefract sessions. The justices, upon hearing both sides, were of opinion that he was not entitled to respite, and as he had not given the necessary notice to enable him to proceed, they had a right to dismiss the case. They are the proper judges of matters of practice arising at their sessions, and their decision on such points, unless manifestly wrong or unjust, ought not to be interfered with. This Court held so in a case like the present, *Rex v. The Justices of Essex*, 2 Chitt. Rep. 385. [PATTERSON, J. The appellants there had not given notice to try at the first sessions, the order having been served too late to enable them to do so.] In *Ex parte Becke*, 3 B. & Ad. 704, where the sessions had refused to adjourn an appeal at the appellant's instance on account of the absence of a witness, and the appellant consequently suffered the order to be confirmed, this Court refused to interfere with the decision of the justices.

Blackburne, *contra*. The original notice of appeal gave the respondents every necessary information, and they were present when the respite to Pontefract sessions was granted. There was no occasion for a ten days' notice at each sessions, after the appeal had been so respited. *Rex v. Lambeth*, 3 D. & R. 340; *Rex v. The Justices of Buckinghamshire*, 6 D. & R. 142; *Rex v. The Justices of Hertfordshire*, 4 B. & Ad. 561. In *Rex v. The Justices of Lancashire*, 7 B. & C. 691, where the sessions had dismissed an appeal on the ground of insufficiency of notice, and a mandamus was moved for, Lord TENNERDEN said, "We think that justice will be most satisfactorily administered by ordering the justices to enter continuances and hear this appeal. They certainly have a discretionary power to make rules for the governance of the practice at the sessions, but the case cited (*Rex v. The Justices of Wilts*, 10 East, 404), shows that this Court, for the purposes of justice, will interfere to control that discretion." [PARKE, J. I do not quite approve of the language held in that case. If the sessions have a discretionary power on the subject, this Court has not. The sessions are the judges of what is reasonable notice, but not the sole judges, and therefore this Court may interfere with their decision upon it. They are, by law, to hear appeals only on reasonable notice, of which we, as well as they, are judges. But it is not correct to say that this Court sets its discretion against theirs.] [*671]

DENMAN, C. J. I have always understood that this Court had authority to interfere for the purpose of seeing that no illegal practice prevailed at the sessions to prevent the hearing of an appeal. In this case the appeal was regularly brought in the first instance, and due notice given: it was then respited to a subsequent session, and an application was there made by the appellant for a further respite. Of that application the respondents had had sufficient notice to prevent their being put to expense in preparing to try at that session. The respite was not granted, and the appellant was then called upon to prove his notice. The affidavit in opposition to this rule would render it doubtful whether the challenge to prove the notice referred to the original notice of appeal, or to a notice to try at that session; but the affidavit on the other side states clearly that the latter was mentioned. I think it is pretty evident that by refusing this mandamus, justice would be shut out; and that we ought therefore to tell the magistrates that they have done wrong in refusing to hear the appeal upon the ground assigned. The rule will therefore be absolute. [*672]

PARKE, J. The province of this Court in such a case as the present is clear. We have no right to interfere with the discretionary power of the sessions; where they have that power, their discretion is to be confided in. But the question, what is such reasonable notice as gives them jurisdiction to entertain an appeal, is a legal question, of which they are not the exclusive judges; and this Court will see that, in determining such a point, they act legally, and according to the jurisdiction which they possess. Now the statute 1 W. 4, c. 49, s. 20, enables a party to appeal, giving notice of such appeal ten days at least before the sessions. A person giving such notice has a right to have his appeal heard, and in this case it is sworn that the notice was given. At the sessions to which that referred, the appeal was respited to the sessions at Pontefract, and there a further respite was moved for. If the justices had merely refused that respite and proceeded with the appeal, and if they had then called for proof of the proper notice and that only, I should say that this Court ought not to interfere with the exercise of their discretion, although such discretion might have been exercised harshly, and that their decision was one by which the subject must be bound. The only question then is, whether the notice they called for was the original notice of trial, in which case their proceeding was right, and the appellant ought to have been prepared to comply with their requisition; or whether it was a notice of trial for the then sessions. Upon the statements before us I think we must take it to have been the latter; and if so, the case of *Rex v. Lambeth*, 3 D. & R. 340, shows that they were [*673]

wrong in law, that the first notice was sufficient, and that proof of the other ought not to have been required.

TAUNTON, J. If the appeal had been dismissed on the ground of non-compliance with a call upon the appellant to prove the original notice of appeal, I should have thought that this Court ought not to interfere. But it appears on affidavit that the notice of which proof was required was a notice of trial of the respited appeal; and I have a suspicion also that the sessions were influenced by the refusal of the appellant to refer on such terms as the respondents would agree to. If they acted on either of these grounds, their decision was illegal. I do not find that either the statute 11 G. 4, and 1 W. 4, c. 49, or any rule of practice at the sessions, requires notice of trial of a respited appeal. It appears to me that justice will be best satisfied by sending the case back to the sessions.

PATTESON, J. The statute requires ten days' notice of the appeal to be given in the first instance, but says nothing as to notice of a respited appeal. If that is necessary, it must be so either by the practice of the sessions, or by [*674] general rules of law. No rule of practice *at the sessions has been produced requiring such notice; if any had been shown, it might perhaps be too much to say that a decision according to the practice was illegal and not to be abided by. As to the general rules of law, *Rex v. Lambeth*, 3 D. & R. 340, shows that they do not warrant the demand of such a notice. The only question then is, whether the notice which the sessions required to be proved was that of the original, or that of the respited appeal? and I think, upon the statements before us, that it must have been the notice to try at the then session.

Rule absolute.

SMITH v. TOPPING.

The bankrupt act, 6 G. 4, c. 16, s. 72, vests in the assignees such goods whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of A. until the day before he became bankrupt, and then demanded the possession of them, which A. refused to deliver: Held, that they did not pass to A.'s assignees.

TROVER for the value of three pipes and three hogsheads of wine. Plea, not guilty. At the trial before ALDERSON, J., at the York Spring assizes, 1833, the jury found a verdict for the plaintiff for 700*l.* damages, subject to be reduced as hereinafter mentioned, and also subject to the opinion of this Court on the following case.

The plaintiff was a merchant at Hull. The defendant was the assignee duly appointed of one Robert Lundie, who, before his bankruptcy, was a merchant at Hull. The following facts as to the ownership of the wine were agreed upon at the trial, viz., 1st, that the plaintiff was the true owner of the wine: 2dly, [*675] that for some time previously to *the 21st of July, 1831, the wine had been deposited by the plaintiff in the cellars of Lundie, and was and remained in his possession as the reputed owner thereof, with the consent and permission of the plaintiff the true owner thereof, within the seventy-second section of the bankrupt act, until the demands hereinafter-mentioned, and also until the time of Lundie's bankruptcy, hereinafter mentioned, unless the Court should be of opinion, that these demands determined such consent and permission. On the 21st of July, intelligence having reached Hull that certain persons, with whom Lundie was supposed to be involved in bill transactions, had stopped payment in London, Mr. Hare, a clerk of the plaintiff, went to Lundie's house about a quarter past eleven in the morning, and demanded the wine from a clerk called Hunter (Lundie being from home); but Hunter, after consulting with Lundie's sister, who lived in his house, refused to deliver up the wine until Lundie's return. He returned soon afterwards, and about one o'clock on the same day, Hare again called at the house and saw Lundie him-

self, and required the plaintiff's wine to be delivered up to him (Hare). Lundie said, "It was an unfortunate affair, he feared it would go to a bankruptcy, and that he did not know how he could act without consulting his attorney, but that to give up the wine would be showing an undue preference." Hare said, "We are not creditors, the wine was not sold to you." Lundie went away for a few minutes, and upon his return said that he would not deliver up the wine. On Friday, the 22d of July, Lundie committed an act of bankruptcy, upon which a commission was afterwards sued out, and he was duly declared a bankrupt, and the defendant appointed his assignee, who thereupon took [*676] *possession of the wine in question. Previous to the commencement of this action, viz., on the 7th of January, 1832, a demand was made by the plaintiff upon the defendant to deliver up the wine, and he refused to do so. The plaintiff was absent from home when the demand of the wine was made by Hare; who had then been thirteen years in the plaintiff's service. The plaintiff lived in the country, and was frequently from home. In his absence Hare transacted his business; he opened his letters and answered them, and had the plaintiff's authority so to do. He did not sell goods or draw or endorse bills of exchange for him, nor was he empowered to do so. He saw the plaintiff the following week after the demand of the wine, and told him of it, and he approved of his having made the demand.

The question for the opinion of the Court was, whether the demand made upon Lundie, upon Thursday the 21st of July, prevented it from passing to the defendant (his assignee) by virtue of the seventy-second section of the bankrupt act (6 G. 4, c. 16). The case coming on for argument this term,¹

S. Martin, for the plaintiff, was stopped by the Court. [PARKE, J. The bankrupt was a tortious holder of the wine at the time of the act of bankruptcy, he did not hold it with the consent of the true owner and proprietor.]

Tomlinson for the defendant. Hare had no previous authority from the plaintiff to make the demand of the wine, and before his act had been ratified by the *plaintiff, the interest of third persons had intervened. [PARKE, J. It is stated that, in the plaintiff's absence, Hare transacted his business, [*677] opened his letters and answered them, having the plaintiff's authority so to do. From that a jury might fairly infer, that Hare had authority to demand the wine.] It is found only that Hare was the plaintiff's clerk, not that he was a salesman, or had any authority to buy or sell goods; but independently of that point, in *Darby v. Smith*, 8 T. R. 82, where persons to whom certain household furniture had been assigned in trust, had permitted it to remain so long in the possession of the bankrupt, as to give him the reputed ownership of it in the opinion of all who dealt with him, and the trustees took possession of it on the eve of the bankruptcy, it was held that such a repossession was fraudulent against creditors; and in *Ex parte Smith*, Buck's B. C. 149, LEACH, Vice-Chancellor recognised that case as having been properly decided, on the ground that the property was withdrawn in contemplation of bankruptcy. [PARKE, J. The Vice-Chancellor seems to have considered it as something in the nature of a fraudulent preference.] It is not necessary to put it on that ground, but the principle upon which a party leaving property in the apparent ownership of a bankrupt loses it, is, that by so leaving it, he suffers the bankrupt to acquire credit. The same degree of credit is acquired whether the property be removed immediately before, or not until, the act of bankruptcy.

PARKE, J. This is a very plain case. It is perfectly clear that the assignees of a bankrupt are not entitled to recover goods under the 6 G. 4, c. 16, s. 72, unless the *bankrupt at the time he became bankrupt had the possession of the goods by the consent and permission of the true owner. The [*678] dividing point is the act of bankruptcy. Now here, on the day before the bankruptcy, Hare, a clerk who usually transacted the plaintiff's business in his absence, applied at Lundie's, the bankrupt's office, for the wine, and Lundie's

¹ November 19th, before PARKE, TAUNTON, and PATTESON, J.

clerk refused to deliver it. Then, if the demand of Hare was equivalent to a demand by the plaintiff, the bankrupt had not the possession of the goods at the time when he became bankrupt with the consent of the true owner; and as we may draw from the facts such inferences as a jury might, I think we must say that Hare had authority to make the demand. That being so, the plaintiff is entitled to recover.

TAUNTON J., concurred.

PATTESON, J. I am of the same opinion. The attempt on the part of the defendant is to satisfy us that an express dissent is a consent.

Judgment for the plaintiff.

The KING v. TREGARTHEN.

A party gave information on oath before a magistrate, that from certain language used towards him he was in bodily fear from another; and the magistrate, upon hearing the complaint, required the latter to enter into recognisances to keep the peace. On motion to discharge the recognisances, on the ground that the language was used in a metaphorical sense only, the Court refused to interfere, because it was for the magistrate to judge in what sense the language was used.

THE defendant and one William Matthews, being rival sail-makers at Penzance in Cornwall, and meeting there on the 30th of October, 1833, the defendant *addressing Matthews, said,—“The rod (alluding to an expression [*679] said to have been used by Matthews towards the defendant) you have in pickle for me, you must prepare yourself to receive such a castigation with as you deserve; and I am determined you shall have it.” Some altercation then passed between the parties; and, on the same day, the defendant sent a letter to Matthews, containing the following expressions:—“The rod you have had so long in pickle for me is now so well saturated, that it is, in every respect, complete and fit for use; and, instead of applying it to my shoulders, you must now prepare yourself to receive such a castigation as your dastardly cowardice and intriguing designs most justly merit. I will no longer scruple to expose your infamous conduct.” The letter then proceeded to give several instances in which the writer alleged Matthews to have been guilty of fraud in the trade of a sail-maker, and challenged Matthews to meet those charges. On the following morning the defendant was summoned to attend before the mayor of Penzance, to be bound over to keep the peace on the application of Matthews, founded on the above conversation and letter: he accordingly attended at the office of the town clerk, when, the conversation and letter having been sworn to by Matthews, he was asked by the town clerk whether, from the language, threats, and letters of the defendant he was not in bodily fear from the defendant; and Matthews having answered in the affirmative, the defendant was compelled to enter into a recognisance of 100*l.* himself, and two sureties of 50*l.* each to keep the peace towards Matthews for six months.

**Cowling* moved for a certiorari to remove the recognisances and information taken, in order that the recognisances might be discharged, or the amount reduced; and contended that the magistrate had not jurisdiction to require recognisances, the words used not importing any threat of bodily injury. [PARKE, J. We cannot interfere where the magistrate has exercised his discretion, if he has proceeded on a sufficient information on oath.] The information was not sufficient. Matthews swore generally, in answer to a question put to him by the town clerk, that, from language, threats, and letters received from the defendant, he was in bodily fear. Now the language used, “The rod you have had in pickle for me,” &c., was used in a metaphorical sense; and coupled with the explanation contained in the letter, could afford Matthews no ground to fear bodily injury. [TAUNTON, J. You say that the charge in the information, that Matthews was in bodily fear, was not proved by the facts, because the language was used in a metaphorical sense; but the

mayor of Penzance had a right to exercise his judgment whether it was used metaphorically or not.]

PARKE, J.¹ The magistrate having, in the exercise of his discretion, thought that there was ground for requiring the defendant to enter into recognisances to keep the peace, this Court cannot interfere.

TAUNTON and PATTESON, Js., concurred.

Rule refused.

¹ DENMAN, C. J., was at the Privy Council.

*In the Matter of JOHN WALLER POE.

[*681]

A prohibition cannot issue to a court-martial, after its sentence has been ratified by the king and carried into execution.

PRICE, on a former day of this term, moved for a rule to show cause "why a prohibition should not issue to the judge-martial and advocate-general of his Majesty's forces, to restrain the execution of the sentence of a court-martial," passed under the following circumstances:—

John Waller Poe, on whose behalf the application was made, was arraigned and tried before a general court-martial, held in the garrison at Chatham, on the 26th of August, 1833, and continued by adjournment till the 11th of September following, on a charge, "That he, the said J. W. P." (described as Lieutenant J. W. P., of the 55th regiment), "being a passenger on board the ship *Cæsar* on her passage from Calcutta to England, was, on or about the 12th of February, 1832, accused of stealing a five pound Bank of England note, and certain articles of wearing apparel, the property of one Thomas Ross, then acting as his servant, and which property the said T. R. alleged had been taken out of his trunks in his, the said J. W. P.'s cabin; and the aforesaid accusation against the said J. W. P. having been thereupon inquired into by Captain Watt, commanding the ship, by Lieutenant Colonel Cunningham and other officers on board, they, the said officers and passengers forthwith expelled the said J. W. P. from their table and society; not permitting him to enter the general cabin, or to have any association whatever with them during the remainder of the voyage: nevertheless, the said J. W. P., under circumstances *so [*682] degrading and disgraceful to him, neither then, nor at any time afterwards, took any measures as became an officer and a gentleman to vindicate his honor and reputation; all such conduct as aforesaid being to the prejudice of good order and military discipline." The said J. W. P. objected, before and at the trial, that the charge against him did not, expressly or constructively, impute any military offence, or infraction of any of the articles of war, or any positive act of misconduct or neglect, to the prejudice of good order and military discipline; nor was there anything in the said charge, if true, so far as it averred any fact, which subjected him to be arraigned or tried as a military officer. The Court, however, proceeded with the trial; and, after deliberating upon the charges, came to the following decision, which they transmitted to the commander-in-chief: "The Court having maturely weighed and considered the evidence adduced in support of the prosecution, together with the prisoner's defence, and the evidence adduced in support of it, is of opinion that the prisoner is guilty of the whole of the charge produced against him, in breach of the articles of war. The Court does, therefore, sentence him, the prisoner Lieutenant J. W. P., of the 55th regiment of infantry, to be dismissed his Majesty's service. The Court, in coming to the above finding and sentence, trusts it may be allowed to add, that it has considered the charge produced against the prisoner entirely in a military point of view, as affecting the good order and discipline of the army; and that it does not mean, by its sentence, to offer any opinion as to the original charge of theft, of which the prisoner was accused by the man Ross." The sentence was confirmed by the king, and carried into execution. The *said J. W. P., at [*683]

the time mentioned in the above charge was proceeding home as a private passenger on board the *Cæsar*, on leave of absence from his regiment for two years.

Price, in moving for the rule. The offence charged in this case was not within the articles of war, and therefore could not be tried by a court-martial, the Mutiny Act, 3 & 4 W. 4, c. 5, s. 5, only empowering his Majesty to appoint courts-martial "for bringing offenders against the articles of war to justice." The seventieth clause of those articles may, perhaps, be cited in answer, which directs that "all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not specified in the foregoing cases, or in our articles of war, shall be taken cognizance of by courts-martial, according to the nature and degree of the offence." But, as Lord COKE intimates (in speaking of the president and council of the North, instituted by Henry the Eighth), a court cannot legally exercise an authority which rests on vague and undefined instructions, and such as cannot be understood by the subject, 4 Inst. 245, 246. There is nothing in itself disgraceful in the fact charged upon this party; it is merely that he was accused of an offence: it does not appear that, after the ship arrived in this country, the accuser had done anything to make good his charge, or the accused had had any opportunity to take steps for his own vindication. [DENMAN, C. J. Does anything now remain to be done by the court-martial?] In *Grant v. Sir Charles Gould*, 2 H. Bl. 69, the court-martial had reported to the king; but there a prohibition was moved for, to prevent the execution of [*684] the sentence; and it is clear, from the judgment of Lord LOUGHBOROUGH, that in his opinion, the prohibition would have lain, if the case had not proved (as it ultimately did) to be within the jurisdiction of that Court. The sentence there, as to one part of it, viz.: degradation from rank, must have already taken effect when the application was made. The finding of the Court had been confirmed by the king, as in the present case. [PARKE, J. Here nothing remains to be done in execution of the sentence.] The party may be restored to his rank, which is often done in such cases after a nominal dismissal. [TAUNTON, J. To whom is the prohibition to be addressed?] It may go to the judge-martial. [DENMAN, C. J. What are we to prohibit him from doing?] From enforcing the sentence. It is a continuing sentence. The Court may be reassembled to revise it. [TAUNTON, J. The ordinary course, where a party thinks himself aggrieved by the decision of a court-martial, is, to draw up a memorial to the king, which is then referred to the judge-advocate, and, as I think I can state with certainty, undergoes a most minute and elaborate investigation in his office.] DENMAN, C. J. Is there any instance in which this court has interfered by prohibition, after the sentence of an inferior court had been fully carried into effect? PARKE, J. If we granted the writ under such circumstances, there would be no case, in which the party was still alive, where an application like the present might not be made to this court. I, for one, should pause before I established such a precedent.]

The Court, however, allowed the case to stand over, in order that *Price* might [*685] look into the authorities with reference to the question last put by the Lord Chief Justice. And, on a subsequent day (November 8th),

Price, being desired by the Court to name any authorities which he had found applicable to the point (but without rearguing the case), mentioned the following: 2 Inst. tit. *Articuli Cleri*, sect. 3, p. 602; same title, sect. 14, p. 609. The resolution of the Judges in *Sir John Bennet v. Dr. Easedale*, Cro. Car. 55, that a sentence of the Star Chamber, making the plaintiff incapable of any office of judicature, "never took from him the office, but the execution thereof, nor gave authority to place others." *Isabel Peel's case*, Cro. Car. 118;

¹ See, as to the revision of sentences on memorial to the king in council, the case of *Lieut. Frye*, 1 *Macarthur on Courts-Martial*, Appendix, No. xxiv., 4th edit., and the case of *Capt. Coffin* in the same work, vol. ii. p. 290, where the memorial was referred to the twelve Judges.

Walker v. Adams, 1 Sid. 331; 2 Keb. 200, 215, 227; Scarborough v. Justus Lyrus; Fitzherbert, N. B. 45 F. 106 D. The form of a writ of prohibition in Regist. Brev. 38, concluding "et si quid per vos minus rite in hac parte attentatum fuerit, id sine dilatione revocari faciatis." Similar forms, Regist. Brev. 39, 40, 43. Home v. Earl Camden, 2 H. B. 533. [PARKE, J. The king has ratified the sentence of dismissal in this case; and he might also have dismissed the officer without any court-martial.] Home v. Lord Bentinck (judgment of DALLAS, C. J.), 8 Price, 249, furnishes an answer to this observation. Where a court-martial has, in fact, been held, this Court may restrain its proceedings by prohibition, whatever might be the case if a different course had been adopted. [PARKE, J., also referred to the authorities cited in Com. Dig. Prohibition, D., particularly Hall v. Norwood, 1 Sid. 166, as making against the present motion.] *Cur. adv. vult.*

*DENMAN, C. J., in the same term (November 14th), delivered the judgment of the Court. [*686]

An application was made for a rule to show cause why a writ of prohibition should not issue, prohibiting the execution of the sentence of a court-martial, which, in the month of August, had been holden at Chatham, on charges preferred against an officer in the 55th regiment, on the ground that the facts alleged in the charge were insufficient to bring the party within the articles of war. In the course of the statement it appeared that a commission had been directed to certain officers, for the purpose of carrying on this inquiry; that witnesses had been examined, and the trial proceeded to its termination; that the Court had pronounced the defendant guilty, and sentenced him to be dismissed from his Majesty's service; and, finally, that that sentence had been ratified and approved by the king, who had accordingly dismissed the applicant from the army. We could not understand why, and to what end, a prohibition should be granted, nor to whom it could be directed, nor what it could prohibit; for not only had the sentence been carried into complete execution, but the court-martial itself, having performed all its functions, had ceased to exist. The learned counsel, however, argued that the writ might be directed to the Judge-Advocate, as in the case of Grant v. Gould, 2 H. Bl. 69, which case, or rather some parts of Lord LOUGHBOROUGH's elaborate judgment upon it, were supposed to furnish authority for granting this rule. We may here observe, that the rule for a prohibition was there discharged, on its being satisfactorily proved that no valid objection to the proceedings of the court-martial existed, and *nothing was said respecting the person to whom it was addressed; [*687] otherwise it is not easy to see what power the judge-advocate could possess after the sentence had been reported to his Majesty, and received his royal approbation; and the prayer of the suggestion is remarkable, in humbly imploring that "the writ may be directed to Sir Charles Gould, the judge-advocate, or to some other competent person or persons, to hinder him from proceeding in ordering the execution of the sentence." That case clearly falls short of the purpose for which it was cited, as the sentence was not fully executed, and this fact is stated in the affidavit on which the rule was founded.

We, therefore, desired to be furnished with some authority (if any could be found) for granting a prohibition, after complete execution of the sentence imposed by the inferior court; and several cases were, at a subsequent day, laid before us; none of which, however, on examination, appear to us to establish the proposition, while others are examples of acting on the contrary doctrine. In Hall v. Norwood, 1 Sid. 166, the Court held that a motion for a prohibition came too late after judgment and execution in the Court below, because there is no person who can be prohibited. And a similar view is taken in Darby v. Cosens, 1 T. R. 552, by ASHURST and BULLER, Js., the only judges in court, who support the prohibition on the ground that something remained to be done. But it is needless to enter at large into the law of prohibition in general, for a

¹ Latch. 262, where the decision was against the prohibition.

court-martial stands on grounds peculiar to itself. When it pronounced its sentence, it ceased to exist.¹ To the judge-advocate no other *duty then [*688] belonged than that of transmitting the sentence for approbation; and even supposing the case of *Grant v. Gould* to furnish some argument that a writ of this nature might be directed to him before execution of the sentence, still it is impossible to discover what he could be required to abstain from after execution. If, then, the writ were to issue at all, we see no court or individual to whom it could be addressed, other than the king himself, who, acting on the sentence, has been pleased to dismiss the officer from his service. Now, admitting for a moment that it were possible to address any writ directly to his Majesty, when it is considered that this power is undoubtedly inherent in the crown, and might have been lawfully executed even without any court-martial, it will at once appear manifest that no prohibition can lie in such a case. For what the king had power to do, independently of any inquiry, he plainly may do, though the inquiry should not be satisfactory to a court of law, or even though the court which conducted it had no legal jurisdiction to inquire.

We do not think it necessary to consider whether the charge that has been tried is so framed as to bring the party within the articles of war; but we agree with Lord LOUGHBOROUGH's remark in *Grant v. Gould*,—"It would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction by a justice of the peace." We are all clearly of opinion that the rule moved for cannot be granted.

Rule refused.

¹See, however, 1 Macarthur on Courts-Martial, p. 262, 4th edit., in which it is said that military courts-martial remain in existence till dissolved by the same authority by which they were held; and the reason given is, that they may be directed to revise the sentence, or to intimate publicly in court to the person tried, his Majesty's pleasure, or that of the commander-in-chief. See also, p. 181, and Appendix, No. iv. (Orders in Lieut. Jephson's case), in the same volume.

[*689] *DOE on the demises of ANDREW PRITCHARD and Others v. DODD.

Where A. demises to B. for the term of his natural life, the demise is, *primâ facie*, for the life of B. But where A. demised to B., his executors and administrators, for the term of his natural life, and the lease contained a covenant by A. for quiet enjoyment of the premises by B., his executors, &c., during the natural life of A.: Held, that the word "his" in the demising clause, must be referred to A., the grantor, and not to B., though his name was the last antecedent.

On the trial of this ejectment before DENMAN, C. J., at the sittings in Middlesex, after Hilary term, 1833, a verdict was found for the plaintiff, but leave given to move to enter a nonsuit, which motion was made in the ensuing term, and a rule nisi granted. Upon showing cause against the rule, the only point which it is deemed necessary to notice, arose on the construction of the following lease; the defendant's counsel insisting that it was a lease for the life of John Pritchard therein mentioned; and the plaintiff's counsel, that it was for the life of John Adams, the lessee, who died in J. Pritchard's lifetime.

The lease purported to be made on the 24th of May, 1816, between Zachariah Kemp and James Corrick, assignees of the estate and effects of John Pritchard the younger, a bankrupt, of the first part; the said John Pritchard of the second part; and John Adams of the third part; and it began with the following recital:—"Whereas, by an agreement in writing,¹ bearing date the 4th day of December, 1807, the said John Pritchard agreed to let, and the said John Adams agreed to take, all that piece or parcel of land and premises hereinafter particularly mentioned, and hereby leased and demised, or mentioned or intended so to be, from Christmas day then last, for the term of his natural life, and the said John Adams agreed to lay out and [*690] expend *on the said piece or parcel of land 440*l.* in building, &c., as also the expenses of leases, &c. And the said John Pritchard agreed

¹ Not proved at the trial.

to grant a lease of the said premises when thereunto required." The indenture then further recited, that a commission of bankrupt had issued against J. Pritchard, under which he had been duly declared a bankrupt, and his estate assigned to Kemp and Corrick; and it then proceeded as follows:—

"Now this indenture witnesseth, that in pursuance and performance of the aforesaid agreement, and in consideration of the trouble and expense the said John Adams hath been at and put unto, in erecting and building the messuages and tenements erected and built by him in pursuance of such agreement, on the said piece or parcel of land hereinafter leased and demised, or intended so to be, as also in consideration of the rents, covenants, and agreements hereinafter reserved and contained; and which, on the part and behalf of the said John Adams, his executors, administrators, or assigns, are to be paid, done, and performed, they, the said Z. Kemp and J. Corrick, at the request, and by the direction of the said John Pritchard, testified by his being a party to and executing these presents, have, and each of them hath, demised, leased, set, and to farm letten, and by these presents do, and each of them doth, demise, lease, &c.; and the said John Pritchard hath also demised, &c., and by these presents doth demise, &c., unto the said John Adams, his executors, administrators and assigns, all that piece or parcel of a field, called the Clay Pit Field, situate, &c., containing, &c., of which said piece or parcel of land the said John Pritchard was, and is, tenant for life under the will of Andrew Pritchard, late of, &c., and which is the same piece or parcel of *land and premises as was agreed to be leased by the said John Pritchard, to the said John Adams by the said agree- [691] ment, on which the said John Adams hath already erected three messuages or tenements, together with all yards, gardens, &c., and appurtenances whatsoever to the said piece or parcel of land, messuages or tenements belonging, or in anywise appertaining: To have and to hold the said piece or parcel of land, messuages, or tenements and premises, with all and every the appurtenances, unto the said John Adams, his executors, administrators, and assigns, from Midsummer day now last past, for and during the term of his natural life, yielding and paying therefor, yearly, and every year during the continuance of the said term, determinable as aforesaid, unto the said Z. Kemp and J. Corrick, their heirs and assigns, the yearly rent," &c.

Then followed a covenant by Adams, for himself, his executors, administrators, and assigns, "at all times during the continuance of the term thereby demised, determinable as aforesaid," to pay the said rent to Kemp and Corrick on the stated days. Covenant by and for the same parties, to repair and keep in repair the messuages erected, and that might be erected on the said premises, and the said premises, &c., so repaired, &c., "at the end of the said term, or other sooner determination of this lease by the death of the said John Pritchard or otherwise," peaceably and quietly to yield up to Kemp and Corrick, their heirs and assigns. Covenant for liberty to K. and C. to enter and view the state of repair, and to give notice of defects, which Adams bound himself, his executors, &c., to repair within three months after such notice. Covenant for the re-entry of K. and C., their heirs and assigns, upon Adams, his executors, &c., if the *rent should be in arrear, or repairs undone, &c. Covenant by K. [692] and C., and J. P., for themselves, their heirs, executors, &c., to Adams, his executors, &c., that Adams, his executors, administrators, and assigns, paying the said rent and performing the said covenants, "Shall and may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said piece or parcel of land, messuages or tenements, and all other, the said hereby demised premises with the appurtenances, during the natural life of the said John Pritchard, without any lawful let, suit, trouble, denial, eviction, &c., of, from, or by the said Z. Kemp, J. Corrick, and John Pritchard, or any of them, or of, from, or by, any person or persons lawfully or equitably claiming by, from, or under, or in trust for them, or any of them."

Sir James Scarlett and Comyn, in this term, showed cause against the rule,

which was supported by *F. Pollock*. Every material observation upon the lease will be found in the judgments delivered by the Court.

DENMAN, C. J. I thought, upon the trial, that the granting part of this lease was all that I could properly look to; and, referring to the name which stood as the last antecedent to the words, "his natural life," in that part of the lease, it seemed to me that the whole must be construed as a grant of lease for the life of John Adams only, though there was every appearance of a different intention in other parts of the deed. But, looking to the covenant for quiet enjoyment, which expressly declares that the lessee shall occupy during the natural life of John Pritchard, to the evident intention of the whole instrument, and to the circumstance of *the demise and covenants being made to Adams, "his [*693] executors and administrators," I am now of opinion that the lease must be taken to have been granted for the life of John Pritchard, and not of that party whose executors and administrators are included with himself in the grant.

PARKE, J. I am of the same opinion. I do not, however, think that the covenant for quiet enjoyment, in this deed, of itself constituted a demise for the life of John Pritchard. It is true that any words which express the intent of giving possession for a certain time may, in construction of law, amount to a lease; but here there is a regular lease by proper words of demise. The covenant for quiet enjoyment cannot operate of itself as a lease, though it may assist in construing that lease. The words of the demise are, that Pritchard doth demise, set, and to farm let, the premises unto the said John Adams, his executors, administrators, and assigns, from Midsummer day last, "for and during the term of his natural life." The next antecedent to "his" is certainly the name of John Adams; but the other words show that the intention was to convey an interest, not merely to John Adams, but to his representatives after his death. It follows that the life contemplated was the life of Pritchard; and this construction is the most beneficial to the grantee. And then comes the covenant for quiet enjoyment, which shows clearly the intention of the grantor in the previous parts of the instrument.

TAUNTON, J. The words of demise are certainly important, but they are not conclusive. When A. demises to B., for the term of his life, the word "his" [*694] would, in ordinary construction, apply to B. as the last *antecedent. But instances perpetually occur where that word is used, and does not refer to the last party named. The words of demise are, at most, ambiguous, and being so, they may derive explanation from the other parts of the instrument. Then the covenant for quiet enjoyment during the natural life of Pritchard tends very strongly to expound the intention of the parties. It is not necessary to say that such a covenant would operate here as an actual demise; though it is a doctrine as old as the year-books, 5 H. 7, 1; Bac. Abr. Leases, (K), p. 817, 7th ed., that a license to enter and occupy land amounts to a lease. But the covenant, as it stands here, is a very strong proof of the intention to grant for Pritchard's life, and not that of Adams.

PATTON, J. The word "his" in the demising clause is ambiguous; but then comes the covenant, that Adams shall quietly enjoy during Pritchard's life, which alone would satisfy me that a lease for Pritchard's life was contemplated in the demising clause. The whole instrument, taken together, suggests that construction. The executors and administrators of Adams would not have been named if the demise intended had been only for his life. Rule absolute.

[*695]

*DOE dem. SMITH v. BIRD and Another.

A. and B., by a settlement made on occasion of their intended marriage (which afterwards took place), conveyed certain freehold estates to trustees, for the benefit of themselves and the survivor of them for life, then for the benefit of the issue of the marriage, if any, and if none, then to the use of such person as the wife by deed or

last will, notwithstanding her coverture, and as if she was sole and unmarried, should appoint, and in default of appointment, to the use of herself in fee. The wife, at the time of the marriage, was seized in tail of certain copyhold lands.

The husband and wife afterwards executed a power of attorney to C., authorizing him to surrender the copyhold lands of which the wife was seized in tail to a third person, in order to make him tenant to the præcipe or plaint, in a recovery intended to be suffered in the manor court. The wife, previous to her executing the power of attorney, was examined apart from her husband, by the deputy steward of the manor. The recovery was suffered, and immediately afterwards the premises were surrendered to the same uses as those mentioned in the marriage settlement: Held, that the power of attorney was valid as the act of the husband; he having sufficient interest in his wife's copyhold lands to pass them by surrender during the joint lives of himself and his wife; and that the recovery (which had stood unreversed for twenty years) was, therefore, well suffered.

After the above surrender, the wife was admitted to other copyhold lands, which were not surrendered to the use of her will. By her will, made in 1802, she devised her real and leasehold estates to certain persons therein named. At the date of her will and of her death she was seized of freehold estates: Held, that the will was a valid disposition of the copyhold which had been surrendered to the use of her will, though it did not refer to the surrender in which the right of disposition was reserved, and though it was made after she ceased to be a feme covert.

Held, further, that the copyholds which had not been surrendered to the use of the will did not pass by the general devise of the real estate, the will having been made before the 55 G. 3, c. 192.

EJECTMENT for one-fourth of several copyhold estates, situate in the manor of West Walton cum Membria, on the part of Emneth, and other manors in the county of Norfolk. A verdict was found for the lessor of the plaintiff, subject to the opinion of this Court on the following case:—

In the year 1777, Mrs. Warren (then Elizabeth Southwell), and her two sisters, Frances and Mary, were tenants in tail of part of the premises in question (being those comprised in the first count of the declaration), and tenants in fee of another part (comprised in the second count of the declaration), and also of certain freehold property. By a settlement in that year, made in contemplation of the intended marriage of Dr. Warren and the said Elizabeth Southwell, they, Dr. Warren and *E. Southwell, conveyed to trustees, their heirs and assigns, their freehold and leasehold hereditaments to certain uses, and [696] upon certain trusts, for the benefit of the said Dr. Warren and E. Southwell, during their lives, or the life of the survivor of them, and afterwards for the benefit of the issue of their marriage; and after the deaths of the said Dr. Warren and E. Southwell or the survivor of them, if they died without issue, then, as to the estates of the said Dr. Warren, to himself in fee, and as to the estates of the said E. Southwell, to the use and behoof of such person or persons, and for such estate or estates, &c., as the said E. Southwell by deed or will executed as in the conveyance was mentioned, should, notwithstanding her coverture, and as if she was sole and unmarried, direct or appoint; and for default of such direction, declaration, or appointment, to the use and behoof of the said E. Southwell, her heirs and assigns for ever. And by the same indentures the said Dr. Warren and E. Southwell covenanted that they or the heirs of the said E. Southwell would surrender all and every the copyhold lands, &c., wherein she had any estate, title, or interest, to the same uses, and for the same intents and purposes, as were thereinbefore expressed and declared of and concerning the freehold estates of the said E. Southwell. No surrender was ever made pursuant to the said covenant.

The marriage between Dr. Warren and E. Southwell was duly solemnized in 1777.

In 1779 the sister Frances died intestate, never having been married, and her surviving sisters, Mary and Elizabeth, were duly admitted to Frances's third part of the lands mentioned in the first count of the declaration as co-heirs in tail.

*At a general court baron holden for the said manor of West Walton cum Membria, on the part of Emneth, on the 8th of October, 1781, Dr. [697]

and Mrs. Warren, and Mary Southwell, by James Guy, their attorney, by virtue of a power of attorney under their respective hands and seals, bearing date the 14th day of July, 1781 (at the foot of which said power of attorney it was certified by the steward, that Mrs. Warren had been, previously to the execution of the said power of attorney, examined apart from her husband touching her consent to the several matters and charges therein contained, and had thereunto freely consented), surrendered into the hands of the lord of the said manor the entirety of such of the messuages and lands mentioned in the first count of the declaration as were holden of that manor, to the use of H. Watts, in order to make him tenant for the purpose of suffering a common recovery. Such recovery was afterwards suffered by J. Guy, Dr. and Mrs. Warren's attorney, wherein W. Clarke was defendant, the said H. Watts, tenant, and the said Dr. Warren and Elizabeth his wife, and Mary Southwell, by J. Guy, their attorney, vouches; and afterwards one undivided moiety of the said messuages and lands in the first count of the declaration mentioned, holden of the said manor, was surrendered by the defendant to certain uses for the benefit of Dr. Warren and E., his wife, and their issue, with remainder, in default of issue, to the use of such person, &c., as Mrs. Warren, by deed or will, should, notwithstanding her coverture, and as if she was sole and unmarried, declare or appoint, and in default of any such declaration or appointment, to the use of the heirs of the said Elizabeth for ever; and at the same Court the said *Elizabeth Warren was admitted [*698] according to the form and effect of the said surrender.

Common recoveries of the entirety of the other messuages and lands mentioned in the first count of the declaration holden of other manors therein mentioned, were suffered by Dr. and Mrs. Warren and Mary Southwell, under and by virtue of other letters of attorney previously executed by them; and which said other letters of attorney, by a memorandum at the foot thereof, signed by the deputy steward of the several manors, stated the private examination and consent of the said E. Warren previous to the execution thereof by her. None of the said recoveries were suffered by the parties in person: but the first recovery was suffered by J. Guy, attorney of Dr. and Mrs. Warren, and the others by S. Draycott, their attorney, in each manor, by the said letters of attorney; and after the suffering of the recoveries one undivided moiety of the messuages and lands in the first count of the declaration mentioned, holden of the several last-mentioned manors respectively, was surrendered by the demandants in the said several recoveries to certain uses for the benefit of Dr. Warren and Elizabeth his wife, and their issue, with remainder, in default of issue, to the use of such person and for such estate as Mrs. Warren, by deed or will to be executed as therein mentioned, should, notwithstanding her coverture, and as if she was sole and unmarried, direct, declare, or appoint, and in default of such declaration or appointment to the use of the heirs of the said Elizabeth for ever. And at the same several courts Mrs. Warren was admitted according to the form and effect [*699] of the said several surrenders. All *the court rolls in existence of the said several manors had been searched, and it appeared that, prior to the recovery suffered by Dr. and Mrs. Warren, there were many instances in which recoveries had been suffered by a feme covert in person, but none was found of a recovery suffered by a feme covert by attorney.

In the years 1781 and 1782, Dr. and Mrs. Warren surrendered the moiety of the lands (late of Henry Southwell) mentioned in the second count of the declaration, to the same uses as were specified in the marriage settlement.

In the year 1790, Elizabeth Warren and Mary Southwell were admitted to other parcels of the said lands, in the second count of the declaration mentioned, (theretofore the property of J. Marshall, deceased), to hold to E. Warren and M. Southwell, and their heirs, in coparcenary, which last-mentioned lands were never surrendered to the use of the will of the said Elizabeth Warren in any way whatever. In 1800, Dr. Warren died, in the lifetime of his wife, without issue.

Mrs. Warren did not, in her lifetime, make any appointment by deed, nor did she make any other surrender to the use of her will than that above stated; but by her last will in writing, dated the 1st of December, 1802, she devised (amongst other things) all her real and personal estate to J. W. Smith, the lessor of the plaintiff, and S. Trafford, their heirs and assigns, upon certain trusts therein mentioned; and by a codicil bearing even date with her said will, after revoking that part of her will as to the devise to J. W. Smith and S. Trafford, she devised in the words following:—"And as to all the rest and residue of my real estates, and also as to all my leasehold estates whatsoever, I devise and bequeath the *same unto my sister, Dame Mary Eyre, during the term of [*700] her natural life; and from and immediately after her decease, I devise and bequeath all my said real estates, and also all my said leasehold estate, unto and to the use of, and for the benefit of the said J. W. Smith and S. Trafford, their heirs, executors, administrators, and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants."

In 1816, Mrs. Warren died, being then, and having been, at the dates of her will and codicil, in possession of one undivided moiety of the several estates mentioned in the first and second counts of the declaration. She was also seised in fee of considerable freehold estates which passed by her will and codicil. Dame Mary Eyre died on the 18th of November, 1825, whereupon Sir J. W. Smith, the lessor of the plaintiff, claimed to be entitled to one undivided fourth part of the said several messuages and lands in the first and second counts of the declaration mentioned, as devisees under the said codicil of Mrs. Warren. This case was argued in Trinity term, 1833.¹

Preston, for the lessor of the plaintiff. There are two parts of the case: one, as to the entailed lands; and the other, as to the lands not entailed. First, as to the entailed lands, it may be contended that a customary recovery of copyhold cannot be suffered by attorney; but, assuming that the recovery is in that respect irregular, it is not absolutely void, but voidable only by application to the Lord's Court, 2 Watkins on *Copyholds, 24, 25; *Ash v. Rogle* and the Dean and Chapter of St. Paul's, Vernon. 367, Shower's P. C. 67, 1 [*701] Eq. Ca. Abr. 119; Viner's Abr. tit. False Judgment, B. pl. 10. On principle the objection cannot be tenable, because otherwise a common recovery, except by special custom, could not be suffered in any case where the parties were so circumstanced, from ill health or otherwise, that they could not appear personally in Court. At common law, a person under such circumstances might appear per responsalem, Bracton, tit. De Essoniis, c. 14, fol. 361. In Viner's Abr. tit. Recovery (A. a.), "reversed, falsified, or stayed, for what and how," there is no instance in which it was merely objected to a recovery, that it was suffered by attorney. In *Wymer v. Page*, 1 Stark. N. P. C. 9, Lord ELLENBOROUGH was of opinion, that an attorney might be appointed for suffering a common recovery of copyhold lands, as of common right, unless there were an express custom to the contrary. [PARKE, J. There is sufficient evidence of a custom here to appoint an attorney, if that be necessary; the only question is, whether Mrs. Warren, a feme covert, could appoint an attorney.] The stat. 47 G. 3, sess. 2, c. 8, enables femes covert to appoint an attorney for the purpose of surrendering a copyhold, of which a common recovery is proposed to be suffered. But the recovery in this case was suffered before that statute. The 59 G. 3, c. 80, was passed to enable femes covert to appoint an attorney to appear for them as tenants to the plaint or writ, or as vouches, in courts of ancient demise, but that they might have done at common law, as appears from the passage already cited from Bracton. The general rule is, that every person *may appoint [*702] an attorney ad prosequendum et defendendum, and there is nothing to show that it does not apply to an inferior court; see *Daubney v. Cooper*, 10 B. & C. 237. At common law the husband might appoint an attorney for his wife, though in some cases she might apply to the Court to appoint an attorney for

¹ Before DENMAN, C. J., LITTLERDALE, PARKE, and PATTERSON, Js. June 4th.

her, on a suggestion that her husband was not doing his duty for her. The course in common recoveries in Westminster Hall is, that a writ of *dedimus potestatem de attornato faciendo* is granted to take the acknowledgment and examination of the parties, and the form of the proceedings is, "that A. B., and C. his wife, put in their place C. D. to be their attorney against D. E. to gain or lose in a plea of land;" and it is required by the rules of the Court that commissioners should examine the wife apart from the husband, and return a certificate to the Court that they have done so. Here there has been a letter of attorney executed by the husband and wife in the most ample manner, authorizing the surrender of the premises into the hands of the lord in order that he might regrant them. If the wife had appeared in Court, she could only have been asked by the Court if she consented; her assent testified by deed is as solemn an act as her declaration in open Court. It is true that a married woman cannot execute a deed; but the letter of attorney is not to be considered the deed of the wife, but a certificate to the Court that she had consented that another person should act as her attorney to suffer a recovery for her. In *Holland v. Jackson, Bridgman*, 69; and see p. 73, 74, one of the errors assigned was, that the wife was within age at the time of the appearance of her and her husband *by attorney, and also at the time of the judgment, but it was not [*703] assigned as error that she was a married woman at that time. So in an Anonymous case in *Dyer*, 262, upon a writ of false judgment, the objection was, that the tenant being within age made an attorney: but there never has been a case in which it has been objected that husband and wife made an attorney. The 10 & 11 W. 3, c. 14, enacts, "that no common recovery shall be reversed or avoided for any defect unless suit be commenced within twenty years after suffering the recovery." Equity would extend the analogy of that statute to the present case.

Then assuming that the recoveries in the manor courts were well suffered, another question is, whether Mrs. Warren's will was a good execution of the power reserved to her by the surrender of the copyholds to the lord in 1781. The first objection (which applies to all the copyhold lands) is, that the will could not operate as an execution of the power, because it contains no reference to it. The answer to that is, that the uses in the surrender, which authorized a will, were not in strict propriety of language a power, but merely a mode of obtaining a devisable interest over copyhold lands; besides, Mrs. Warren was also owner of the fee, and might as such devise her copyhold lands.

Then assuming that the words of the devise were sufficient to pass all the copyhold lands which had been surrendered to the use of her will, another question is, whether they are sufficient to pass those to which she was admitted in 1790, and which were not so surrendered. As Mrs. Warren had the ultimate fee which now confers the right of possession, and as she was living when the 55 G. 3, c. 192, was passed, that statute was equivalent to *or superseded [*704] the necessity of a surrender to the use of her will, and rendered the language of her will as effectual as if there had been surrenders in the ordinary form to uses declared, or to be declared by her. Every disposition made or to be made by any will by any person who shall die after the passing of the act, is rendered valid without any previous surrender. It was doubted at one time, whether, since the statute, copyholds would pass under a general devise of real estate by a testator who had both freehold and copyhold lands, and who had made no surrender to the use of the will. But *Doe dem. Clarke v. Ludlam*, 7 Bing. 275, expressly decided that copyholds would pass under such a devise, and that it ought to receive the same construction as if the testator had made a surrender to the use of his will. The statute, therefore, places the testator in precisely the same situation as if he had made a surrender to the use of his will. And it is quite clear that if Mrs. Warren had made such a surrender, the copyhold lands to which she was admitted in 1790, would have passed under this devise.

Follet, contra. First, Mrs. Warren could not devise the land of which she

was seised in tail. There was no valid recovery, not because Dr. and Mrs. Warren could not appear by attorney, but because she being a feme covert was incompetent to execute a deed, and the surrender to the lord made by the attorney was void, and consequently there was no good tenant to the plaint in the manor court. It is said that this recovery can only be avoided by application to the lord's court; but *Roe v. Baldwere*, 5 T. R. 104, shows that this Court will *examine a recovery of copyhold as well as of other lands. [*705] In *Holland v. Jackson*, Bridgman, 69, the husband and wife appeared by attorney, and the question was whether the appearance by the wife, she being an infant, was error. That is not the question here. In *Watkins on Copyholds*, vol. i. 63, it is said that "the husband and wife may together surrender the wife's lands, she being on such surrender examined apart by the steward;" and in page 65, "when any one is authorized to surrender his copyhold, it is not always necessary he should do it in person; he may appoint in many cases an attorney for the purpose;" and then it is added, "where the copyholder is not under any personal incapacity, as non compos, covert, or an infant, and possesses a power which may be delegated to another; a surrender which is warranted by the general law of copyhold may be by attorney as well as in propria persona." The statutory provisions on the subject show that a surrender by a married woman was not valid at common law. The 9 G. 1, c. 29, enables a feme covert to appoint an attorney for the purpose of admission to copyholds, and the 47 G. 3, sess. 2, c. 8, (A.D. 1807,) for the purpose of suffering a recovery of them. Here the surrender and admission were long before the latter statute. The statute 10 & 11 W. 3, c. 14, which limits the reversal of a recovery to twenty years, does not apply to a case where there has been no good tenant to the præcipe or plaint. This is shown by the 14 G. 2, c. 20, s. 5, which enacts, "that every common recovery shall, after the expiration of twenty years from the suffering thereof, be valid, if it appears upon the face of such recovery that there was a tenant to the writ, and if the person joining in the *recovery had a sufficient estate to suffer the same, notwithstanding the deed making the tenant shall be lost." The case here [*706] is as if there had been a recovery in the superior court, and no good tenant to the præcipe: such a recovery would be void.

But, secondly, none of the copyholds, either in tail or in fee, which were surrendered to the use of her will, can pass by the devise, unless it be a valid execution of the power. The words are, "notwithstanding her coverture, and as if she were sole." That implies that the power was only to be executed while she was covert. And assuming that to be otherwise, if it is a power, the will or codicil does not refer to the power, and therefore is not a good execution of it; and there are other freehold estates to satisfy the words. It is said, that the right reserved to Mrs. Warren by the surrender, to make a will, is not a power, but merely a mode of obtaining a devisable interest over the copyhold lands. But a similar clause in a surrender was treated as a power by the Court of Common Pleas in *Driver v. Thompson*, 4 Taunt. 294. [PARKE, J. Here, in default of appointment, the copyholds are limited to the use of her and her heirs for ever. Now, assuming that the will may not be a good execution of the power given by the surrender, may it not operate on the reversion in fee vested in her in default of appointment? *Doe v. Hickman*, 4 B. & Ad. 56.]

At all events, the copyholds to which Mrs. Warren was admitted in 1790, and which were never surrendered to the use of her will, will not pass under the general devise of all her real and leasehold estates, she having, at the time of her will, freehold as well *as copyhold property. The question is, whether, at the [*707] time when she made her will, she intended that her copyhold, as well as her freehold, property should pass. The rule of construction is, that where a testator, having both freehold and other property, uses general words of devise, they are restrained to the freehold, unless a contrary intention appears. The words, "all my lands and tenements," are only applied to leasehold where the

testator has no freehold property: *Rose v. Bartlett*, Cro. Car. 292; *Hartley v. Hurle*, 5 Ves. 540; and other authorities collected in 2 *Powell on Devises*, p. 127, 3d ed. The same rule applies to a general devise by a testator having both freehold and copyhold property; such devise is restrained in construction to the freehold property, unless there has been a surrender to the use of the will, and then such surrender has been held to show a different intent; *Chapman v. Hart*, 1 Ves. sen. 273; *Sampson v. Sampson*, 2 Ves. & B. 337; *Nicholls v. Butcher*, 18 Ves. 193; *Tendrill v. Smith*, 2 Atk. 85; *Goodwyn v. Goodwyn*, 1 Ves. sen. 227; and other cases cited, 2 *Powell on Devises*, p. 121. In *White v. Vitty*, 2 Russ. 484, where the Lord Chancellor was assisted by the Chief Justices of the Courts of King's Bench and Common Pleas, TINDAL, C. J., in delivering his opinion, reviewed several of the authorities, and said that the effect of the surrender in those cases was, to show the intention of the testator that the copyhold should pass. Then if before the stat. 55 G. 3, c. 192, in the case of a general devise of all the testator's real estate, a surrender to the use of his will was necessary to show his intention to pass his copyholds, the

[*708] testatrix who in this case made such a general devise without having so surrendered, must be taken to have intended that her copyholds should not pass. The stat. 55 G. 3, c. 192, renders valid every disposition made by will of copyhold tenements, notwithstanding the want of a surrender. Here the will, from the want of a surrender, was not, at the time when it was made, a disposition of the copyholds. The statute was intended to supply surrenders which were matters of form merely; and accordingly, in *Doe v. Bartle*, 5 B. & A. 492, it was held that it did not dispense with a surrender, required by custom to enable a feme covert to devise copyhold lands, in making which surrender she was examined by the steward, apart from her husband; this surrender being a matter of substance, and intended to protect the acts of a married woman. Here the surrender is a matter of substance, because it is necessary to show the intent of the testatrix to pass her copyholds. If her intent, when she made her will, was, that the copyholds should not pass, that intent cannot be altered by a statute passed long after. If it could, the statute would not only cure defects, but make the will. In 2 *Powell on Devises*, p. 137, it is said, "the writer is not aware that it has ever been expressly decided that the rule in *Rose v. Bartlett*, Cro. Car. 292, excluding leaseholds where the devisor has freeholds, applies where he has freeholds at the time of the will, but not at his death; so that, in event, the devise has nothing but leaseholds to operate upon. But there can be no difficulty, it is conceived, even in the absence of decision, in confidently asserting that the rule extends to such a case; inasmuch *as it is the intention of the testator at the period of making the will, which is the point to be ascertained, and which cannot of course be evinced by subsequent events." This case is different from *Doe v. Ludlam*, 7 Bing. 275, because there the will was made after the 55 G. 3, c. 192 had passed; and the language attributed to the Chief Justice of the Common Pleas is referable to a will made when a surrender was unnecessary.

Preston in reply. It is unnecessary for the Court to decide whether a feme covert can by deed appoint an attorney to suffer a recovery, because here Mrs. Warren, when the recoveries were suffered, had an estate tail in possession; her husband, therefore, had an estate of freehold in her right, and might (during the joint lives of himself and wife) transfer a sufficient freehold to his grantee to make him tenant to the præcipe or plaint: *Robinson v. Comyns*, Cas. temp. Talbot, 164, 167, note (b), 3d ed., as reported in an opinion of Mr. Booth, in 5 *Cruise's Digest*, 312. Here, the power of attorney, as the deed of the husband, was valid, and made the appointee competent to surrender the copyhold into the hands of the lord.

Then as to the effect of the devise on the copyholds first mentioned in the declaration. A copyhold tenant might, before the late statute, acquire the power to devise copyholds by making a previous surrender to the uses of his

will. The law would not, from a general devise of the real estate, infer an intent to give copyholds which the deviser had not qualified himself to devise by a previous surrender; but, where there was a previous surrender, the law would infer from such general devise that the testator intended to give all which *he had a right to give. Now here Mrs. Warren, by the recovery and surrender to such uses as she should appoint, had acquired the potentiality of passing, by her will, all the copyholds which were in settlement. It is said that they will not pass because the will does not refer to the power; but why did she acquire the power to make a will but for the purpose of exercising it? She reserved to herself a special right of disposition and a fee also; she has done what was necessary to give her the potentiality of disposing. This is not, strictly speaking, a power, but a right of disposition. To another objection made, the answer is, that the right of disposition is reserved to Mrs. Warren, not during, but notwithstanding, her coverture. The object evidently was, that she should have a power of disposition which she would not otherwise have, but not that she should have that only. Then as to the copyholds not surrendered to the use of her will, the want of a surrender is supplied by the statute, which is not confined to wills made after the statute. It enacts, that every disposition made or to be made by any last will, by any person who shall die after the passing of that act, of copyhold tenements, shall be as valid and effectual, although no surrender shall have been made to the use of the will, as if a surrender had been made. The words "any person who shall die," &c., would be idle unless the act referred to wills already made. This is a case within the words of the statute. If a testator, before the statute, devised all his real and personal estate, and his copyholds expressly, without having surrendered the latter to the use of his will, they would not pass. The object of the statute was to supply that defect. *Cur. adv. vult.*

*DENMAN, C. J., in the course of this term delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—

Upon this state of facts, three questions were raised in argument. First, whether the recovery suffered in 1781 was valid.

Secondly, whether Mrs. Warren's will was a valid execution of the power contained in the surrenders made in the years 1781 and 1782. And,

Thirdly, whether Mrs. Warren's will was sufficient to pass the lands to which she was admitted in 1790, having been made before the passing of the 55 G. 3, c. 192, although she died subsequently to that act.

With respect to the first question, it was objected that the recovery was void because a married woman could not, previous to the 47 G. 3, stat. 2, c. 8, appear and suffer a recovery by attorney, and because there was not a good tenant to the præcipe, inasmuch as the power of attorney to James Guy was void as regarded Mrs. Warren, who was then a married woman, and inasmuch as her husband could not appoint an attorney for her for the purpose of making a surrender.

It was answered, that a recovery suffered by a married woman, by attorney, is at all events not void, but voidable only by petition to the lord; and that the stat. 10 & 11 W. 3, c. 14, limits reversal of recoveries to twenty years, which have long elapsed, and that there was a good tenant to the præcipe, because, admitting that the power of attorney was void as the act of Mrs. Warren, and that her husband could not appoint an attorney for her for the purpose of surrender, as is expressly laid down in Watkins on Copyholds, vol. i. p. 65, yet that the power of attorney was valid as the act of *Dr. Warren, and that the husband has such an interest in his wife's copyhold lands, as that he may pass them by surrender during the joint lives of himself and his wife, though such a surrender will not operate as a discontinuance of his wife's estate. [*712]

We are of opinion, that this is the true answer to the objection; that the

act of the husband was sufficient to make a good tenant to the præcipe; and that the recovery, not having been reversed within twenty years, is good.

With respect to the second question, it was objected that the will was not a good execution of the power contained in the surrenders of 1781 and 1782, for two reasons: first, because it does not refer to the power, nor the subject of it; and, secondly, because the power extends only to the period of Mrs. Warren's coverture, whereas the will was made after she became a widow.

It is true, that the will is in general terms, and does not refer either to the power or the subject of it; it is also true, that there is other property upon which it would operate; but, in regard to copyholds, such a clause in a surrender is not strictly a power, but a mode of rendering the lands devisable. And it is not essential that the will should refer to the surrender: *Manwood's case*, Cary's Reports, 25, ed. 1650. Then as to the time of the execution, we are of opinion that the power is not restricted to the time of Mrs. Warren's coverture: the words are not "during her coverture," or whilst she shall be covert, but "notwithstanding her coverture, and as if she were sole and unmarried;" they were plainly intended to enable her to make a will whilst married as if she were sole, but not to disable her if she should actually become sole.

[*713] *With respect to the third question there is more difficulty. In the case of *Doe dem. Clarke v. Ludlam*, 7 Bing. 275, it was held that copyholds would pass under general words in a will made since the stat. 55 G. 3, c. 192, although there had been no surrender; but it does not follow that they will pass under such words in a will made previously to the statute. We have not found any authority upon the point; but looking to the state of the law previous to the statute, and to the words of the statute, we are of opinion, that this will is not a disposition or devise of the copyhold lands to which Mrs. Warren was admitted in 1790; and therefore, that the statute does not cure the want of a surrender. The words of the statute are, "that in all cases where, by the custom of any manor in England or Ireland, any copyhold tenant of such manor may by his or her last will and testament dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made or to be made by any such last will and testament, by any person who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual, to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will." If the will had contained an express devise of copyholds, no doubt this statute would have applied [*714] to the present case, for the words are "made or to be *made;" or if there had been an implied devise of copyholds, the same consequence would have followed. But if there be neither one nor the other, and if the legal effect of the words of the will be to raise the presumption that the testatrix, at the time of making the will, intended the copyholds not to pass, the statute cannot alter that presumption, and supply a different intent. Now it has been established, by a long series of cases prior to the statute, that general words in a will are not to be applied to copyholds which have not been surrendered to the use of the will, if there be freehold lands on which they can operate, because the absence of a surrender shows that the testator intended that they should not be so applied. It follows that, when this will was made, it was not a disposition by will of the copyholds not surrendered; and neither the statute, nor anything that has happened since, can alter the fact and make it such a disposition. The case of *Doe v. Ludlam*, 7 Bing. 276, rests on a totally different ground, for there the will was made since the statute; and it seems clear that the statute, by rendering a surrender unnecessary, has done away with the presumption of the testator's intention arising from the absence of a surrender.

Upon the whole, therefore, we are of opinion that the lessor of the plaintiff is entitled as to all the lands except those to which Mrs. Warren was admitted in 1790, and that, as to those, the defendant is entitled.

Judgment accordingly.

*HARE *v.* HORTON. Nov. 18.

[*715]

A., by a deed of mortgage, granted, bargained, sold, released, and confirmed to B. (in his possession then being by a previous bargain and sale), an iron foundry and two dwelling-houses, &c., and the appurtenances; together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses; and all trees, houses, cottages, commons, &c., easements, profits, &c., to the said foundry, messuages, and lands appertaining. There were cranes, presses, a steam-engine, and other fixtures in the foundry, used for the purposes of the business carried on there, and valued at 600*l.*: Held, that the specification of the grates and other fixtures in and about the dwelling-houses, showed that those in the foundry were not intended to pass, though they would have passed if the others had not been mentioned.

Declaration stated, that an iron foundry, messuages, and cranes, boilers, and other machinery, &c., which were described, were in the possession of plaintiff's tenant, the reversion belonging to plaintiff; and that defendant, contriving to injure plaintiff in his reversionary interest, while he was such reversioner, broke and entered the said foundries, machinery, &c., and messuages, with the appurtenances, cranes, boilers, &c., tore up, broke down and prostrated the same; seized, carried away, and converted the machinery, &c., and the cranes, boilers, &c., affixed to plaintiff's reversionary interest, and scattered and spread the same with rubbish, greatly injuring the said reversionary estate. Plea, not guilty. At the trial it appeared that the plaintiff had no right to the fixtures: Held, nevertheless, that enough appeared on this declaration to support a verdict for the plaintiff for unnecessary damage done in removing the fixtures, of which proof had been given.

Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage: Held, that the possession of it by plaintiff was *prima facie* evidence that it had been delivered to him as a deed.

CASE. The declaration stated that before and at the time, &c., divers, to wit, ten iron foundries, machinery, apparatus and furniture, ten messuages or dwelling-houses, ten warehouses, ten shops, ten yards, and ten gardens, with the appurtenances, situate, &c., and divers, to wit, twenty cranes, twenty boilers, twenty furnaces, twenty steam-engines, &c. (describing many other articles of machinery), twenty desks, twenty tables, &c. (describing other furniture, and tools), were in the possession and occupation of William Bailey, as tenant thereof to the plaintiff, the reversion thereof belonging to plaintiff: and that defendant, contriving and intending to injure plaintiff in his reversionary estate in the said foundries, machinery, &c., with the cranes, boilers, &c., whilst the same were in the possession of W. B. as tenant to plaintiff, and whilst plaintiff was so interested *in the same as aforesaid, viz., on, &c., wrongfully and [*716] unjustly, without the leave, and against the will of plaintiff, "broke and entered the said iron foundries, machinery, apparatus, and furniture, messuages or dwelling-houses, warehouses, &c., with the appurtenances, cranes, boilers, and furnaces, and other goods and chattels before mentioned, and tore up, broke down, pulled to pieces, prostrated, and destroyed the same, and seized, took, and carried away, and afterwards, on, &c., converted to his own use, the said machinery, apparatus and furniture, boilers, cranes, and furnaces, and other goods and chattels before mentioned, and things which were affixed to the reversionary estate and interest of the said plaintiff in the said iron foundries, machinery, apparatus, furniture, messuages or dwelling-houses, warehouses, &c., with the appurtenances, cranes, boilers, &c., and other goods and chattels before mentioned, and scattered and spread the same over with large quantities of bricks, stones, mortar, and rubbish, and continued the same so scattered and spread, greatly injuring the said reversionary estate of the said plaintiff therein,

from thence hitherto." By means whereof plaintiff was greatly injured in his said reversionary estate of and in the said iron founderies, machinery, &c. There was also a count in trover for like goods and chattels to those above mentioned. Plea, not guilty.

At the trial before PARKE, J., at the Stafford Spring assizes, 1833, the following facts appeared. In December, 1830, Bailey entered into an agreement with the defendant to buy of him the fee-simple of an iron foundry, lands, and dwelling-houses, at Great Bridge, in Staffordshire, for 4,500*l.*; and at the same time the parties signed *an agreement, not under seal, for the purchase [*717] by Bailey of the defendant's good will in his business of a gasometer-maker at 200*l.*, and also of his stock and implements of trade, tools and fixtures, in the warehouses, shops, &c., occupied by him at Great Bridge aforesaid, at a valuation to be taken as in the agreement was mentioned, the amount to be paid by instalments at stated periods, and the payment to be secured by certain promissory notes: and it was further agreed, that the defendant should have the use of a house and garden, &c., part of the premises, till Christmas, 1831, and should be at liberty to finish certain works, then in the course of manufacture, upon the said premises. For the purpose of raising a part of the purchase-money, Bailey and the defendant executed a mortgage deed to the plaintiff, which was in substance as follows:—

By indenture, bearing date the 22d of February, 1831, between the defendant of the first part, William Spurrier of the second part, the said William Bailey of the third part, and the plaintiff of the fourth part, reciting certain indentures of lease and release of the 7th and 8th of December, 1825, whereby all that iron-foundry, together with the two dwelling-houses, warehouses, shops, yards, garden, and appurtenances thereto belonging, situate at or near Great Bridge, &c., formerly in the occupation, &c., and also all that close, called the Foundry Field, situate near Great Bridge aforesaid, adjoining, &c., then in the occupation, &c., together with their rights, members, and appurtenances, were conveyed, limited, and assured to such uses as the defendant should appoint, and in default of appointment, to the use of him and his assigns during his life, with a limitation to the use of Spurrier, his executors, &c., during the life of the de- [*718] fendant, remainder to the use of the defendant in fee; *reciting also, that the defendant had contracted with Bailey to sell him the fee-simple of the foundry, messuages, lands, and other hereditaments intended to be by that deed appointed and released, for 4500*l.*; reciting also, that Bailey had requested the plaintiff to lend him 3500*l.* to enable him to complete the purchase, and the plaintiff had agreed to do so on having the said sum and interest thereon secured by mortgage on the said foundry, messuages, lands, and other hereditaments, as after mentioned: it was witnessed, that, in pursuance of the agreement on the part of the defendant, and in consideration of 1000*l.*, part of the purchase-money, paid to him by Bailey, and 3500*l.*, the residue, paid to him by the plaintiff, and by virtue of the above-mentioned power of appointment, the defendant appointed that the foundry, messuages, lands, and other hereditaments after mentioned, &c., with their appurtenances, should go and remain to the use of the plaintiff in fee, upon the trusts, &c., after mentioned. And Spurrier, in consideration, &c., and at the request and by the direction of the defendant and Bailey, did bargain and sell, and the defendant, at the request, &c., of Bailey, did grant, bargain, sell, alien, release, and confirm to the plaintiff (in his possession then being by a previous bargain and sale), and his heirs, all and singular the said iron-foundry, together with the said dwelling-houses, warehouses, shops, yards, gardens, and appurtenances thereunto belonging, and thereinbefore more particularly described, and then in the occupation, &c.; and also all that close called the Foundry Field, before described, and the dwelling-houses or buildings erected thereon, and all other the hereditaments conveyed in and by the before-recited indentures of lease and release (with the exception [*719] therein made of certain mines, minerals, &c.); *together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-

houses and the brewhouses thereto belonging; and all fruit and other trees growing upon the said premises; and all houses, cottages, out-houses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow and pasture feedings, woods, underwoods, and the ground and soil thereof, commons, &c., and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, water-courses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever to the said foundry, messuages, lands, and other hereditaments hereby released or otherwise assured, or intended so to be, or any of them respectively, belonging or in anywise appertaining, or accepted, reputed, held, &c., as part, parcel, or member of the same, or any of them respectively; and the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said foundry, messuages, lands, and other hereditaments hereby released, &c., and every part and parcel of the same, with their and every of their rights, members, and appurtenances; and all the estate, right, title, interest, &c., of the said William Spurrier and Joshua Horton (the defendant), and each of them, of, into, and out of the said foundry, messuages, lands, and other hereditaments, and every part and parcel of the same, with their rights, &c.;" habendum to the plaintiff in fee, upon and for the trusts, intents, and purposes, and with, and subject to the powers, provisoes, agreements, and declarations thereafter expressed concerning the same. The deed also contained a proviso for reconveyance by the plaintiff to Bailey, his heirs, &c., on repayment of the 3500*l.*, and interest; a power to the mortgagee to sell on default in *payment of the principal or interest; and a proviso, that [*720] Bailey should hold and receive the rents, issues, and profits of the hereditaments by that indenture appointed and released, without let, &c., by the plaintiff, until such default should be made.

The above deed was executed by the defendant and Spurrier (neither the plaintiff nor any person on his behalf being present), and witnessed by Mr. *Fellows*, the defendant's attorney, and Mr. *Caldecott*, his mining agent. The deed was then delivered to *Caldecott*, but there was no evidence of his having delivered it to the plaintiff, except that the plaintiff produced it at the trial.

Bailey was let into possession, and, at the time next mentioned, was in the exclusive occupation of the premises, machinery, and other property, except the house and garden mentioned in the agreement of December, 1830. In June, 1831, a dispute having arisen between Bailey and the defendant as to the fulfilment of that contract, the defendant, with a number of men, entered the foundry, carried away the tools and other movables, and severed and took away, among other things, a steam-engine, cranes, presses, frames for gasometers, and other apparatus, all fixed into the earth or walls, doing thereby much unnecessary damage to the premises. For the injuries caused by this proceeding to the plaintiff's reversionary interest, the present action was brought. The value of the fixtures and tools was stated at the trial to be 1545*l.* The plaintiff was nonsuited, but leave given to move to enter a verdict for 600*l.*, the value of the fixtures, or 35*l.*, the amount of damage done to the freehold in removing them. The points reserved were: First, Whether the fixtures annexed to the foundry passed to the plaintiff by the *mortgage of February, 1831? [*721] Secondly, Whether on the present declaration, the plaintiff could recover for the alleged injury to the freehold? Thirdly, Whether the instrument of mortgage was delivered as a deed, or only as an escrow? A rule nisi having been obtained,

Maule and *R. V. Richards* now showed cause. As to the first question, *Ex parte Quincy*, 1 Atk. 477, as far as it is an authority on the point, tends to show that the fixtures would not pass by the mortgage-deed. The language there used is indeed loose, and no satisfactory reason is assigned. But in the present case, the words of the deed clearly show the intention not to pass the fixtures belonging to the foundry. The grant is, "of the said iron-foundry, together with the said dwelling-houses, warehouses," &c.; after which nothing

is said of the fixtures belonging to the foundry, but the deed goes on; "together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses, and the brewhouses thereto belonging." [PATTESON, J. If there are three houses mentioned, and a grant of fixtures refers only to those in two, can it be said that those in the third will pass?] The maxim, "expressio unius est exclusio alterius," would apply. But the case here is even stronger, for the general mention of fixtures is preceded by that of "grates, boilers, and bells;" and the rule is, that where an enumeration begins with the mention of particular things, subsequent general words only carry things ejusdem generis. If, therefore, the enumeration in this case had been applicable to the foundry as [*722] well as the dwelling-houses, still the grant would not have passed *fixtures of a more important kind than those first-named. The Court, in construing an instrument like this, may look to the intention of the parties, as was done in *Colegrave v. Dias Santos*, 2 B. & C. 78, and if matter debors the deed be admissible to explain that intention (which was left undetermined in *Thresher v. The London Waterworks Company*, 2 B. & C. 608), the agreement of December, 1830, goes far to show that the fixtures in question were not meant to pass to the plaintiff by this mortgage. As to the second point, if these fixtures did not so pass by the deed, there is no proof of any injury sustained by the plaintiff, to which the declaration is applicable. Thirdly, the instrument of mortgage was delivered by the defendant to Caldecott merely as an escrow, to be the defendant's deed on the performance of the previous agreement by Bailey, and any misconduct of Caldecott in parting with it before the proper time could not alter its nature. It is indeed laid down in *Com. Dig. Fait (A. 3)*, that if one deliver a writing, as his deed, to a stranger, to be delivered to the party upon performance of a condition, it shall be his deed presently, and if the party obtains it, he may sue before the condition performed, and *Degory v. Roe* (1 Leon. 152; but see *Moore*, 300, S. C.; see, also, 13 Vin. Abr. *Faits*, M.) is cited. But it is pointed out in *Johnson v. Baker*, 4 B. & Ad. 442, that that dictum in *Comyn* rests upon an erroneous report of the case referred to, which was, in fact, decided the contrary way.

Talfourd, Serjt., *Cripps*, and *Hoggins*, contra. The fixtures in the foundry passed by the mortgage deed. *Accessorium sequitur suum principale*, Shepp. [*723] *Touchst.* *89, 7th edit. by Mr. Preston, and it is there laid down that, "by the grant of mills, the waters, floodgates, and the like, that are of necessary use to the mills, do pass;" and the editor adds, "also a stone belonging to the mill, though separated from the mill to be new-worked." In the present case, many of the articles were necessary for the purposes of the iron foundry, or for carrying on the business of a gasometer-maker. [PATTESON, J. In *Place v. Flagg*, 4 Man. & Ry. 277, it was held, that by mortgage of a mill the mill-stones and tackling passed. There will hardly be any dispute on this point; the question will be, whether the effect of the deed as to these fixtures is not limited by the subsequent parts.] The express mention of the fixtures in and about the dwelling-houses will not prevent the fixtures at the foundry from passing by the general words "the said iron foundry."—"If a man has a house in A., and houses and lands in B., and devises his house in A. to one, and (having demised the houses and lands to D. rendering rent) all those his lands, meadow, and pasture in B. to another, his houses there pass by the word lands, though he mentions his house in A. expressly;" *Com. Dig. Grant*, E. 3, citing 2 Roll. 57, l. 20. Where the land is granted, everything which is inseparable from the soil must pass. If houses would pass, the same reason would extend to the cranes in this case, which are fixed deeply in the ground. And deeds are to be construed most strictly against the grantor. This is an acknowledged principle of law, and the rule for construing maxims and applying them in practice, is to see if they go in accordance with and extend an acknowledged [*724] *principle; but to give the effect contended for to the maxim *expressio unius, &c.* (which is rather a maxim of reason than of law), would be

to contract the operation of the principle just referred to. If the things expressed had been such as would not necessarily pass by the deed, as benches, weights and scales, or water-tubs, the naming of these would have excluded other things of the same description not named. But the fixtures in question did not require to be named or referred to in this deed, and the mention of them should not prejudice the plaintiff, for *utile per inutile non vitiatur*. Any mention of them was nugatory: "*expressio eorum quæ tacitè insunt, nihil operatur*." If the fixtures mentioned be understood as those of the dwelling-houses and brewhouses only, it may be that those particular fixtures were mentioned from an apprehension that they might otherwise have been understood to be removable as tenant's fixtures, upon the grounds stated in *Grymes v. Boweren*, 6 Bing. 437, though no such question could arise as to those in the foundry. As to these last, *Ex parte Quincy*, 1 Atk. 477, is no decision in favor of the defendant, for it does not appear that that case was finally decided; and if the language there used raises any doubt, *Colegrave v. Dias Santos*, 2 B. & C. 76, shows clearly that fixtures will pass by a conveyance of the freehold, if there be no contrary intention expressed: *Thresher v. The East London Waterworks Company*, 2 B. & C. 608, supports the same proposition; and these cases show *Ex parte Quincy* to be no authority, for the purpose for which it is cited. It might further be contended, if necessary, that the machinery and engines let into the *ground passed under the description of "edifices and build- [725] ings," "to the said foundry, messuages, lands, &c., belonging;" *Naylor v. Collinge*, 1 Taunt. 19. That was a case of annexations made to the freehold by a tenant for the purposes of trade; yet it was held that the right to remove was controlled (as to the buildings let into the soil) by the covenant to yield up all buildings in good repair: and the Court said that if there had been an intention to exclude anything, it should have been expressed. Here, even supposing that the machinery might have been removed before the vendor gave up possession, still, after the plaintiff had possession, the right was gone: *Colegrave v. Dias Santos*, 2 B. & C. 76, and *Lee v. Risdon*, 7 Taunt. 188, there cited. The defendant is estopped from denying that the plaintiff had received possession by his own mortgage deed, where he releases to the plaintiff the premises "in his possession then being," &c. In *Steward v. Lombe*, 1 B. & B. 506, land had been mortgaged, together with a windmill which was upon it, fastened to the soil, but capable of being removed; the mortgagor remained in possession; but it was nevertheless held, that the conveyance to the mortgagee prevented a creditor of the mortgagor from taking the mill under a *fi. fa.* The present deed clearly expresses the intention of the defendant and Spurrier to pass to the plaintiff every right and interest which they had in these premises. The only exception from the grant is of the mines and minerals reserved by the indentures of 1825: no exception is made of fixtures.

Secondly, the declaration is in an ordinary form, and it was not necessary to prove all the allegations. It alleges that the defendant broke and entered the *iron-foundries, machinery, messuages, dwelling-houses, &c., and tore [726] up, broke down, prostrated and destroyed the same. That includes the buildings as well as machinery; the declaration, therefore, does state an injury to the substance of the freehold. If the defendant had a right to take the fixtures, he is liable for injuring the premises. It was an excess, which might have been new assigned in an action of trespass, if the plaintiff had been in a situation to bring one: it was also proveable under the general issue.

As to the other point, the deed is found in the possession of the plaintiff. The production of it by him was sufficient, *prima facie*, to show that it was delivered to him as a deed. It did not lie upon the plaintiff to prove that Bailey had performed his part of the agreement between him and the defendant.

PARKE, J.¹ I am of opinion, and the rest of the Court agree with me, that this rule must be made absolute to a certain extent. The first question is, whe-

¹ DENMAN, C. J., was attending the Privy Council.

ther the fixtures at the foundry passed to the plaintiff by the mortgage-deed. Looking at all parts of the deed, and especially in the manner in which the conveyance is qualified as to fixtures by the reference to the dwelling-houses, I am of opinion that the fixtures in question did not pass. *Primâ facie*, the mere conveyance of the foundry would have passed them; but we must look to the deed to see how far that is controlled by subsequent words; and I think no reasonable person can doubt, that, if a transfer of those fixtures had been contemplated, different expressions would have been used. The granting part of the deed (to which the appointing *part refers) is as follows. (His [*727] Lordship then read the description of the premises, and other matters conveyed, as it is set out, *antè*, pp. 718, 719.) Now, I think it is impossible to suppose that if the parties making this grant had intended to convey by it fixtures which are valued at more than 600*l.*, they would have omitted to mention those, and inserted others which are of much less importance. It seems to me, therefore, that the intention was to pass the walls of the foundry and nothing more; and consequently the plaintiff must fail as to that part of the case. Then is he entitled to recover 35*l.* for the alleged injury to the reversion? When I first looked into the declaration, I thought it did not meet the case in this respect: it is only upon examining it more narrowly that I find enough stated to entitle the plaintiff to recover. The real complaint is, the entry of the defendant to take away, and his taking away these fixtures. But the first count contains a number of allegations, which may be read disjunctively. It states that the defendant entered into ten iron-foundries, machinery, apparatus, and furniture, ten messuages, &c., and twenty cranes, &c., in the possession of Bailey as tenant to the plaintiff. There is nothing which obliges the plaintiff to show that Bailey was his tenant both of the walls and the fixtures; the count may therefore be read as if it merely stated that the foundries and messuages were in Bailey's possession as tenant. It then goes on to state that the defendant, contriving to injure the plaintiff in his reversionary estate and interest in the said iron-foundries, machinery, apparatus, and furniture, messuages, &c., with the cranes, &c., [*728] before mentioned, tore up, broke down, pulled to pieces, and *destroyed the same, and scattered and spread the same with rubbish, greatly injuring the plaintiff's reversionary interest therein. The allegations may be taken distributively, and we may read a portion of the count as if it contained merely the simple statement that the plaintiff was entitled to a reversionary interest in the foundry, and the defendant wrongfully entered into it and pulled down a part. That was all which the plaintiff was under the necessity of proving. The defendant's case is, that he entered in exercise of a right; but if that had been specially pleaded, the excess might have been new assigned, and the jury here, have, in effect, found such excess. Stripping the statement of unnecessary allegations, it amounts to a complaint that the defendant, in removing the fixtures, did a damage to the premises, which need not have occurred if the removal had been carefully made. The plaintiff is therefore entitled to a verdict for 35*l.* unless the instrument of mortgage was improperly admitted as a deed. I said at the trial, that although there was evidence that the deed was at first delivered as an escrow, yet its being afterwards found in the plaintiff's possession was some evidence that the condition upon which it was so delivered had been complied with; and the defendant should, if it had been in his power, have shown the contrary. I still remain of that opinion.

TAUNTON, J. On the first point I confess I have not been able to entertain much doubt. It is very plain, that if the granting part of the deed had only mentioned the foundry, messuages, and dwelling-houses, the foundry fixtures, as well as those in the [*729] *dwelling-houses, would have passed: there are many cases which show this. But as the deed goes on to say, "together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses," I think the mention of these fixtures excludes those in the foundry, on the principle, "*expressio unius est exclusio alterius.*" Why, it may be asked, were these particular ones mentioned

if the whole were intended to pass? Besides, the mention of bells and other fixtures of an inferior kind, shows that fixtures of greater value and on a larger scale were not contemplated. And in the recital of the plaintiff's agreement to lend money, in the early part of the deed, it does not appear that any security was proposed beyond that of the real property. As to the second point, the declaration is nearly silent on that which is the real gist of the action; namely, the taking away of the fixtures without due care to avoid damaging the premises. Almost the whole of the first count is pointed to acts of force, not negligence, and seems to have been framed on the speculation that the taking of the fixtures could be made the cause of action. There are, however, some words in that count which cannot be rejected, and which amount to an allegation, divisible from the rest, of a cause of action upon which the plaintiff is entitled to recover. It is stated that the defendant broke and entered the iron-foundries, machinery and apparatus, and tore up, broke down, pulled to pieces, prostrated and destroyed the same; that is, all these, or some one of these things, which includes, among the rest, the walls of the foundry: and that so the plaintiff was damaged in his reversionary interest to an amount covering the sum found by the jury. We cannot say, therefore, that the declaration is wholly beside the cause of action. As to the third point, the *fact of the deed being in the plaintiff's possession was *prima facie* evidence of its having been delivered to him as a deed. [*730]

PATTESON, J. I have had considerable doubt on this case, but am now satisfied that the mortgage deed did not carry the fixtures. I should be sorry to bring into question the decision of this Court, that a conveyance of premises will pass all that is attached to them: and at first I thought that the language of the appointment in this deed was large enough to carry the fixtures in question; but that clause refers to the granting part; and we there find that the defendant and Spurrier grant and confirm the iron-foundry, &c., together with all grates, bells, boilers, and other fixtures in and about the two dwelling-houses; and, therefore, the rule applies "*expressio unius est exclusio alterius*." As to the declaration, I am now of opinion, though I at first thought otherwise, that it is sufficient to include the present cause of action. The first count is for an injury to the plaintiff's reversionary interest in houses, foundry, and fixtures. The plea of not guilty, if put into other words, alleges that the plaintiff had no reversionary interest in the fixtures; and, as to the supposed injury to the building, that the defendant acted in exercise of his right, doing no unnecessary damage. The plaintiff, by joining issue, denies the assertion that the defendant did no unnecessary damage. On the third point a sufficient answer has been given.

Rule absolute to enter a verdict for the plaintiff for 85*l.* on so much of the first count as relates to the injury to the reversion. The verdict to be for the defendant on the rest of the first count, and on the second.

*DOE dem. PILKINGTON v. WILLIAM SPRATT. [*731]

A. devised copyhold lands to his son D. S. and his wife, and J. H. and his wife, or the survivor of them, for their lives; and after the decease of all of them, to the male heir-at-law of him the testator, his heirs and assigns for ever; he then bequeathed legacies to three other sons, and afterwards died, leaving five sons and one daughter, three by his first wife, and three by his second: Held, that the fee vested, at the testator's death, in the person who was then his male heir-at-law, and did not remain contingent until the determination of the life estates.

EJECTMENT to recover possession of a messuage and lands being copyhold of the manor of East and West Deeping in the county of Lincoln. At the trial before DENMAN, C. J., at the Spring assizes for the county of Lincoln, 1833, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—

William Spratt, by his will dated the 10th of March, 1801, devised as follows:—"I give and devise all that my cottage and lands, being formerly two tenements, called the Customs, together held by copies of court roll of the manor of East and West Deeping, under the yearly rent of 9s. and 6d., with the appurtenances thereunto belonging, unto my son Daniel Spratt and Sarah his wife, and James Hankin and Elizabeth his wife, or the survivor of them, during their natural lives and no longer; and after the decease of all of them to the male heir-at-law of me the said William Spratt, his heirs and assigns for ever. I give and bequeath unto my sons Charles, Urias, and James, seven shillings each, to be paid within one month after my decease. And I do hereby nominate and appoint my sons Daniel Spratt and James Hankin joint executors of this my will." According to the custom of the manor, copyholds may be granted in tail. The premises mentioned in the above devise were those for the recovery of which this action was brought. The testator died on the 10th of October, 1801, leaving five sons and one daughter; William (the *eldest), Charles, and Elizabeth, by his first wife; Daniel, the eldest child by the second marriage, Urias, and James, by his second wife. On the 28th of April, 1802, Daniel Spratt, and Sarah his wife, and Elizabeth Hankin, widow of the, above mentioned James Hankin, the survivors of the devisees for life mentioned in the devise above set out, were duly admitted to the said premises to hold to them and the survivors of them during their natural lives. On the 1st of October, William Spratt, eldest son and heir-at-law of the testator, was admitted to the reversion of the said premises, expectant on the death of Daniel Spratt and Sarah his wife, the then surviving devisees for life. On the 20th November, 1806, the said William Spratt and the devisees for life surrendered absolutely to the use of Benjamin Handley certain common rights in East and West Deeping, which were appurtenant to the said devised premises; and the said Benjamin Handley was admitted to such common rights upon that surrender; and upon an inclosure which afterwards took place, allotments were made to him in respect thereof, of which he is still possessed. William Spratt, the son, died without issue and intestate in 1811; and on the 17th January, 1821, Charles Spratt, brother and heir-at-law of the said William Spratt, was admitted to the reversion of the premises in question, expectant on the death of the tenants for life. On the 14th November, 1821, Charles Spratt joined the tenants for life in a conditional surrender of the premises in open court to the lessor of the plaintiff, his heirs and assigns, with a proviso for redemption by Charles Spratt, or the tenants for life, or either of them, their heirs, executors, or administrators; and the lessor of [*733] the plaintiff was thereupon duly admitted *according to the effect of such surrender. Charles Spratt died in the year 1831, in the lifetime of Daniel Spratt, the last surviving tenant for life, leaving William his eldest son. Daniel Spratt died in 1831, and upon his death, the last named W. Spratt was admitted to all the premises devised by the will. By the custom of the manor of East and West Deeping, an absolute surrender operates to bar an entail. The question for the opinion of the Court was, whether the remainder over, after the death of the tenants for life mentioned in the will, vested in the son who was heir-at-law at the time of the testator's death, or whether it vested, upon the determination of the life estates, in that William Spratt who was, upon such determination, the male heir-at-law of the testator. In the former case the verdict was to stand, in the latter a verdict was to be entered for the defendant. This case was argued in the present term.

N. R. Clarke for the lessor of the plaintiff. The remainder vested on the testator's death in his son W. Spratt, who was then his male heir-at-law. It did not remain contingent until the determination of the life estates. The general rule of law is not to construe a limitation in a will as a contingent remainder, if it be capable of being considered as vested; and on that princi-

if the whole were intended to pass? Besides, the mention of bells and other fixtures of an inferior kind, shows that fixtures of greater value and on a larger scale were not contemplated. And in the recital of the plaintiff's agreement to lend money, in the early part of the deed, it does not appear that any security was proposed beyond that of the real property. As to the second point, the declaration is nearly silent on that which is the real gist of the action; namely, the taking away of the fixtures without due care to avoid damaging the premises. Almost the whole of the first count is pointed to acts of force, not negligence, and seems to have been framed on the speculation that the taking of the fixtures could be made the cause of action. There are, however, some words in that count which cannot be rejected, and which amount to an allegation, divisible from the rest, of a cause of action upon which the plaintiff is entitled to recover. It is stated that the defendant broke and entered the iron-foundries, machinery and apparatus, and tore up, broke down, pulled to pieces, prostrated and destroyed the same; that is, all these, or some one of these things, which includes, among the rest, the walls of the foundry: and that so the plaintiff was damaged in his reversionary interest to an amount covering the sum found by the jury. We cannot say, therefore, that the declaration is wholly beside the cause of action. As to the third point, the *fact of the deed being in the plaintiff's possession was *prima facie* evidence of its having been delivered to him as a deed. [*730]

PATTESON, J. I have had considerable doubt on this case, but am now satisfied that the mortgage deed did not carry the fixtures. I should be sorry to bring into question the decision of this Court, that a conveyance of premises will pass all that is attached to them: and at first I thought that the language of the appointment in this deed was large enough to carry the fixtures in question; but that clause refers to the granting part; and we there find that the defendant and Spurrier grant and confirm the iron-foundry, &c., together with all grates, bells, boilers, and other fixtures in and about the two dwelling-houses; and, therefore, the rule applies "*expressio unius est exclusio alterius*." As to the declaration, I am now of opinion, though I at first thought otherwise, that it is sufficient to include the present cause of action. The first count is for an injury to the plaintiff's reversionary interest in houses, foundry, and fixtures. The plea of not guilty, if put into other words, alleges that the plaintiff had no reversionary interest in the fixtures; and, as to the supposed injury to the building, that the defendant acted in exercise of his right, doing no unnecessary damage. The plaintiff, by joining issue, denies the assertion that the defendant did no unnecessary damage. On the third point a sufficient answer has been given.

Rule absolute to enter a verdict for the plaintiff for 35*l.* on so much of the first count as relates to the injury to the reversion. The verdict to be for the defendant on the rest of the first count, and on the second.

*DOE dem. PILKINGTON v. WILLIAM SPRATT. [*731]

A. devised copyhold lands to his son D. S. and his wife, and J. H. and his wife, or the survivor of them, for their lives; and after the decease of all of them, to the male heir-at-law of him the testator, his heirs and assigns for ever; he then bequeathed legacies to three other sons, and afterwards died, leaving five sons and one daughter, three by his first wife, and three by his second: Held, that the fee vested, at the testator's death, in the person who was then his male heir-at-law, and did not remain contingent until the determination of the life estates.

EJECTMENT to recover possession of a messuage and lands being copyhold of the manor of East and West Deeping in the county of Lincoln. At the trial before DENMAN, C. J., at the Spring assizes for the county of Lincoln, 1833, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—

William Spratt, by his will dated the 10th of March, 1801, devised as follows:—"I give and devise all that my cottage and lands, being formerly two tenements, called the Customs, together held by copies of court roll of the manor of East and West Deeping, under the yearly rent of 9s. and 6d., with the appurtenances thereunto belonging, unto my son Daniel Spratt and Sarah his wife, and James Hankin and Elizabeth his wife, or the survivor of them, during their natural lives and no longer; and after the decease of all of them to the male heir-at-law of me the said William Spratt, his heirs and assigns for ever. I give and bequeath unto my sons Charles, Urias, and James, seven shillings each, to be paid within one month after my decease. And I do hereby nominate and appoint my sons Daniel Spratt and James Hankin joint executors of this my will." According to the custom of the manor, copy-holds may be granted in tail. The premises mentioned in the above devise were those for the recovery of which this action was brought. The testator died on the 10th of October, 1801, leaving five sons and one daughter; William (the *eldest), Charles, and Elizabeth, by his first wife; Daniel, the eldest child by the second marriage, Urias, and James, by his second wife. On the 28th of April, 1802, Daniel Spratt, and Sarah his wife, and Elizabeth Hankin, widow of the, above mentioned James Hankin, the survivors of the devisees for life mentioned in the devise above set out, were duly admitted to the said premises to hold to them and the survivors of them during their natural lives. On the 1st of October, William Spratt, eldest son and heir-at-law of the testator, was admitted to the reversion of the said premises, expectant on the death of Daniel Spratt and Sarah his wife, the then surviving devisees for life. On the 20th November, 1806, the said William Spratt and the devisees for life surrendered absolutely to the use of Benjamin Handley certain common rights in East and West Deeping, which were appurtenant to the said devised premises; and the said Benjamin Handley was admitted to such common rights upon that surrender; and upon an inclosure which afterwards took place, allotments were made to him in respect thereof, of which he is still possessed. William Spratt, the son, died without issue and intestate in 1811; and on the 17th January, 1821, Charles Spratt, brother and heir-at-law of the said William Spratt, was admitted to the reversion of the premises in question, expectant on the death of the tenants for life. On the 14th November, 1821, Charles Spratt joined the tenants for life in a conditional surrender of the premises in open court to the lessor of the plaintiff, his heirs and assigns, with a proviso for redemption by Charles Spratt, or the tenants for life, or either of them, their heirs, executors, or administrators; and the lessor of [733] the plaintiff was thereupon duly admitted *according to the effect of such surrender. Charles Spratt died in the year 1831, in the lifetime of Daniel Spratt, the last surviving tenant for life, leaving William his eldest son. Daniel Spratt died in 1831, and upon his death, the last named W. Spratt was admitted to all the premises devised by the will. By the custom of the manor of East and West Deeping, an absolute surrender operates to bar an entail. The question for the opinion of the Court was, whether the remainder over, after the death of the tenants for life mentioned in the will, vested in the son who was heir-at-law at the time of the testator's death, or whether it vested, upon the determination of the life estates, in that William Spratt who was, upon such determination, the male heir-at-law of the testator. In the former case the verdict was to stand, in the latter a verdict was to be entered for the defendant. This case was argued in the present term.

N. R. Clarke for the lessor of the plaintiff. The remainder vested on the testator's death in his son W. Spratt, who was then his male heir-at-law. It did not remain contingent until the determination of the life estates. The general rule of law is not to construe a limitation in a will as a contingent remainder, if it be capable of being considered as vested; and on that princi-

¹ Nov. 15th. Before DENMAN, C. J., PARKE, TAUNTON, and PATTESON, Js.

ple the decision in *Doe v. Maxey*, 12 East, 589, proceeded. BAYLEY, J., there says, "It is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have been the intention of the testator; *but if it will admit of being considered as a vested remainder, [734] the Court will always read it as such; because a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated." In *Halloway v. Halloway*, 5 Ves. 399, a testator by codicil, bequeathed 5000*l.* in trust for his daughter for life, and after her decease for such child or children as she should leave at her decease, in such shares as she should think proper to give the same; and in case she should die leaving no child, then in trust for such person as should be his heir-at-law. And Lord ALVANLEY said, "the only question is, whether upon the true construction of this codicil it must necessarily be intended, he (the testator) did not mean by these words what the law *primâ facie* would, strictly speaking, intend, heirs-at-law at the time of his death. A testator certainly may by words properly adapted show that by such words, *persona designata*, answering a given character at a given time, is intended. But *primâ facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case, the words are not necessarily confined to any particular time: nor from the nature of the gift is there any necessary inference, that it should not mean, what the law would take it to mean, heirs at the death of the testator." Those observations apply to the present case. This case is distinguishable from *Doe dem. King v. Frost*, 3 B. & A. 546, where the devise was to the testator's son W. F. and his heirs for ever, and if he should have no children, child, or issue, the estate was on his decease to become the property of *the heir-at-law, subject to such legacies as W. F. might leave by will [735] to any of the younger branches of the family. In that case it was held that W. F. took an estate in fee, with an executory devise over in the event of his dying without leaving issue, to such person as should be then, and in that event, heir-at-law of the testator. That case falls within the rule laid down by Lord ALVANLEY, because it must there have been necessarily intended that the testator meant the person who should be heir of the testator at the death of the son, for he had previously given the fee to the son, who would be heir at his, the testator's death; but here is no such necessary intendment. The gift is to the male heir-at-law. The testator's eldest son was not otherwise provided for.

Preston, *contra*. It is true that the law rather inclines to the vesting of estates than suffering them to remain in contingency; but still, as it is competent to a testator to make a remainder, either vested or contingent, his intention must be collected from the context of the will. Here it sufficiently appears from the whole will, that the testator intended the remainder to be contingent until the determination of the life estates. The gift, after the determination of those estates, is to the male heir-at-law of the testator, his heirs and assigns for ever. Now, the words "heir male" are always held to mean heirs of the body. The gift is not to the eldest son by name, or to the right heirs by character; if it had been so given, the heir might have taken by descent: as it is, the male heir takes by purchase, not by descent. If the testator's eldest son had died during the lifetime of his father, and left a daughter, that *daughter [736] could not have taken under this will, because she would not have been heir male: *Counden v. Clerke*, Hob. 29. But here, the estate to be taken by the heir male, is to him and his heirs. And when he was ascertained, the testator intended to let in the largest possible course of descent. *Doe dem. Cholmondely v. Maxey*, 12 East, 589, was undoubtedly decided on the principle, that the law rather inclined to the vesting of estates than suffering them to remain in contingency; but *Phillips v. Deakin*, 1 M. & S. 744, which comes very near the present case, is an instance where the Court collected from the context of the will, an intent to suspend the remainder until the determination of the particular estate. There the testator, after a gift of several particular

estates, for default of issue, devised in these words: "to such of the uses, for such of the intents and purposes, and under and subject to such of the limitations, powers, provisoes, conditions, and agreements mentioned and declared in and by the said will of my late cousin Thomas Vernon, as shall be then existing undetermined, or capable of taking effect, or as near thereto as the deaths of parties, and other intervening accidents and contingencies, and the rules of law and equity will then admit of." The Court declared that the limitation to the party who would be entitled under the recited will, was contingent and suspended till the prior particular estates should be determined. So in *Marsh v. Marsh*, 1 Bro. Ch. Ca. 293, Mr. Belt's edition, the testator ordered the residue of his personal estate to be laid out in the purchase of stock, and that the trustees should pay the interest, &c., to his son W. W. for life; and [*737] from and after his decease, to his eldest son and his heirs for ever; *and in case of their death without issue, unto his (the testator's) nearest relation, and to the nearest relations (heirs of such nearest relation) for ever. At the time of making the will, the testator lived separate from his wife. He had only one son, who was unmarried (and who afterwards died in the lifetime of his father); he had a half sister, the plaintiff; and there were also alive children of a deceased half brother, who, with the testator's widow, were the defendants. And it was held by the lords commissioners, that if W. W. had had a son, that son would have taken the whole from his birth, but that at the decease of W. W. without issue, there was a good remainder over to the then nearest relation of the testator, namely, the half sister: and, according to the note from Sir S. Romilly's MSS., Lord LOUGHBOROUGH said, "the testator certainly meant that the nearest relation at the time of the decease of the son should take the property, not the nearest at his own decease. To suppose he meant a reversion to his son, is impossible; and his widow clearly has no title. The surviving sister is alone entitled." *Doe v. Frost*, 3 B. & A. 546, already mentioned, is an authority the same way. *Cholmondely v. Clinton*, 2 Meriv. 171; 2 B. & A. 625; 2 Jacob & W. 113, also is to the same effect. On the intent of the deed there, it was argued, that the ultimate limitation to the use of the right heirs of S. R., was to the person who should answer that description at the determination of the prior particular estates, and not to Lord Oxford, himself the grantor, who, at the date of his deed, was the right heir. On a case from the Court of Chancery, the majority of the Judges certified their [*738] opinion that the words right heirs were words of plain *and well-known import; and, therefore, must denote the settlor himself, and that the ultimate limitation was void. BAYLEY, J. was of opinion, and certified, that, from the context of the deed, its effect was to vest in the settlor an estate in tail, with remainder to such person as, at the expiration of that estate tail, should be right heir of S. R. in fee. Here it is proper to look to the state of the testator's family. There were five sons and one daughter; and three sons were of the half blood to the other two sons and daughter. Testators generally look more to the time for possession than the time of vesting. The testator, in this case, most probably meant the person who would be his heir-at-law at the determination of the particular estates; and the construction, that his immediate heir at the time of his death took, would exclude the brothers of the half blood, while they had a chance by suspending the time of vesting. Looking at this state of the family connexion, the true construction of the will is, that the testator meant the person who would be heir male at the time of the determination of the particular estates; and, at that time, the taker was to have the largest possible estate, in point of descendible qualities.

N. R. Clarke in reply. In *Phillips v. Deakin*, 1 M. & S. 744, the devise after the gift of the particular estates was, for default of such issue, to such of the uses, &c., as should be then existing undetermined, or capable of taking effect. Here there is no corresponding language to show that the testator must have meant the remainder to vest only on the death of the tenants for life. In

all the other *cases cited there were grounds of decision which do not exist here. The argument from the exclusion of the half blood would [*739] apply to any case where parties would have a chance by suspending the time of the estate vesting. *Cur. adv. vult.*

DENMAN, C. J., in this term delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—The law favors the vesting of estates, and it is an established rule of construction, not to read a limitation in a will as being a contingent remainder, unless such clearly appears to have been the testator's intention—if it admits of being considered as a vested remainder, it will always be read as such. Consequently, where land is given to one for life, or any other estate upon which a remainder may be limited, and after the determination of that estate, to a person sustaining a given character as heir-at-law, heir male, or next of kin of the testator, or of another, the remainder will vest in the person or persons who fill that character at the death of the testator, unless it can be plainly and distinctly made out from the will that the testator intended otherwise. Cases in which the rule is laid down were quoted on the argument, and others were referred to, in which the clear intention of the testator to the contrary prevailed.

Upon examining the latter class of decisions, it will be found that the intent of the testator, that the person who filled the required character at his death should not take, is to be collected in the clearest way from the provisions of the will. In the present case, there are none of the circumstances relied upon in that *class of cases; there is no inconsistency in adopting the general [*740] rule; there is nothing to show that the testator did not mean, by the words "heir male at law," what the law would, strictly speaking, intend, heir male at law at the time of his death. The words are not necessarily confined to any particular time, nor does the case furnish any certain inference that they were so limited. They merely raise a conjecture that this testator, as other ignorant persons usually do, looked to the period of the actual possession, and not the vesting of the estate in remainder, and had in his contemplation the person who would be his heir-at-law at that time.

In the cases relied on for the defendant, an intent contrary to the general rule was shown. Thus in *Doe v. Frost*, 3 B. & A. 546, where the devise was to W. F. (the testator's eldest son and heir-at-law) and his heirs for ever; and if he should have no children, child, or issue, the said estate, on the death of W. F., to become the property of the heir-at-law, subject to such legacies as W. F. might leave by will to any of the younger branches; it was held that the executory devise over vested in the person who would be heir-at-law at the death of W. F. without issue living at his death; for it is clear that W. F. himself could not be meant as the heir-at-law, as then the devise over would be nugatory, and the power of leaving legacies unnecessary.

Again, in *Phillips v. Deakin*, 1 M. & S. 744, where the devise was to the testator's daughter for life, remainder to her first and other sons in tail male, with remainder over to his niece, her sons and daughters severally and successively in tail, and for default of such issue, to such of the uses, *and [*741] subject to such limitations declared by the will of Thomas Vernon, as shall be then existing, or capable of taking effect, or as near thereto as the deaths of parties will then admit, it was held that T. S. Vernon, who would have been tenant in tail in possession under the will of Thomas Vernon, took no vested estate under the will in question, for the use of the word *then* clearly showed that until failure of issue of the niece, the person to take should not be determined. In *Marsh v. Marsh*, 1 Bro. Ch. Ca. 293, where there was a bequest of the interest of stock to the testator's son for life, and from and after his decease to his eldest son and his heirs, and in case of their death without issue, to the testator's nearest relations, Lord LOUGHBOROUGH held (as appears by Mr. Bell's note) that the nearest relation, when the event happened, must have been intended, because it was impossible to suppose he meant his son to whom he had given the previous estate.

The last case mentioned was *Lord Cholmondely v. Clinton*, 2 Meriv. 171; 2 B. & A. 625; 2 Jacob & W. 118, in which the intention to be collected from the recital and other parts of the deed itself was clear, that the limitation to the right heirs of Samuel Rolle was not intended to vest in the settlor himself.

The verdict therefore which has been entered for the plaintiff must stand.

Judgment for the plaintiff.

[*742] *RIPPINGHALL, Clerk, v. LLOYD. Nov. 19.

Vendor covenanted under seal to vendee that he would, on or before the 30th of November, then next, deduce a good title to the premises sold: and would, on or before the 8th of January execute a proper conveyance for conveying the fee-simple: and it was stipulated that the conveyance should be prepared by and at the expense of the vendee; and further that if the vendor should not verify the title to the vendee or his agent, by production of deeds, &c., at Norwich, Lynn, or London, before the 30th of November, the agreement should be void.

In an action of covenant by the vendee, two breaches were assigned: first, that the vendor did not on or before the 30th of November, deduce a good title; secondly, that the defendant did not, on or before the 8th of January, execute a proper conveyance.

Plea first, that the vendor did, before the 30th of November, produce and show divers deeds, in part deducing a good title, and that until and upon that day he was ready and willing to produce and show to the vendee other deeds, completing such title, and would, on or before that day, have produced such deeds to the vendee or his agent attending, whereof the vendee had notice, but that he would not by himself or agent attend: Held, on special demurrer, that the plea was bad, inasmuch as the vendor's covenant was general, and therefore the facts stated were no excuse: And that if the covenant could be read as qualified by the subsequent stipulation as to place, the plea ought to have averred notice to the vendee at which of the three places the vendor would be ready to produce his deeds.

Plea, secondly, to the first breach, that by a subsequent agreement made before any breach committed, the time for deducing title had been enlarged; and that the vendor was ready to deduce title within such enlarged time. Thirdly, the defendant pleaded a similar agreement after breach, and that plaintiff accepted such agreement as a substitution for the former, and as a satisfaction of the damages resulting from the breach; and that the defendant was ready to fulfil such agreement, but plaintiff refused, &c.:

Held, on special demurrer, that the second plea was bad, in not stating the new agreement to have been under seal. Leave given to amend the third plea, by stating the new agreement to have been in writing; but, quare, if it were so, whether the facts amounted to a good accord and satisfaction.

Plea to the second breach of covenant, that the vendor, until and on the 8th of January, was ready and willing to execute proper conveyances, and would have executed the same if the plaintiff would have prepared and tendered them, but that he did not do so.

Replication, that the vendor did not deduce a good title, wherefore the vendee did not, prepare the conveyances.

Rejoinder, that although the vendor, within a reasonable time before the 8th of January, was ready and willing, and offered to deduce a good title, so that the vendee might, before the 8th of January, have prepared and tendered conveyances, whereof the vendee had notice, yet the vendee refused to have such title deduced, and discharged the defendant from deducing such title. Surrejoinder, that the vendor was not ready and willing to deduce, &c.

On general demurrer, Held, that, upon this breach, the matter pleaded by the vendee was no answer to the pleas of the vendor, and that the latter was entitled to judgment.

COVENANT. Declaration stated that on the 23d day of October, 1827, by articles of agreement under seal, the defendant agreed with the plaintiff to sell him the fee-simple and inheritance in possession of certain freehold and leasehold property for 21,020l.; and that defendant would on or before the 30th day of October then instant, at his own expense, make and deliver to [*743] *the plaintiff, or his agent, an abstract of his, defendant's, title to the premises; and would, on or before the 30th November then next, deduce and show forth a good and clear title thereto, and to every part thereof (except a certain right of free warren) to the plaintiff, and also that defendant would

on or before the 8th day of January then next, on receiving the 21,020*l.* from the plaintiff, execute the proper conveyance for conveying and assuring the fee simple and inheritance of and in the said freehold premises to the plaintiff, his heirs and assigns for ever, and also for conveying, assigning, and assuring, all the interest in the leasehold premises to the plaintiff; and it was further agreed, that the said conveyances should be prepared by and at the expense of the plaintiff. Averment that the plaintiff was always ready and willing to have accepted a proper conveyance at his own expense, on having a good and clear title deduced and shown; and also, on having such title as aforesaid, and having such conveyance made, to have paid the defendant 21,020*l.*, whereof the defendant had notice, and was requested by the plaintiff to show forth, deduce, and make such good title, and to execute such conveyance. Breach, first, that the defendant did not nor would, on or before, &c., or at any time, &c., deduce or show forth, or make a good and clear title to the said premises. Secondly, that the defendant did not nor would, on or before the said 8th day of January, or at any time, &c., execute a proper conveyance as aforesaid. The agreement was set out on oyer, containing the covenants stated in the declaration (*vis.* to deliver an abstract on or before October 30th, to deduce a good title on or before November 30th, and to execute a conveyance on receiving the 21,020*l.*); to which was *added a further agreement, that the conveyance should be prepared by or at the expense of the said S. F. Rippinghall; and [*744] further, that if the said J. Lloyd shall not deliver a full abstract of his title to the said several hereditaments and premises to the said S. F. Rippinghall or his agent before the said 30th day of October instant, and shall not verify the same by the production of all the deeds, evidences, and writings in support thereof, to the said S. F. Rippinghall, or his agent at Norwich, Lynn, or in London, before the said 30th day of November instant, and shall not deduce and show forth a good and marketable title to the said several hereditaments and premises hereinbefore mentioned, on or before the said 30th day of November next, and shall not, on or before the 8th day of January next, by himself and all other proper and necessary parties, have executed the said conveyances at Norwich, at Lynn, or in London, and have delivered the same to the said S. F. Rippinghall on receipt of the said purchase-money, then and in any or either of the said cases, and immediately after the said 30th day of October, or the said 30th day of November, or the said 8th day of January, as the case may be, this present agreement shall be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred.

The defendant after pleading three pleas, which it is unnecessary to notice, pleaded, fourthly, to the first breach of covenant, that he did before the said 30th of November, to wit, on, &c., by his agents (an abstract of the title of the defendant to the said premises having been theretofore delivered by the defendant to the plaintiff), produce and show forth unto agents of the plaintiff [*745] *in that behalf, divers deeds, &c., in part deducing and showing forth a good and clear title to the said manors and premises; and that he the defendant, until and upon the same 30th of November, was ready and willing, by his agents in that behalf, to produce and show forth unto the plaintiff or his agents in that behalf, divers other deeds, &c., completing the deduction and showing forth of such title as last aforesaid, and would on or before, &c., have produced such other deeds to the plaintiff or his agents attending or appearing for that purpose according to the said agreement, and the defendant's said covenant in that behalf, whereof the plaintiff had notice; but that the plaintiff did not nor would on or before the same 30th of November, by himself or his agent or agents in that behalf, attend or appear for the purpose aforesaid.

Fifth plea, to the same breach of covenant, that before any breach, a new agreement (not alleged to be under seal) was made, extending the time for deducing title, and that title was deduced within that time.

Sixth plea, to the same breach of covenant, that after the committing of that

breach, and before the exhibiting of the plaintiff's bill, to wit, on the first day of December, 1827, by a certain agreement between the plaintiff and defendant, in consideration that defendant, at the request of the plaintiff, had then agreed to deduce and show forth a good title to the said premises within a reasonable time in that behalf, and thereon and within a reasonable time, to make, or cause to be made, a good and sufficient conveyance according to the terms of, and in the manner stipulated by, the said articles of agreement in the declaration mentioned, [*746] except as to time, the plaintiff agreed to accept such title and *conveyance, and that the same agreement on the part of the defendant should be taken, and be as a substitution for the covenants of the defendant in the said articles of agreement in that behalf contained as to time, and the plaintiff accepted the said agreement so entered into between the plaintiff and defendant in full satisfaction and discharge of the damages by the plaintiff sustained by reason of the breach of covenant first above assigned, and thereby acquitted and discharged the defendant from the damages. The plea then stated that defendant was ready to fulfil the last-mentioned agreement, but that the plaintiff did not, nor would by himself or his agent attend, so that such title might be deduced and shown forth within such reasonable time, or at any other time, and wholly refused to accept such title and conveyance as aforesaid.

Eighth plea, as to the second breach of covenant, that defendant before, and until, and upon, the said 8th day of January, was ready and willing, with all necessary and proper parties, to execute proper conveyances, &c., and would so have done, if the plaintiff would have caused to be prepared and tendered such conveyances as aforesaid for the purpose aforesaid; but that the plaintiff did not prepare any conveyance whatever for the purpose aforesaid.

Special demurrer to the fourth, fifth, and sixth pleas. Replication to the eighth plea that the defendant did not, on or before the said 30th day of November next, or before the said 8th day of January, or at any time since the making of the said articles of agreement hitherto, although duly requested, deduce a good title to the said premises as by the said articles of agreement he [*747] was bound to do, wherefore the plaintiff did not nor *could, on or before, the said 8th day of January, or at any time, prepare or tender, or cause to be prepared or tendered such conveyances as in the eighth plea were mentioned, as he otherwise would have done. And this, &c. Rejoinder, that although he, the defendant, within a reasonable time in that behalf before the said 8th day of January, to wit, on, &c., was ready and willing, and offered to deduce and show forth, and would then have deduced and shown forth a good title to the said premises, so that the plaintiff could and might, on or before the said 8th day of January, have prepared and tendered such conveyances as aforesaid, if he, the plaintiff, would have had such title deduced and shown forth as aforesaid, whereof the plaintiff then had notice, yet the plaintiff refused to have such title deduced, and wholly discharged the defendant from so deducing and showing forth the same.

Surrejoinder, denying that defendant was ready and willing, and offered to deduce title, &c. (as stated in the rejoinder), and concluding to the country. General demurrer and joinder.

Austin for the plaintiff. The fourth plea is bad, because it does not aver a performance of the covenant to deduce a good title, or any excuse for its non-performance. It implicitly alleges a non-performance only, and professes to excuse the non-performance by reason that the plaintiff did not attend, without showing any duty incumbent on him so to do, or place or time fixed for his so doing. The general principle is, that where a party is to do an act, he must either show the act done, or if it is not done, at least that he has performed [*748] everything that it was in his power to do: **Lancashire v. Killingworth*, Com. Rep. 116, cited in a note to *Peeters v. Opie*, 2 Wms. Saund. 352, note (3). Here the covenant is unqualified, to deduce a good title. [PARKE, J. The question is, whether that covenant is affected by the subsequent stipu-

lation, "that if Lloyd shall not deliver an abstract of his title to the plaintiff before the 30th of October, and shall not verify the same by the production of all deeds, &c., at Norwich, Lynn, or in London, the agreement shall be void." That is a stipulation introduced for the benefit of the defendant, the vendor; as his deeds might be dispersed, a liberty to produce them at one of three places named, is reserved to him; but in that case he must be bound to give notice at which of the three places he meant to produce them. It may be doubtful, even, whether, if such notice had been averred, it would have been sufficient; for if the presence of the party is not necessary, his absence will not excuse, though the act is to be done to him: *Comyns's Dig. tit. Condition (L. 5), Rolle's Abr. tit. Condition, 457, l. 45.* The defendant ought to have tendered a conveyance executed, *Standley v. Hemmington, 6 Taunt. 561*, unless the vendee had dispensed with the vendor's tendering the deed: *Jones v. Barkley, Doug. 684.* [PARKE, J. Here the deeds are to be verified, to show the vendor, or his agent, that they agree with the abstract delivered.] Then the defendant did not give notice. In *Sugden on Vendors, 9th edit. p. 245*, it is said, "If either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal." *Standley v. Hemmington, 6 Taunt. 561*, goes further, and shows that [*749] there ought to be a tender of conveyance executed, and demand of the money, and refusal to accept and pay.

The fifth plea is bad, because it admits that the covenant was not performed within the prescribed time, and attempts to excuse the non-performance by an instrument not averred to be under seal: *Blemerhasset v. Pierson, 3 Levinz, 234; Rogers v. Payne, 2 Wils. 376; Roe dem. Gregson v. Harrison, 2 T. R. 425; Thomson v. Brown, 1 B. Moore, 358.* [*Kelly*, for the defendant, here intimated, that he should not rely on this plea.] The same objection applies to the sixth plea. [PARKE, J. Not quite so; the new agreement is there pleaded as accord and satisfaction after the breach of the old.] Then the defendant must contend, that the first agreement had become void by reason of the stipulation, "that if the defendant should not deliver a full abstract of his title, and verify the same, &c., before the 30th of November, &c., the agreement shall be void to all intents and purposes." But that clause was introduced for the benefit of the purchaser only; otherwise the vendor, by neglecting to do the several acts stipulated on the days named, might have made the agreement void at his option. [PARKE, J. The word void in the agreement means void at the option of the vendee. *PATSON, J. Rede v. Farr, 6 M. & S. 121*, is an authority to that effect.] Then the same objection applies to this plea as to the last,—that it attempts to vary an instrument under seal by a parol agreement. Besides, if that plea is to be considered as a plea of accord, it ought to have been shown to be executed. And further, it ought to have appeared [*750] that the new agreement, if performed, would have been a valuable consideration to the plaintiff for relinquishing the old: *Fitch v. Sutton, 5 East, 230.* [PARKE, J. That case does not apply, because this is an action for unliquidated damages.] In *Lobley v. Gildart, 3 Lev. 55*, it was held, that one obligation given in satisfaction for another, was no discharge, whether grounded on an accord or not. [PARKE, J. There the bond had become absolute for a sum certain; that is very different from a covenant for unliquidated damages. An accord with mutual promises to perform is good, there being a remedy to enforce it. *Com. Dig. Accord (B. 4)*, see *Good v. Cheesman, 2 B. & Ad. 328*, judgment of PARKE, J.] Then the latter agreement ought to have been in writing, *Com. Dig. Action upon the case upon Assumpsit (F. 3)*; and it should have been so stated in the plea. Lastly, as to the pleading to the second breach, the rejoinder alleges, that the defendant was ready and willing to deduce a good title, so that the plaintiff might have prepared and tendered conveyances, but the plaintiff refused to have it deduced, and discharged the defendant from deducing it. The surrejoinder

takes issue on that. By the demurrer to the surrejoinder, the defendant admits that, at the time in question, he was not ready and willing to deduce a good title; and if so, there could have been no tender of a conveyance as stated in the plea, and, consequently, no refusal to execute. The only meaning the defendant can have when he pleads that he was ready and willing, &c., is, that he had it in his power, but was discharged. He could not be discharged from what he could not do at the time. The issue was on his ability.

[*751] **Kelly, contra.* The whole question turns on the meaning of the defendant's covenant, which must be construed with reference to the whole of the articles of agreement. If what was covenanted to be done could not be done without the act of the plaintiff or his agent, and the defendant did what he could, to perform the act, and it was owing to the plaintiff's default that it was not perfected, the plea is good. Now the declaration states three covenants, first, to deliver an abstract on or before the 30th of October; secondly, to deduce a good title on or before the 30th of November, and thirdly, to execute a conveyance. What is the meaning of the words "deduce a good title?" If it consisted of a single act, as payment of money, or delivering an abstract, or any other thing which might be done in the plaintiff's absence, the principle of the authorities cited might apply, the money might be paid, or the abstract delivered in the plaintiff's absence; but looking at the covenant here, and the nature of it, it could not be performed without the attendance of the plaintiff or his agent. In the ordinary course of dealing, the abstract is delivered, objections are made, and requisitions stated; the production of marriage certificates and deeds or attested copies is required. If they are in the custody of third persons, it is sufficient to produce attested copies with an intimation that the originals are in such a place, and that they may be compared, if the purchaser will attend. As far as appears, all that was required here was done. It is true that the deeds were to be produced at one of three places, and the plaintiff, the purchaser, would have been obliged to attend one of the three places, if the vendor had been ready there to deduce title; but he could make title by the attested copies, though *he would be bound to give the purchaser the means of comparing them with the originals. The fourth plea alleges, that the defendant was ready and willing to deduce title, and what more could he do? [TAUNTON, J. He might have given notice at which of the three places mentioned, he would be ready and willing to produce the deeds, he having the liberty to produce them at one of the three; how could the plaintiff know at which of the three he was to attend?] In substance it is alleged that he did give notice. The deeds may have been in many different places. The only question is, whether it must not be assumed that he gave such notice as was necessary. It was not necessary to state every place in which the deeds were. If it appears with reasonable certainty, that he has done what was necessary, that will be sufficient. The attending must have been where the deeds were. How could he be ready and willing (as alleged) to produce the deeds completing the title, to the plaintiff, or his agent attending, unless it be assumed that the deeds were at the place where the plaintiff was to attend? [TAUNTON, J. Surely it cannot be contended, on an agreement so generally worded as this, that if the deeds were in a hundred places, the vendee must attend personally at every place where they are.] That is not necessary, but if the vendee insist on seeing the original deeds and they are in so many places, he must by himself or his agent attend at places where they are. [TAUNTON, J. Every prudent vendee would see the original title deeds. The common course is, that first an abstract is delivered, then the original deeds are exhibited, and the vendee's attorney compares them with the abstract.] Those of which the vendor is in possession, [*753] *he must produce and deliver over, but to those which are not under his control, access can only be had in the hands where they are. The vendor must produce attested copies, and refer the vendee to the places where the originals are to be seen. [PARKE, J. If deeds are in the hands of third persons,

the vendor should qualify his covenant.] That is the effect of the covenant here. [PARKE, J. If the plea had alleged that the vendor had pointed out that the deeds were in certain places, and the vendee had refused to look at them, the case might have been different, but he has entered into an unqualified covenant, and must take the consequence whatever it may be.] The question here is what the consequence ought to be. If it be as contended, all the forms of conveyance must be altered. [PARKE, J. The question here is one of strict law, and arises on special demurrer.] The law must be with reference to practice and the subject-matter. [TAUNTON, J. I think the law always, *prima facie*, intends that the vendor has the deeds in his possession, or at least under such control, that he can produce them when necessary. PATTESON, J. You have not stated that you did give the vendee the means of inspecting the deeds, in the way even that you say would be sufficient.] As to the objection taken to the sixth plea, that it does not state the subsequent agreement to have been in writing, the defendant craves leave to amend. [PARKE, J. The Court will give leave, if you can make anything of the substituted contract. PATTESON, J. If you amend, you must not assume that you are right as to the accord and satisfaction.] Then as to the pleadings on the last breach. The covenant of the vendor, to execute a conveyance, depends on a condition precedent *on the part of the plaintiff, though contained in a separate clause, "that the conveyances shall be prepared by him or at his expense." [*754] The defendant, therefore, could not be called on to execute a conveyance, which was to be prepared by or at the expense of the plaintiff, till such conveyance had been prepared. The defendant, therefore, has pleaded that no conveyance was prepared. Then the replication, admitting that this would be an answer, states a new cause of action, that the defendant did not deduce title.

PARKE, J.¹ Your argument as to that is, that the plaintiff's remedy is on the first breach; for if he was prevented from tendering a conveyance, whatever the reason might be, still, a conveyance not being tendered to you, you were not bound to execute. The judgment must be for the defendant as to this;—but the plaintiff is entitled to judgment on the demurrer to the fourth plea, because, by a general covenant, the vendor undertakes to make out title at his own peril; and even if the covenant here is to be taken as qualified by the condition, the plea ought to have stated that he gave notice that he would produce the deed at one of the three places.

TAUNTON and PATTESON, Js., concurred.

Judgment for the plaintiff on the demurrer to the fourth and fifth pleas. The defendant to be at liberty to amend the sixth plea, by stating the agreement to have been in writing. Judgment for the defendant on the demurrer to the surrejoinder.

¹ DENMAN, C. J., was absent.

*DOE dem. EMMA ROGERS and Others v. FRANCIS COOTE [*755]
ROGERS and Others.

A power was reserved to grant leases for a term not exceeding seven years, so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof. The donee of the power granted a lease for seven years, at a specified rent, which lease contained a covenant by the lessee, to find board, lodging, and wearing apparel during the term, for three children of the donee (if they wished it), at 7*l.* a year each, and for the donee's son *gratis*: Held, by PARKE and PATTESON, Js., (TAUNTON, J., dissentiente) that assuming the power to require two conditions, first, that the rent reserved should be the best rent; and, secondly, that there should be no fine or premium; it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, parol evidence was admissible to show that the rent reserved was the best that could be obtained.

EJECTMENT. At the trial before TAUNTON, J., at the Spring assizes for the county of Salop, 1833, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—The lessors of the plaintiff produced indentures of lease and release, bearing date the 24th and 25th of September, 1830, made for the purpose of suffering a common recovery, whereby it was agreed that the recovery should enure to the use of the lessors of the plaintiff for the term of 1000 years. The release contained a power to Elizabeth Rogers to demise or lease the said premises for any term not exceeding ten years from the day of the date thereof, or seven years from the day of the decease of the said E. Rogers, to take effect in possession, so as there should be reserved in such lease the best rent that could be gotten for the same without taking any premium for the making thereof. The defendants put in a lease of the 17th of September, 1831, whereby Elizabeth Rogers, in consideration of the yearly rent therein reserved, and the covenants and agreements therein contained on the part of the lessee, did demise and lease unto Francis Rogers, the premises in question, to hold to him, his executors, &c., for the term of seven years, to be [*756] computed from the day of the decease of the said *Elizabeth Rogers, yielding and paying yearly during the said term, unto Milward Rogers, or to the person, who, for the time being, should be entitled to the freehold and inheritance of the said demised premises immediately expectant on the decease of the said E. Rogers, the yearly rent of 150*l.*, to commence at the expiration of six months from the decease of the said E. Rogers. The lease contained a covenant by the said Francis Rogers, to pay the rent and all taxes, &c.; to keep the premises in good repair during the term, and to manage the said lands, &c., in a husbandlike manner. And the said Francis Rogers, for himself, his executors, administrators, &c., covenanted with the said E. Rogers, her heirs and assigns, that he would, upon the commencement, and from thenceforth during the continuance of the said term, if Martha Rogers, Margaret Rogers, and Mary Rogers, the three younger children of the said Elizabeth Rogers, or any or either of them, should be so minded and desirous, permit and suffer them, and any or either of them, to reside with him the said F. Rogers, and as part of his family in and upon the said dwelling-house and premises, then in the occupation of the said Elizabeth Rogers, for so long as they, the said three children, or any or either of them should think proper; and also that he should, during the time the said children should so continue to reside with him, find, provide, and allow unto each of them good and sufficient and suitable meat, drink, and lodging, upon being paid for the same by each of them, the sum of 7*l.* sterling, per annum, and so in proportion for any less period than a year; and also should, during the term, permit and suffer Edward Cooke Rogers, one of the sons of [*757] the said Elizabeth Rogers, to reside with him in and upon the same *dwelling-house and premises, and at the sole expense, cost, and charges of him, Francis Rogers, his executors, administrators, &c., find, provide, and allow unto the said E. C. Rogers, sufficient board, lodging, and wearing apparel, without having or being paid any compensation for the same. Elizabeth Rogers died soon after the lease was granted. It appeared by affidavit, that Edward Cooke Rogers was of the age of thirty-five years, Margaret Rogers twenty-nine, and Martha and Mary Rogers twenty-four. It was contended for the plaintiff, that the covenants to maintain the lessor's children were in the nature of a premium, and that, therefore, the lease was void on the face of it. For the defendant it was argued that it was a question for the jury, whether the rent reserved was not the best rent that could be obtained; and evidence was tendered to show that before the lease was executed the land had been valued, and the rent reserved in the lease had been fixed by a person of competent skill without any reference to the covenants by the lessee to maintain the lessor's children. The learned Judge was of opinion, that these covenants were in the nature of a premium taken by the lessor, and that the taking of any premium whatever, made the lease absolutely void; and that as it appeared on the face of the lease a

premium had been taken, parol evidence was inadmissible: he therefore directed the jury to find a verdict for the lessor of the plaintiffs. A rule nisi for a new trial was obtained by *Maule*, on the ground of misdirection and the improper rejection of evidence.

Whateley, on a former day in this term, showed cause. The condition in the leasing power is twofold: first, that the best rent be obtained; and, secondly, that no *premium be taken. The lease was void, first, because the best rent was not reserved; and, secondly, because the covenant by the lessee [758] to board and lodge the children of the lessor, was in the nature of a premium taken by the lessor. As to the first point, it is stated in Sugden on Powers, 5th edit., p. 626, that in the *Queensberry* case, see 1 Bligh. 427, Lord ELDON said, "There is but one criterion which our Courts always attend to as a leading criterion in discussing the question, whether the best rent has been got or not: that is, whether the man who makes the lease has got as much for others as he has for himself; for, if he has got more for himself than for others, that is a decisive evidence against him. The Court must see that there is reasonable care and diligence exerted to get such rent as, care and diligence being exerted, circumstances mark out as the rent likely to be obtained." And in the same work, p. 624, it is stated by the author to be clear, that, "under a power to lease at a rack-rent, improvements by the tenant, however valuable, will not authorize a lease at an under value; and if a fine be taken, the lease cannot be supported, not only because it is against the intent of the power, express or implied, but because it is evident that, however considerable the rent, it might have been increased if the fine had not been taken." The very taking of a fine, therefore (which in effect was done here), shows that the best rent has not been obtained. Secondly, the covenant to provide board and lodging gratuitously for one of the children of the lessor was in the nature of a premium, and, if any premium whatever was taken, the lease is not within the power, and parol *evidence was inadmissible to show that the best rent was reserved. That [759] covenant was an advantage to the tenant for life, and not to the reversioner. *Roe v. The Archbishop of York*, 6 East, 86, may be cited to show that the question, whether the best rent was reserved, ought to be submitted to the jury; but in that case there was nothing in the nature of a fine or premium taken, and the same observation applies to *Doe v. Radcliffe*, 10 East, 278.

Maule and *R. V. Richards*, contra. The evidence proposed to be given was, that the land was valued and the rent was agreed on, and the draft of the lease prepared without reference to any covenant for the boarding and lodging of the lessor's children. If that evidence had been received, it would have been a question for the jury whether the best rent had been reserved. But it is said that, although that may be so in an ordinary case, yet here the covenant to board and lodge the children of the lessor is in itself a premium; and, that being so, parol evidence was not admissible to show that the best rent had been obtained. Now, assuming first, that a benefit to the tenant for life was equivalent to a premium, here, the children were adults, and therefore not persons whom the lessor was bound to maintain. The covenant by the lessee to maintain them was, therefore, no advantage to the lessor. The plaintiff reads the leasing power as if it contained two conditions, one, that the best rent be reserved, and the other, that no premium should be taken; but that is not the true construction: in truth they constitute but one condition. The words, "without taking any premium," are a qualification of the *preceding words, and the whole sentence imports that "such a rent be reserved as is the best without taking any [760] premium." Now, assuming that to be the true construction of the power, the question is, whether the covenant that the lessee shall board and lodge three children of the lessor, can be considered a premium. A premium is something paid or agreed to be done, in respect of which a less amount of rent is agreed to be paid. It must depend on evidence aliunde as to the adequacy of the rent, whether the thing agreed to be done was in the nature of a premium. Suppose

the lessee had covenanted to go to York, and to receive 30*l.*, whether that might or might not be a benefit to the lessor would depend upon this, whether 30*l.* was a proper compensation to the lessee for going to York. That could not be ascertained without the intervention of a jury. So here the question, whether the covenant to maintain the lessor's children was in the nature of a premium, will depend on the adequacy of the rent. As to Lord ELDON's dictum, cited in Sugden on Powers, this falls within the latter part of it, for the evidence here offered was to show that reasonable care and diligence had been exerted to obtain the best rent. The question as to the adequacy of the rent is undoubtedly for the jury; *Roe v. The Archbishop of York*, 6 East, 86; and *Doe v. Radcliffe*, 10 East, 278. In *Shannon v. Bradstreet*, 1 Sch. & Lef. 72, Lord REDESDALE held that a lease made under a power "to lease without fine at the best improved yearly rent that could be had," was not necessarily void, though containing a covenant to lay out 200*l.* in improvements, "if the rent were, notwithstanding, the best that could be got."

*PARKE, J., on a subsequent day of the term, delivered judgment as [761] follows:—This case was argued a few days ago before my brother TAUNTON, my brother PATTESON, and myself; the only question was, whether a lease by tenant for life, under a settlement, was conformable to a leasing power therein contained. The learned Judge then stated the terms of the power and of the lease, and proceeded as follows:

On the trial, the learned counsel for the defendant offered evidence to prove that the rent was the best that could be obtained; but my brother TAUNTON rejected it, and held that the lease was, upon the face of it, void. The question is, whether that ruling was right. It seems to my brother PATTESON and myself that it was not, and that there should be a new trial.

Unless the Court can pronounce that it is impossible that the lease can be a valid execution of the power, under any circumstances, the defendant is entitled to have his *parol* evidence submitted to a jury. What conclusion they ought to come to is quite a different question.

The power requires that the best rent should be reserved that could be gotten, without taking a fine or premium for the making it. Assuming the power to require two conditions, first, that there should be the best rent, and, secondly, that there should be no fine or premium (and that is to put the case the most strongly against the defendant), the question is, whether, upon the face of the lease, it clearly and incontrovertibly appears that either of the conditions has not been performed?

First, as to the fine or premium; in the ordinary acceptance of those terms, none is paid or taken: and *if benefit to the tenant for life be equivalent [762] to a fine or premium, none appears; for it does not necessarily follow that the covenants to support the children are beneficial to the mother, the tenant for life, as all the children were grown up and bound to maintain themselves, and after the death of the lessor, she could not be bound to maintain them. Besides, so far as relates to the daughters, it is impossible for the Court to say, that the contract is necessarily beneficial to the lessor, if she was bound to support them, for it may be beneficial to the lessee; and so far as relates to the son, it is possible that there may have been some collateral consideration for it, as, for instance, a bequest of the personal estate of the lessor to the son, the lessee.¹ If, then, the Court cannot pronounce that there has been a fine or premium, the only remaining point is, whether they can say that the rent is not the best that could have been gotten?

That this is, generally, a question for the jury, cannot be doubted: does the existence of the above-mentioned covenants make it no longer so? Are they so clear a proof that the lessee would have paid more, and consequently that this rent is not the best, that no evidence could ever prove the contrary?

We conceive that they are not conclusive of this question, and though it is

¹ The lessee was the son of the lessor.

highly probable a jury would think that the best rent was not reserved, it is certainly possible that such evidence may be adduced as to prove that it was.

The case of *Shannon v. Bradstreet*, 1 Schoales & Lefroy, 52, before Lord REDESDALE, is a distinct authority on this part of the *case, for he held, [*763] that a covenant in the lease to lay out 200*l.* in improvements, did not necessarily show that the rent was less than might have been obtained. For these reasons we think the case ought to go to a new trial.

TAUNTON, J. I retain the opinion which I held at the trial, that the covenant to maintain the children of the lessor was in the nature of a premium, and that the taking of that premium was a breach of the condition in the power, which could not be explained by parol evidence. I take it that the word premium does not necessarily mean a money consideration; but that money's worth may constitute a premium. A covenant to maintain and support three of the lessor's children at an adequate price would not be a premium. But allowing that the question of inadequacy may be the subject of parol evidence, the obligation to maintain and support one of the lessor's children gratuitously, is, I think, according to the common course of things, necessarily a loss to the lessee, and a benefit to the lessor, and cannot be explained away. The question here is not simply whether the best rent that could be got was obtained, but also whether the lease was granted on a premium. The condition in the power is twofold: first, that the best rent shall be reserved; and, secondly, without a fine or premium. That implies that no fine or premium shall be taken. The evidence offered, and which I thought inadmissible, was to show that in fact the best rent had been reserved. Assuming that to be so, still if a premium was taken, there was a breach of the condition in the leasing power. One reason for the condition in these leasing powers, that *no premium shall be taken, [*764] is, I imagine, to provide against the uncertainty of parol evidence in the doubtful question, what was the best rent that could be got when the lease was granted, which in the case of old leases may be at a very distant period. If any premium whatever was taken, that seems to me a breach of the condition in the power. A power to lease should be construed strictly and rigorously, because it is a power to be exercised over property which upon the death of the donee belongs to another. I am unwilling to relax the rigor of the rule, and if once a door is opened to evasion by nice distinctions, there is no saying where it will end.

As, however, my brothers think there should be a new trial, the rule must be absolute.

Rule absolute.¹

It was contended by *Whately* on the argument, that if the objections to the lease were not tenable, the plaintiff was still entitled to recover on the demise of the trustees of the term for 1000 years. But the Court said, that that term was subservient to the leasing power, and consequently was no answer to the action, provided the lease were good; and they referred to *Doe dem. Courtail v. Thomas*, 9 B. & C. 288, as in point.

¹ In the beginning of the statement, p. 755, the words "the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case," should be omitted, for the question was argued and determined on a rule for a new trial, not on a special case.

*DOE, on the several Demises of ELIZABETH GRIFFITH, of [*765] SUSANNAH EVANS, of the said ELIZABETH GRIFFITH and SUSANNAH EVANS, of the said ELIZABETH GRIFFITH, SUSANNAH EVANS, and HUMPHREY EVANS, and of the said HUMPHREY EVANS, *v.* HUGH PRITCHARD, JOHN ROBERTS, and ELIZABETH JONES.

Ejectment may be maintained for freehold lands, on the demise of a person attainted of felony, when there has been no office found on behalf of the king.

A lease for three lives contained a proviso, that if the lessee, his heirs, &c., should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void. Tenant (being the second cestuy que vie) under such lease, was attainted of felony, and transported. His mother and sister occupied the farm from that time, till the expiration of the third life named in the lease, and during that period the reserved rent was regularly paid to R. W. P., to whom the reversion had come by devise, and who knew all the facts. The time of his becoming entitled did not appear. The reversioner, on the expiration of the third life, supposing that the term was at an end in point of law, let the land to a new tenant, whom he afterwards ejected, the attainted party being still alive.

Quere, whether the attainder of the tenant was a forfeiture of the lease; but, held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction:

Quere also, if a forfeiture was committed, whether it was one of which an assignee of the reversion might take advantage by stat. 82 H. 8, c. 84.

Held, that if such a forfeiture was committed, the reversioner had waived it by accepting the reserved rent under the lease, from the parties occupying the premises:

Semble, that if the forfeiture had not been waived, a sufficient entry had been made to avoid the lease.

EJECTMENT for a messuage and lands at Llanfau, Merionethshire. At the trial before BAYLEY, B., at the Bala Spring assizes, 1833, a verdict was found for the defendant, subject to certain points, upon which the learned Judge reserved leave to move to enter a verdict for the plaintiff. On a motion being made for that purpose in Easter term, 1833, the Court directed that the facts should be put into a special case, which was stated, in substance, as follows:—

The premises in question were conveyed by lease of the 25th of February, 1775, made between Richard Price Thelwall of the one part, and Evan Griffith [*766] of the other part, whereby Thelwall demised, granted, leased, *set and to farm let unto the said Evan Griffith the premises in question, habendum to the said E. G., his heirs and assigns, from, &c., for and during the natural lives of the said Evan Griffith, Humphrey Evans his son, and Elizabeth Evans his daughter, and the life of the longer liver and survivor of them, at the yearly rent of 20*l.*, payable to Thelwall, his heirs or assigns. The lease contained a clause of re-entry in case of nonpayment of rent for the space of twenty days (the same being first lawfully demanded), and also the usual covenants on the part of the lessee. After which was the following clause:—

“Provided, &c., that in case the said Evan Griffith, his heirs and assigns, shall at any time hereafter grant, demise, set, let, or assign over the said demised premises, or any part thereof, or deposit, pledge, or mortgage this present lease as a security for any sum or sums of money, without the consent in writing of the said R. P. Thelwall, his heirs or assigns, being first had and obtained, to or with any person or persons whatsoever, or in case the said E. G., his heirs and assigns, shall hereafter, during the continuance of this lease, happen to become insolvent, and unable in circumstances to go on with the management of the said farm and demised premises, that then and in any and either of those cases this present demise, and every matter and thing therein contained, from thenceforth shall cease, determine, and be absolutely void, to all intents and purposes whatsoever.” The lessor covenanted for quiet enjoyment by the lessee, he paying the rent and performing his covenants.

The lease was duly executed and livery of seisin given. Evan Griffith occupied the premises under this *lease to the day of his death, which took [*767] place on the 1st of April, 1797. After his death, Humphrey Evans, his son and heir-at-law, and one of the lives named in the lease, became entitled to the estate as special occupant.

At the great sessions for the county for Merioneth, held in April, 1801, the said Humphrey Evans was convicted of felony (sheep stealing), and on that conviction was transported for life to New South Wales. No inquisition was taken, and no office found for the crown, of the lands and tenements of the said

H. E. on his said conviction and attainder, neither has any entry ever been made on behalf of the crown into or upon the estate in question.

After the departure of the said H. E., the premises were occupied and the farm managed by Elizabeth Griffith, the widow of Evan, the original lessee, and mother of H. E., until her death in March, 1812; after which Susannah Evans, the daughter of the said Evan and Elizabeth Griffith, and sister of the said H. E., continued in possession and management of the farm until the death of Elizabeth Evans, the third life named in the lease, which took place on the 24th of January, 1816.

During the whole of this period, the reserved rent was regularly paid to the person entitled to the reversion, who had full knowledge of the conviction of Humphrey Evans. Immediately after the death of the said Elizabeth Evans, Richard Watkin Price, to whom the reversion had come by devise, supposing the estate to have been determined by the death of the last cestui que vie, let the same premises at an increased rent of 40% to John Evans, another son of the above-named Evan and Elizabeth Griffith, who then resided on the premises *with his sister, the said Susannah Evans. John Evans occupied the premises until July, 1819, when Mr. Price brought an ejectment on [*768] that letting, and recovered possession.

The said Humphrey Evans was alive on the day of the demise laid in the declaration, a convict settled in the colony of New South Wales.¹

*The questions for the opinion of the Court were:—1. Whether the estate of Humphrey Evans was divested out of him by his attainder [*769] and conviction, without office found or entry made by or on behalf of the crown.

2. If not, whether H. E. had capacity to demise on the day of the demise laid, viz., January 1st, 1827.

3. Whether the estate was determined by breach of the proviso in the lease, that the same should be void if Evan Griffith, his heirs or assigns, should become insolvent and unable in circumstances to go on with the management of the farm and premises.

This case was argued in the present term, November 15th.

J. H. Lloyd for the plaintiff. (As to the first point, *Sir J. Campbell*, Solicitor-General, for the defendants, admitted that Humphrey Evans having

¹ Before the trial it was ordered by the Lord Chief Justice, by consent of the parties, on summons, pursuant to Reg. Gen. 20, Hil. 4 W. 4 (p. xvii. post), "that an examined copy of the muster-roll of convicts from New South Wales, filed with the Secretary of State for the Home Department, be received and read in evidence on the trial of this cause, as proof of the existence of Humphrey Evans in the declaration in this cause mentioned, on the 31st day of December, 1828." A writing was accordingly produced at the trial, headed, "New South Wales, census taken in the month of November, 1828;" and stating, under distinct heads, in several columns, the name, age, sentence, employment, and residence of Humphrey Evans, the date of his transportation, and some other particulars; to which was added a certificate, signed John Henry Capper, and stating that the above was a true extract of the muster-roll, which muster-roll was deposited in the office of the Secretary of State for the Home Department. The witness who produced it, together with the Lord Chief Justice's order, had compared the extract with the roll. It was objected at the trial, and there was no evidence to show that the document from which this extract purported to be taken, was in reality a muster-roll or authentic account of the convicts at New South Wales; and that the Lord Chief Justice's order, merely authorising the plaintiffs to read the extract, did not cure the defect, since the extract could not be better evidence than the roll itself, and the objection would have applied to that if produced. And it was further urged, that the evidence adduced did not show the identity of Humphrey Evans mentioned in the extract with the Humphrey Evans mentioned in the declaration. *BAYLEY, B.*, was of opinion, that as the Judge's order consented to by the defendants, assumed the existence of a muster-roll at the Secretary of State's office, from which an extract might be taken for the present purpose, the objection could not prevail. He also thought that the order precluded any question on the subject of identity; but he reserved both points. On the motion to enter a verdict for the plaintiff, *J. Jervis* for the defendants renewed the objections, but the Court (*DENMAN, C. J.*, *LITTLEDALE*, and *PARKE, Js.*), concurred in the opinion expressed by *BAYLEY, B.*, at the trial.

taken a freehold estate as special occupant, 2 Black. Comm. 259, such freehold was not divested without office found.) The second proposition on the part of the plaintiff, viz., that Humphrey Evans had capacity to demise, is a corollary from the first. In *Nichols v. Nichols*, Plowd. 486, the question was put, "If the possession in deed or in law of the lands of a person attainted of treason shall not be in the king before office found, in whom shall it be by the course of the common law in the life of the person attainted?" And it was held that the freehold of such lands would be in fact in the person attainted, as long as he should live: "for as he hath capacity to take in deed lands by a new purchase, so hath he power to retain his ancient possessions, and *he shall be tenant to every præcipe." Except as to the king, who has an inchoate right capable of being perfected by office and seizure, the attainted party has a good right against all the world, and may grant in virtue of such right, though the title which he conveys is defeasible, being subject to the king's paramount right. This doctrine, as to attainted persons, is supported by 2 Shepp. Touchst. 232, 7th edit., and Mr. Preston's addition to the original passage. So an alien may purchase and grant, and may suffer a recovery, 2 Shepp. Touchst. 232; 2 Vin. Abr. Alien (A), pl. 18. The case of an attainted person granting is analogous to that of a copyholder making a lease without license or special custom. Such lease is a cause of forfeiture, but until the lord takes advantage of it, it is good as to every one else: *Gilbert on Tenures*, 213, and note xcii. by Watkins, 5th edit. And, according to the reasoning in that note, the Court, in the present case, will not arbitrate upon the question of rights between the attainted party and the king, but will decide the cause as between the present claimants. The king has done nothing to enforce his right; and a freehold estate must be determined by some formal act.

Then as to the third point. The estate here was determinable upon a contingency. The Court cannot say that that contingency has ever happened. Conditions which lead to forfeiture are to be construed with great strictness, Co. Litt. 218, a; *Adams on Ejectment*, page 176, 3d edit.; *Doe dem. Abdy v. Stevens*, 3 B. & Ad. 303; per Lord TENTERDEN. The condition here refers [*771] to a pecuniary inability. It is true that the felon's goods are *forfeited on conviction, but they may not be seized, and until they are, they remain in the felon's hands. There is no proof here that they were seized, and the Court will not assume that fact and the consequent pecuniary deficiency. The party may still have carried on the farm by his agents, or by his under-tenants, if the landlord did not enforce the covenant against underletting. The mere absence of the convict would not occasion a forfeiture, if it were not coupled with insolvency.

In the first place, therefore, the contingency upon which this estate was determinable, never happened. Secondly, if it did happen, there ought to have been a re-entry by the landlord; for the estate, commenced by livery, ought also to have had a formal termination. And further, on the contingency happening, the estate was voidable only; the facts may show an intention not to avoid it, and, if that appear, the forfeiture is purged. If the contingency ever happened, it occurred on the conviction, and that was not a continuing breach. The lord, after notice of the conviction, accepted rent, and consequently he waived the forfeiture; and not merely the forfeiture, but the condition itself, according to Co. Litt. 211, b. [TAUNTON, J. There is a difference between waiving the condition, as in *Dampor's case*, 4 Rep. 119, b, and waiving the particular breach. The Courts in modern times have been inclined, in such cases, to consider the breach overlooked rather than the condition waived; as in *Doe dem. Boscawen v. Bliss*, 4 Taunt. 735. But the waiver of the condition is not necessary to your argument.] In the modern cases, where the construction just mentioned has been adopted, the breach has been occasioned by *some act of the [*772] lessee, and the Court has held that he could not, by his own misconduct, make the lease void, whether the lessor desired it or not. It was so in *Doe*

dem. *Bryan v. Banks*, 4 B. & A. 401; and the same reason applies to *Doe dem. Ambler v. Woodbridge*, 9 B. & C. 376. In *Roberts v. Davey*, 4 B. & Ad. 664, a license to mine was granted, with a condition that it was to become void if the grantee should neglect for a certain time to work the mines; and it was held that, on breach of the condition, the license was voidable only at the election of the grantor. In these three cases there was a continued breach, by the voluntary act of the grantee, and it was considered that the grantor did not, by omitting at some time during such continuance to avail himself of the breach, forego his right to do so at a subsequent time. In these cases if they had been decided otherwise, the grantee would have benefited by his own wrong in continuing the breach. But here the forfeiture accrued, not by the continuance of an act but by the happening of an event, which, having once occurred, all beyond it was out of the lessee's power: nor did he afterwards commit any voluntary default, for the management of the farm went on as before.

Assuming, however, that in this case there was a breach, and a continuing one, no entry was ever made for the purpose of taking advantage of it. It may be a question whether Price had any right so to enter. He could not do it before his title accrued. The case does not show whether he became reversioner before or after the alleged forfeiture; but when he had become so, he had no right of entry at common law; and, *whether or not this was one of the cases in which a right of entry is transferred to the assignee of the re-[*778] version by stat. 32 H. 8, c. 34, would depend upon another question, viz., whether the condition here has reference to a collateral act, or to a thing incident to the reversion, like payment of rent, or forbearing to do waste.¹ But, however this may be, Price never did enter. It is not enough that he ultimately came into possession. There should have been such an entry as evinced an intent to take advantage of the condition broken. Where an estate is not void, but only voidable at the will of the lessor, there must be a formal act to show that he intends to avoid the estate by reason of the forfeiture. "Regularly when any man will take advantage of a condition, if he may enter, he must enter, and when he cannot enter, he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim, and also the feoffor or grantor may waive the condition at his pleasure;" Co. Litt. 218, a, where examples are given in illustration of this doctrine. The language of Lord KENYON, and of BULLER and ASHHURST, Js., in *Roe dem. Tarrant v. Hellier*, 3 T. R. 169, 172, 173, shows the strictness with which the proceedings of the lord are to be regarded in enforcing such a right of entry. It does not appear, in the present case, that the landlord entered with the intention of forcing the forfeiture. He entered as the case states, supposing the estate to have been determined by the death of the last *cestui que vie*. No case has been found expressly deciding that an entry for forfeiture must appear to have *been made eo intuitu: [*774] but on principle it should seem that this must be so, where the estate is voidable only. Here the estate, being for lives, was voidable only, though the condition was, in terms, that in case of breach it should be "absolutely void:" *Pennant's case*, fifth point, 3 Rep. 64, b; 1 Wms. Saunders, 287, c, note (16); and the landlord, in this case, not having re-entered, but having accepted rent after notice of the forfeiture, the same authorities show that he has thereby not avoided but affirmed the lease.

Sir J. Campbell, Solicitor-General, *contra*. Although the freehold did not vest in the king without office found, the king was, nevertheless, entitled to the profits during *Humphrey Evans's* life. The statute, *De Prærogativâ regis*, 17 Ed. 2, stat. 1, c. 16, gives the king year, day, and waste after the death of the felon, but it also gives him the profits during the felon's life; and being entitled to those, he was also entitled to enter for the purpose of taking them, and to hold possession for that purpose, to the exclusion of *Evans*. And there is no

¹ See 1 Wms. Saund. 288, b, note (16).

authority to show that an inquest of office is necessary, to enable him to do this.¹ Then if Evans had not the right of entry, he could not demise. The freehold might be in him, but the right of possession was in the crown. It is assumed on the other side, that what a man has in him he may alien: but he may have the freehold under circumstances like the present, and yet not be able to alien. In *Bullock v. Dodds*, 2 B. & A. 275, ABBOTT, C. J., says, "An attainted person is considered, in law, as one *civilitur mortuus*. *He may acquire, [*775] but he cannot retain; he may acquire, not by reason of any capacity in himself, but, because if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the crown by its prerogative, there being no other person in whom it can vest." In *Doe dem. Evans v. Evans*, 5 B. & C. 584, where a copyholder was convicted of a capital felony, but pardoned on condition of suffering two years' imprisonment, it was held that he might maintain ejectment for the copyhold lands after the expiration of the two years, against a party who had ousted him; but it is clear, that he would not have been held entitled to bring the action during the two years.

Then as to the other points. The case contemplated by the proviso, of the tenant becoming insolvent and unable to go on with the management of the farm, had occurred. It is admitted that the goods of the party were forfeited on conviction, without office found; but, it is said, the crown did not take possession: that, however, makes no difference. If the felon, after conviction, retained possession of the goods, he did so as a wrongdoer; he could not legally have them. The passage just cited from the judgment of ABBOTT, C. J., in *Bullock v. Dodds*, 2 B. & A. 275, applies to this point. It is suggested that Price, as assignee of the reversion, could not take advantage of this condition; but any covenant, which touches the enjoyment or management of the land, runs with the land, and may therefore be taken advantage of by such assignee. The covenant in question, which regards the disqualification *of the [*776] tenant to manage the land, must surely affect the land, and run with it. As to the waiver, to establish that, the rent should have been received from the lessee with an intent to waive the condition. [PARKE, J. It is found that the reversioner knew of Evans's conviction.] But he did not receive the rent from Evans, the lessee. He received it from other parties, under the notion that Evans was civilly dead. He acted under a mistake. [PARKE, J. The rent was received as rent due under the lease.] Receipt of rent is an affirmation of tenancy, where it can operate by way of estoppel, as where the lord receives it from a disseisor; but an estoppel must be mutual; and there can be no mutuality where the rent is paid by parties between whom and the lessee there is no privity in estate; and who, in fact, are mere strangers, as the mother and sister of Humphrey Evans were in this case. [PARKE, J. Distraining for rent after forfeiture affirms the lease, and yet there is no mutual estoppel by that act. The receiving of rent, as rent, from these parties, might, in the same manner, operate as a waiver of forfeiture. DENMAN, C. J. In this case, that which was paid is called the "reserved rent."] It was never received with the intention of waiving the forfeiture. Price did not think of interposing till the third life dropped, because he imagined that the lease had not expired till then. [PARKE, J. He knew all the facts; he only acted in ignorance of the law. TAUNTON, J. In practice, as far as I have ever known it, when the landlord has once received rent with knowledge of a forfeiture incurred, it has been considered that he waived that forfeiture, whatever his secret view may have been in acting as he did. It is an acknowledgment that the lease continues, and that, [*777] in respect of it, such rent is due.] At all *events this may be regarded as a continuing breach. It would clearly be so, if the expression in the proviso were that if the tenant should, "at any time or times" during the

¹ See Staunf. Prerogative, tit. Corone, 49, a, b.

continuance of the lease, become insolvent, the lease should be void; and the clause must necessarily be read as if that were expressed. The insolvency here is quite sufficient: no man can be more insolvent than a convict, who cannot hold any property. [TAUNTON, J. Insolvency is where a man is not in a condition to pay his debts. We do not know that this person had any.] As to the entry: it may be admitted that merely walking across the land would not be sufficient; but if the lord comes upon the land with the intent of claiming for forfeiture, that is a good entry: and here the very act of bringing an ejectment shows that the intent was such. In *Roe dem. Tarrent v. Hellier*, 3 T. R. 162, where the lord of a manor seized copyhold land generally and without any defined purpose, it was held to be an absolute seizure as for a forfeiture, and not quousque. There is no instance in which it has been held, that a party having entered and got possession could be defeated because he had not stated in what right he claimed.

Lloyd in reply. Nothing is claimed here on behalf of the crown but a right of entry. Why might not Evans, the lessor of the plaintiff, demise subject to that right? [TAUNTON, J. In *Com. Dig. Capacity*, D. 6, it is said, citing *Perkins, Grants*, s. 26, that a person attainted of felony has not capacity to make a grant that shall bind the king; but a grant by a person attainted binds *himself and his heirs.] The same authority is referred to in 2 *Sheppard's Touchstone*, 232, already cited: and Mr. Preston's note does not [*778] impugn the doctrine, see also *Shepp. Touchst.* p. 7, 7th ed. *Bullock v. Dodds*, 2 B. & A. 258, related only to the rights of an attainted felon in respect of a bill of exchange. *Doe dem. Evans*, 5 B. & C. 584, decided no more than was necessary for the purpose of that case, viz. that after pardon, the felon's right to demise his copyhold lands was restored, the lord having done nothing to divest the estate. It is said that the tenant here was insolvent because convicted of felony. If the proviso as to insolvency related merely to the pecuniary ability of Evans as an individual, the condition was a collateral one, and an assignee of the reversion could not take advantage of it: if it related to the capacity of carrying on the farm (in which case alone it would run with the land), another person might fulfil the condition on Evans's behalf by conducting the farm, though he himself had forfeited his goods. As to the waiver, the question is not what the intent was in receiving the rent, but whether the landlord, by doing so, in fact affirmed the existence of the lease. There is no proof that the rent was received under a mistake in law, even supposing that that would alter the effect of the receipt. It is said that the parties who paid the rent were not privy in estate to Evans; but they could claim no title whatever, except under him. The breach could not be a continuing one. The words of the condition are, "in case the said Evan Griffith, his heirs, &c., shall hereafter during the continuance of this lease happen to become insolvent." There was only one point of time when he *could be said to become insolvent. That an entry to operate as such, must be made eo intuitu, [*779] rests not on decided cases but on principle. [PARKE, J. Many examples are given in *Co. Litt.* 245, b, of acts of ownership which in themselves amount to an entry.] There must be something amounting to a claim as against a person adversely holding; or an act done adversely to that person. In the present case there was no act or claim that was adverse to any one, for the landlord thought the lease was determined. With respect to the supposed right of the crown to take the profits of the land during the life of the attainted party though there be no office found, if the king were entitled to the profits, he would also be entitled to the land: for, as it is said in *Co. Litt.* 4, b, "what is the land but the profits thereof?" and it is admitted that the king is not entitled to the land without office.

DENMAN, C. J. Many points have been raised in this case, and there is one upon which we entertain some doubt, and shall require time for consideration: it will not, therefore, be necessary at present to express an opinion upon all the

others. As to the question of waiver, I think if there was a forfeiture incurred it was waived by the acceptance of rent. The case states that the reserved rent was regularly paid; we must take that to mean, that there was a payment of rent under the lease in question: and the landlord having accepted it with knowledge of the forfeiture, everything was done that is requisite to waive a breach of condition. This makes it unnecessary to say whether or not the [780] landlord, as assignee of the reversion, could avail himself of the breach of such a condition. Then comes the question, whether, even before office found, a person civilly dead can convey any interest in his lands which are forfeited to the crown. On this point no sufficient authority has been brought to our notice. We must take further time to consider it.

PARKE, J. I think that we may dispose of all the points in this case except the second. On the first point, it has been conceded that the freehold was not divested out of Evans so as to entitle the crown to it, there being no office found. As to the second, the power of Evans to demise, I have a strong impression that he had that power, but it will be necessary to look into authorities on the subject. With respect to the forfeiture, it appears to me that, if Evans became insolvent at all, as to which there may be some question, his becoming so was contemporaneous with his conviction: he became insolvent by that. Then, if a forfeiture was so incurred, the next point is, whether it was afterwards waived? Price, the landlord and assignee of the reversion, is stated to have received the rent, with full knowledge of Humphrey Evans's conviction; and receipt of rent, as rent due under a lease, deliberately and with full knowledge of the facts which might create a forfeiture, is a waiver of such forfeiture, and prevents the lease from becoming void. As to the remaining point, I think any entry as owner would have been sufficient in point of law to avoid the lease (see the next case, p. 783); but the question to which the case now reduces itself is, whether an attainted person can make a valid demise.

[781] *TAUNTON, J. I think the whole case is clear, except as to the power of demising, which is an important point, and of no small difficulty.

PATTESON, J. I am of opinion that there was no continuing breach in this case, but that the breach and forfeiture were complete the moment Evans was convicted. The acceptance of rent afterwards was a waiver of the forfeiture. *Dumpor's case*, 4 Rep. 119, b, which was cited, is distinguishable from some of the later decisions in this respect; there the lessee had, by license of the lessors, assigned all his interest in the demised premises, and therefore the covenant itself (not to alien without license) was held to be waived: such an assigning was very different from underletting, or the other acts stated in the more modern cases, where it was held that the breach only was waived.

As to the remaining point,

Cur. adv. vult.

DENMAN, C. J., on a subsequent day of the term (Nov. 15th), delivered the judgment of the Court.

The only point in this case upon which the Court took time to consider, was, whether an action of ejectment can be maintained upon the demise of a person attainted of felony. It is admitted that an estate of freehold, which this was, is not divested in cases of attainder until office found. Here no office has been found, and therefore the crown is not entitled.

It is laid down in Perkins's Profitable Book, Tit. Grants, s. 26, that "a man [782] attainted of felony or *murder, &c., may make a grant of a rent or common, or a feoffment, &c., and the same shall bind all persons but the king (for his time), and the lord of whom the land is holden." This passage is referred to in Comyns's Digest, Tit. Capacity, D. 6. The same doctrine is laid down in Sheppard's Touchstone, 232.

The passage in Co. Lit. 42, b, which seems at first sight to be contrary, will, on examination, be found to be consistent with these authorities; for, after stating that persons attainted of felony have no ability to enfeoff, &c., he con-

cludes, "for the feoffments, &c., of these may be avoided;" and doubtless they may by the king.

The case of *Bullock v. Dodds*, 2 B. & A. 258, was pressed in argument. It is sufficient to say, as to that case, that it was an action for a chattel which had vested in the king without office found, and is therefore no authority upon this occasion. We are, therefore, of opinion that *Humphrey Evans*, the lessor of the plaintiff, was capable of granting, and that judgment must be given for the plaintiff.

Judgment for the plaintiff.

***DOE dem. WILLIAM JONES v. WILLIAM WILLIAMS. [*783]**

A father, seised in fee, executed a deed of settlement on the marriage of his son, containing the following clause: "Whereas it is agreed upon by and between the parties to these presents, that the said A. J. (the father) giveth and settlcth upon his said son Griffith J., all and singular, the premises, &c., from Michaelmas next for the term of his natural life; and from and immediately after his decease, to the use of the first son of the body of the said Griffith J., on the body of J. J. (his intended wife), to be lawfully begotten, and so on successively for all and every other son," &c.; and in default of such issue male, the like limitation to the daughters; and for want of such issue, to the use of the settlor's right heirs: Held, that this clause was not a mere executory agreement, but operated, in law, as a covenant by the settlor to stand seised to the uses declared by the settlement; namely, to the uses of the first and other sons of Griffith J. successively for their respective lives.

It is a sufficient entry to avoid a fine, if the party enters expressly to claim the premises as his own: it is not necessary for him to say that he enters to avoid all fines, or to specify what particular act, adverse to his own interest, he means to defeat.

ON the trial of this ejectment, before BOSANQUET, J., at the Summer assizes for the county of Cardigan, 1833, it appeared that the lessor of the plaintiff claimed as the second son of Griffith Jones, under a deed of settlement, executed on the marriage of the said Griffith. The deed was entitled, "Articles of agreement, indented, made, covenanted, concluded, and fully agreed upon this 9th day of January, &c., 1770:" the parties were, Abel Jones, the father of Griffith, of the first part; the said Griffith Jones, of the second part; Elizabeth Jonathan, widow, and John, her son (mother and brother of Jane, the intended wife of Griffith Jones), of the third part; and the said Jane Jonathan, of the fourth part. The deed began as follows:

"Whereas it is covenanted and agreed upon by and between all and every the parties to these presents, that a marriage, by God's permission, shall be shortly had and solemnized between the said Griffith Jones and the said Jane Jonathan; and whereas it is also covenanted and agreed upon by and between all and every the said parties to these presents, and the said Abel Jones and Griffith Jones, as well for, and in consideration of, *the said intended [*784] marriages, as also of the sum of 60*l.* to be advanced by the said Elizabeth Jonathan and John Jonathan, or their executors, &c., with her the said Jane J. as marriage portion, which said sum is to be paid within three years after the solemnization thereof, with interest," &c. (stating the mode of payment); "and whereas the said Abel Jones is intituled in fee of, in, and to all that messuage, house, or burgage, and part of the garden, together with the spot of ground on the liberties thereto adjoining, on the east side thereof, commonly called and known by the name of Ty-yoha, now in the tenure, &c., situate, &c., and all the estate, right, title, &c., of, in, and to the same, with the appurtenances: And, whereas it is also covenanted and agreed upon by and between all and every the said parties to these presents, that he the said Abel Jones, for the support and settlement in the world of the said young couple, freely and clearly giveth and settlcth upon his said son, Griffith Jones, all and singular the above-mentioned premises, with the appurtenances, from Michaelmas next, for and during the term of his natural life, and from and immediately after his decease to the use and behoof of the first son of the body of the

said Griffith Jones, on the body of her the said Jane Jonathan, lawfully begotten, or to be begotten, and so on successively for all and every other son and sons, the elder to take before the younger; and in default of such issue male, to the use," &c. (the like limitation to the daughters, successively); "and if, in case more than one child shall happen to be born, therefore the younger children, if more than one, are to be provided for according to their father's discretion: and for want of such issue, to the use and behoof of his own right heirs

[*785] *for ever. And for the further support of the young couple, the said Abel Jones giveth unto the said Griffith, his said son, all that part of the sloop called the Mally, which the said Abel is now owner of, with all and singular mast, sail, &c., to his part belonging, or in anywise appertaining; to hold the same unto the said Griffith Jones, his executors, &c., for ever. And as for and concerning the messuage, &c., and garden, and all and singular, the premises before-mentioned, and it is hereby the true intent and meaning of these presents, and of all and every the said parties, that is to say, that if she the said Jane shall happen to survive her said husband, Griffith Jones, that then and in such case a moiety of the rents and profits of all and singular Ty-ycha aforesaid, with its appurtenances, and a moiety of the rents and profits of any other house or houses" (which should be built upon the land, as was more particularly stated in the deed), "to be received by her, the said Jane, as her jointure," &c. "Provided always, and it is hereby further covenanted and agreed," &c. Here followed a covenant for restitution of a part of the wife's intended portion in case of her dying without issue in the course of three years after the marriage: and a like covenant for restitution of the husband's personal estate in case of his dying without issue during the same period. The deed was signed and sealed by all the parties.

The marriage took place, and Griffith Jones and his wife had issue, John Jones, their eldest son, and William Jones, the lessor of the plaintiff, their second son, and other children. In July, 1798, the said Griffith and Jane Jones, and John Jones, levied a fine, with proclamations, of the above premises, which they mortgaged to one Evan Evans, and it was declared in and by the mortgage

*deed that the fine should enure to certain uses in that deed mentioned. [*786] Evans afterwards joined in an assignment of the premises to one Lewis, under whom the defendant claimed. Griffith Jones and his wife died sometime afterwards, leaving the said John and William Jones, and other children, then surviving. John, the eldest son, died in February, 1832, leaving a widow and children; whereupon William, the lessor of the plaintiff, as the second son, claimed the life estate limited to him by the marriage articles, alleging that that deed operated as a covenant to stand seised to uses, by virtue of which he was now entitled to the premises in question, notwithstanding the fine levied by Griffith Jones and John Jones; the estates given by the deed to the first and other sons of the marriage being merely successive life-estates, for want of words of limitation. On the part of the defendant, it was contended that the deed was merely executory as to those premises, and that the plaintiff could not claim any legal estate under it. To show that the lessor of the plaintiff had made a sufficient entry to avoid a fine, it was proved that, in July, 1832, he went upon the premises and demanded possession, saying that they were his property, and asked the defendant Williams if he would become his tenant. The learned Judge, upon this evidence, directed a verdict for the plaintiff, but reserved the points as to the operation of the deed of settlement, and as to the sufficiency of the entry.

Wilson, in this term, moved for leave to enter a nonsuit upon the points reserved. First, the articles of agreement were only an executory contract, and could not give the lessor of the plaintiff a legal estate in the premises. [*787] *The clause referring to this property begins in the form of a recital, and points to a future time. No words of limitation are annexed to the use declared for the eldest son. It is said that the clause may be construed as a covenant to stand seised to uses; and there is, perhaps, sufficient consideration for such a

covenant. But the objection to this mode of reading the instrument is, that the intention will be defeated, for if the articles be a covenant to stand seised, giving merely successive life estates to the children, and altogether passing over the issue of those children; then, supposing there should be ten children of the marriage, every one of whom should leave issue, the fee simple might, by means of the ultimate limitation to the settlor's right heirs, be totally alienated from all the descendants of the marriage, notwithstanding a part of the consideration for the articles appears to have been a sum of money received as the portion of the wife. This cannot have been the intention of the parties. But if it should be held that these are mere executory articles, not passing any legal estate, the construction of them would devolve on a court of equity, where the instrument would be considered as mere notes or heads, for a more formal conveyance to be prepared under the direction of that court, and into which limitations conformable to the intention would be introduced: for courts of equity, when considering those limitations which are the immediate objects of their jurisdiction, namely, limitations which do not include or carry the legal estate, will regard the end and consideration of the settlement, and the intent of the trusts, beyond the legal operation of the words in which the articles or trusts are expressed. This is laid down in *Fearne Cont. Rem.* p. 90, and instances are there given [*788] *where courts of equity, in dealing with executory articles, have departed from the rule in *Shelley's case*. If this Court were to decide in the manner proposed upon the articles now in question, they would exclude this jurisdiction of the courts of equity, and prevent the settlement from being carried into effect, according to the practice of those courts, so as to fulfil the settlor's intention. [TAUNTON, J. Is there any instance where a contract might have operated as a covenant to stand seised to uses, and the courts of law have forborne to give it that effect, lest they should usurp the jurisdiction of the Court of Chancery?] There does not appear, in this case, any intent that the agreement should have an immediate operation. [TAUNTON, J. A covenant to stand seised to uses need not.] The words are, "whereas it is agreed that Abel Jones giveth all and singular the premises from Michaelmas next." That means, that he will so give by a settlement to be thereafter prepared. [DENMAN, C. J. The agreement is, "that he giveth."] When speaking of the sloop, all the words he uses are de præsentii. Supposing, however, that William Jones's claim was not barred, his entry was not such as could avoid the fine. "A bare entry into the lands, without more, is not sufficient. He must also, at the time of entry, declare quo animo he entered, that it is to avoid all fines, otherwise it will not amount to a sufficient entry to avoid a fine:" 1 Wms. Saund. 319, f, note (1) to *Clerk v. Pywell*, citing 13 Vin. 292, pl. 23, MSS.; and *Ford v. Lord Grey*, 6 Mod. 44. *Cur. adv. vult.*

*DENMAN, C. J., on a subsequent day of the term (Nov. 15), delivered the judgment of the Court. After referring to the marriage articles [*789] above stated, his Lordship said, there does not appear in the deed any agreement to make a further settlement at a subsequent time; we therefore think that the contract on the part of Abel Jones must be construed as a covenant to stand seised to the uses declared in that settlement. As to the entry, the point is like one which has been decided in the last case;* and we think the rule of law is, that if a party enters expressly to claim the premises as his own, it is not necessary for him to say what particular act, adverse to his interest, he means to defeat. There will, therefore, be no rule.

PABKE, J. The note in Mr. Serjeant Williams's *Saunders*, relied upon in moving for the rule, states that the party entering must, at the time, declare quo animo he enters, that it is to avoid all fines; but the authorities cited for that proposition do not support it. Rule refused.

* The case there referred to is *Berrington dem. Dormer v. Parkhurst*, 2 Stra. 1066, 4 Bro. P. C. 85.

* Doe dem. *Griffith v. Pritchard*, ante, p. 765.

TURNER v. ROBINSON and Another.

In an action by a servant, who was dismissed, for wages, the proof was, that he was to have wages at the rate of 80*l.* per annum: Held, that the *prima facie* presumption was, that the hiring was for a year; and that having been rightfully dismissed for misconduct before the year expired, he could not recover wages *pro rata*. And this, although the master had brought an action against him for misconduct, and recovered damages.

ASSUMPSIT for work and labor. At the trial before DENMAN, C. J., at the London sittings after Trinity term, 1833, the following facts appeared. The [*790] *defendants were silk manufacturers; the plaintiff acted as their foreman from January, to June, 1831, and sought to recover in this action, a remuneration for his services during that period. The evidence as to the amount of wages was, that it had been agreed between the plaintiff and defendants, that the plaintiff was to have wages at the rate of 80*l.* per year. In June, 1831, the plaintiff was dismissed by the defendants, for having advised and assisted their apprentice to quit their service and go to America, and for that, the defendants had brought an action against the plaintiff, and recovered 40*s.* damages. It was contended for the defendants, that it must be taken on this evidence, that the plaintiff had been hired for a year, and having been rightfully discharged from their service for misconduct during the year, was not entitled to recover wages *pro rata*, and *Spain v. Arnott*, 2 Stark. N. P. C. 256, was cited. The Lord Chief Justice was of opinion that there was nothing to repel the ordinary presumption, that the servant was hired for a year; and that being so, the whole wages were forfeited before the term expired, by his misconduct, whereby the defendants were prevented from having his services for the whole year. He therefore directed a nonsuit, reserving liberty to move to enter a verdict for the plaintiff.

Law in this term moved to enter a verdict. There was no proof that the plaintiff was hired for an entire year. The evidence as to that was only that he was to have wages at the rate of 80*l.* per year. Besides, here the defendants had already recovered against the plaintiff for his misconduct in enticing the [*791] apprentice from their service. *[PARKE, J. The *prima facie* presumption was, that the plaintiff was hired for a year; and there was nothing to rebut that presumption: and having violated his duty before the year expired, so as to prevent the defendants from having his services for the whole year, he cannot recover wages *pro rata*.]

The Court' refused the rule.

1 DENMAN, C. J., PARKE, TAUNTON, and PATTESON, Js.

PLANT v. JAMES and Another.

Two co-heiresses being seised each of an undivided moiety of two estates conveyed to H. in fee, for the purpose of making partition, one of the estates called Parkhall, to which they were entitled by descent as coparceners, and another called Woodseaves, of which they were tenants in tail, together with all houses, outhouses, edifices, orchards, ways, paths, passages, rights, members, and appurtenances whatsoever to the said several messuages, tenements, lands, and hereditaments belonging or therewith usually held or occupied, to hold Parkhall to H. in fee to certain uses, and Woodseaves to H. in fee to the use of H. and his heirs, to make him tenant to the precepts, in order to suffer a common recovery. The deed contained a covenant to levy a fine of the moiety of one of the co-heiresses in Parkhall, and a declaration that a recovery should be suffered of Woodseaves, and then declared the uses of the fine, recovery, and conveyance as to the whole of the said messuage or tenement called Parkhall, with the buildings, lands, hereditaments, and appurtenances thereto respectively belonging, to be to such uses as the husband of the said co-heiress should appoint; and as to Woodseaves, with the buildings, lands, hereditaments, and appurtenances thereunto belonging, to the use of the other co-heiress in fee. The fine was levied, and the recovery suffered: Held, that a way from the king's highway over the Woodseaves estate to the Parkhall

estate, which, before the conveyance, fine, and recovery, had always been used by the occupiers of Parkhall, did not pass by this deed of partition, fine, and recovery, to the owner of Parkhall.

TRESPASS for breaking and entering plaintiff's closes. Plea, that these closes were parcel of a certain farm, called Woodseaves; that Thomas Smallwood and Maria his wife, in right of the said Maria, and Elizabeth Hector, were seised each of an undivied moiety of the Woodseaves Farm, and also other estates, called Park Hall and Park House; and that they, by indentures of lease and release, of the 10th of November, 1812, *to which Huxley and Spearman were [*792] parties, conveyed to Huxley and his heirs and assigns, for the purpose of making partition, the two estates called Park Hall and Park House, to which Maria and Elizabeth were entitled by descent as coparceners, and the estate called Woodseaves, to which they were entitled under a settlement in tail general, and also an allotment under an inclosure act, together with all houses, outhouses, edifices, &c., orchards, ways, paths, passages, &c., rights, members, and appurtenances whatsoever to the said several messuages or tenements, lands, and hereditaments, lying, belonging, or in any wise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof; to hold Park Hall and Park House to Huxley and his heirs, to the uses thereafter expressed, and to hold Woodseaves Farm and the allotment to Huxley and his heirs, to the use of Huxley and his heirs, to make him tenant to the præcipe, in order to suffer a common recovery thereof. The indenture also contained a covenant by Smallwood with Spearman, to levy a fine of the moiety of Smallwood and his wife in Park Hall and Park House, and a declaration that a recovery should be suffered of the Woodseaves estates: and it then proceeded to declare the uses of the fine, recovery, and conveyance to be "as for and concerning the whole of the said messuages or tenements called Park Hall, and Park House, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging, and also the whole of the allotment, with its appurtenances, to such uses as Smallwood should appoint: and in default of appointment, with the usual limitations in favor of *Smallwood, so as to bar dower; and as for and concerning Woodseaves Farm, with the build- [*793] ings, lands, hereditaments, and appurtenances thereto belonging, to the use of Elizabeth Hector, her heirs and assigns for ever." The plea then stated the levying of the fine and suffering of the recovery; and averred that, long before and at the time of the making of the said indenture, and the levying the fine and suffering the recovery, the occupier for the time being of Park Hall had always been used to have and enjoy a certain way from the king's highway, over and along the said closes, in which, &c., towards and into Park Hall and back again for the convenient occupation of Park Hall; and that the said way had before and at the time of the making of the said indenture, and the levying of the said fine, and suffering of the said recovery, been always held, used, occupied, and enjoyed therewith. A title in the defendants was then deduced by the plea to the Park Hall estate, with the appurtenances, including this right of way (if it passed by the said indenture, fine, and recovery), and the defendants justified the trespass in the exercise of such right. To this plea there was a general demurrer. The case was argued on a former day in this term by *R. V. Richards* for the plaintiff, and *Follett* for the defendants.¹ The arguments urged and the several authorities cited are so fully stated and commented on in the judgment of the Court, that it is deemed unnecessary to notice them further.

Our. adv. vult.

DENMAN, C. J., in this term delivered the judgment of the Court.

*The sole question raised by the demurrer to the plea is, whether this right of way passed by the indenture, fine, and recovery. We are [*794] of opinion that it did not, as there are no words in this indenture capable by law of passing such an easement. Whether the parties intended to have included

¹ Before DENMAN, C. J., PARKER, TAUNTON, and PATTERSON, Js.

this way is a mere matter of conjecture, but the question in this and all other similar cases is, not what the parties intended to have done, but what is the meaning of the words they have used.

Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass: *Grymes v. Peacock*, 1 Bulstr. 17; *Saundays v. Oliff*, Moore, 467; *Whalley v. Thompson*, 1 B. & P. 371; *Clements v. Lambert*, 1 Taunt. 205; and *Barlow v. Rhodes*, 1 Crompt. & Meeson, 439; 3 Tyrwhitt, 280. If the grantor wishes to revive or create such a right, he must do it by express words, or introduce the terms "therewith used and enjoyed," in which case, easements existing in point of fact, though not existing in point of law, would be transferred to the grantee.

It is however insisted that the meaning of the word "appurtenances" may be extended, either by reference to the actual state of the subject of the grant, or to the context; and the case of *Morris v. Edgington*, 3 Taunt. 24, is referred to in support of the former position. That was, as is observed by Mr. Baron BAXLEY (1 Crompton & Meeson, 449), not a case properly requiring the construction of the words "belonging" and "appertaining," *because, if [*795] there had been no such words, the law would have implied the way in question as a way of necessity, and all that the Court determined was, that one way being necessary, and there being two, the more convenient way to the lessee passed. Some expressions are attributed to Lord Chief Justice MANSFIELD in the report, which can hardly be correct. He is stated to have said, that "as we hear of no other ways, and as it is impossible that these parties, who are supposed necessarily to understand the law, could suppose these ways were 'ways appurtenant,' they therefore meant them, being the only subsisting ways, by the improper name of 'ways appurtenant.'" It would have been more correct to have stated, that one of the ways would have passed as a way of necessity, and not to have made use of the absence of other ways as a ground for extending the meaning of the term "appurtenant;" and indeed it would be dangerous to press the general words of a conveyance into a proof that the parties may have meant something to pass under each; for such words are generally inserted to cover any right which may possibly exist, and there are scarcely any conveyances in which all such words are satisfied. But supposing the observations of the Lord Chief Justice to be well founded, they are inapplicable to the present case, as there is no grant here of ways appurtenant; and if there were, it does not appear upon these pleadings but that there were ways, strictly appurtenant, to satisfy the grant.

The principal reliance on the part of the defendant is however placed on the other ground, viz., that the context shows that the word "appurtenances" is not to be construed in its strict technical sense; and that it was meant to comprise all the easements relating to *Park Hall estate, which passed to the trustee under the general words of "ways used, occupied, and enjoyed" with that estate; to which point *Follett* cited *Kooystra v. Lucas*, 5 B. & A. 830; *Whalley v. Thompson*, 1 B. & P. 371; *Harding v. Wilson*, 2 B. & C. 96 (per HOLROYD, J.); for it was contended that it never could have been in the contemplation of the parties, that any easements should be conveyed to the trustee, which were not to pass from him to the cestuy que use. The correctness of that reasoning may be admitted; but the difficulty in the way of the defendant is, that this right of way in the Woodseaves estate to the Park Hall estate did not, and could not, pass by these general words; for the soil itself of both estates passed; and in that part of the conveyance the general words of "all ways used, occupied, and enjoyed with the lands," could convey only ways, if any such happened to be, in other lands of the granting parties not granted to the trustee. They could not have any operation to create a right of way de novo in the very lands the freehold of which was granted by the same sentence in the deed.

It may be further observed that no definite line of road is so marked out in the deed, or ascertainable by reference to any other instrument mentioned in it, as to show that the parties contemplated its existence before the partition, or its continuance afterwards. Even the words "therewith used" cannot, without some violence, be applied to the Park Hall farm and the Woodseaves farm separately considered, as they follow the mention of both farms, and may mean such ways as had been used by the joint owner of both in respect of his joint ownership. There is no clear statement, therefore, that the way claimed was ever *de facto* used, except as every owner has a right of going over every part of his own land; and even if the word "appurtenances" [*797] were susceptible of the sense contended for in this case, the intention to use it so is far from being established.

For these reasons we are of opinion that the way in question did not pass by the indenture, fine, and recovery, and that the plaintiff is entitled to our judgment. It may be that these instruments have not carried into effect the intention of the parties, and that there has been a mistake in the words used; but they must take the consequence of their neglect, if it be so; and it would be dangerous to unsettle the meaning of legal terms, in order to obviate a particular mischief.

Judgment for the plaintiff.

FREEMAN v. BAKER and Another. Nov. 20.

An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue.

The owners of a ship circulated advertisements of sale, beginning with a description of the ship, which stated her to be copper-fastened; after which was a notice, that the hull, masts, yards, and rigging, were to be taken with all faults. Under this was printed the word "Inventory," which was followed by a list of the ship's stores and tackle; and there was then a further announcement, that the vessel and her stores were to be taken with all faults, and without allowance for weight, length, quality, quantity, or any defect whatever. The owners afterwards executed a written contract of sale, not stating the vessel to be copper-fastened, but containing this clause: "On payment of the purchase-money, the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited; but the said inventory shall be made good as to quantity only, and the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever."

Held (assuming that the advertisement could, by words of reference, be incorporated with the contract of sale), that the word "inventory" in the contract, referred only to the list of stores, &c., and not to the prior part of the advertisement; and, therefore, that on the two documents taken together, no warranty appeared that the ship was copper-fastened.

CASE. The first count of the declaration stated, that before and at the time of the committing of the grievance, &c., the defendants were possessed of a certain ship or vessel called the Leslie Ogilby, which was not copper-fastened, as said defendants before and at the time, &c., well knew; yet [*798] defendants, contriving, &c., to deceive and injure plaintiff in this respect, and to induce plaintiff to purchase the said ship at and for a large sum of money, heretofore, &c., falsely, fraudulently, and deceitfully represented to plaintiff that the said ship was a copper-fastened ship. The count then stated, that defendants, further contriving, &c., kept the said ship afloat in a certain dock called the West India dock, so that the said ship could not be inspected or examined by plaintiff, and that defendant used and employed divers other subtle arts and devices for the purpose of preventing an inspection and examination of said ship by plaintiff, and thereby defendants afterwards, to wit, &c., induced plaintiff to purchase the said ship as a copper-fastened ship, with divers stores belonging thereto, from defendants, at and for a large sum of money, to wit, 1800*l.*, and falsely, fraudulently, and deceitfully sold the said ship as a copper-fastened ship

with the stores as aforesaid, to plaintiff, at and for the said sum of 1800*l.*, by means whereof the said ship became and was, and still is, of little or no use or value to plaintiff; and so the plaintiff averred, that he was then and there cheated and defrauded by said defendants of a large sum of money, to wit, 1800*l.* The second count was similar, but omitted the mention of any means used to prevent inspection. The third count stated, that plaintiff bargained with defendants, at their instance and request, to buy of them a certain other ship, with stores, &c., for the sum of 1800*l.*, and defendants, by falsely and fraudulently representing the last-mentioned ship to be copper-fastened, then and *there [*799] sold the said last-mentioned ship, with the stores, &c., to plaintiff, for the sum, &c., whereas, in truth and in fact, the said ship, at the time, &c., was not a copper-fastened ship, which defendants well knew, by means whereof, &c. The seventh count stated, that the plaintiff bargained, &c.; and defendants, by falsely warranting the said ship to be a copper-fastened ship, sold the said ship to plaintiff for the sum, &c., whereas, in truth and in fact, the said last-mentioned ship, at the time of the said warranty and sale, was not a copper-fastened ship, but, on the contrary thereof, there were several iron through bolts in the larboard bilge, &c. (describing the particular fastenings which were not of copper), by means whereof the ship became of little or no use, and so defendants falsely and fraudulently deceived plaintiff, &c. The eighth count was similar, but more general. Plea, not guilty.

At the trial before DENMAN, C. J., at the sittings in London, after Hilary term, 1833, a memorandum of agreement for the sale and purchase of the vessel was put in, signed by or on behalf of the vendors and purchasers; at the foot of which memorandum (after the copy of the certificate of registry), was the following clause:—"On payment of the whole of the purchase-money as aforesaid, a legal bill or bills of sale shall be made out and executed to the purchaser or purchasers, at his or their expense, and the said brig, with what belongs to her, shall be delivered according to the Inventory which hath been exhibited; but the said inventory shall be made good as to quantity only. And the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, of any *defect [*800] whatsoever." The memorandum itself said nothing of the vessel being copper-fastened, but the plaintiff gave in evidence together with it a printed paper, called an advertisement of sale, issued by the defendants, which began as follows:—

"For sale.—The fine brig *Leslie Ogilby*, 193 tons; British built; coppered and copper-fastened; shifts without ballast, takes the ground well, stows a large cargo for her tonnage, was coppered in August, 1829, is well adapted for general purposes, and requires little more than provisions to send her to sea.—Now lying in the West India dock. Hull, masts, yards, standing and running rigging, and stores, to be taken with all faults as they now lie." Under this was printed,

"Inventory.—Anchors, 1 best bower; 1 small ditto," &c., &c. Here followed a list of articles, under different heads, viz., anchors, cables, sails, carpenter's stores, &c., at the foot of which was added,—“The vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, quantity, or any defects or injuries whatever. Inventories may be had on board, and further particulars known, by applying to M'Ghie and Page, sworn brokers.”

The Lord Chief Justice thought that the last-mentioned paper could not be considered as incorporated with the agreement of sale, and therefore, that on the authority of *Pickering v. Dowson*, 4 Taunt. 779, the plaintiff ought to be nonsuited; but he left the case to the jury, and they found (in answer to questions submitted to them by his Lordship) that the vessel was not copper-fastened; but [*801] that there was no evidence that the defendants *knew it, and that there was no concealment on their part. A verdict was entered for the plain-

tiffs on the above-mentioned counts of the declaration, but leave given to move to enter a nonsuit, or a verdict for the defendants. A rule nisi having been obtained for that purpose,

Sir *J. Campbell*, Solicitor-General, *Comyn*, and *Amos*, now showed cause. First, supposing the printed advertisement not to form part of the actual contract of sale, yet it was a false representation, made in order to induce the plaintiff to enter into that contract; and if that be so, then, although the jury have negatived any knowledge by the defendants that the ship was not copper-fastened, and have found that they used no concealment, there was, nevertheless, a fraud in law, which renders them liable under the first three counts; for *Polhill v. Walter*, 3 B. & Ad. 114, shows that an action on the case for a deceitful and fraudulent representation is maintainable, where the defendant (though without any corrupt motive) has made an assertion, not knowing whether it was true or otherwise, whereby the plaintiff has been led to incur damage. [PARKE, J. In *Polhill v. Walter*, 3 B. & Ad. 114, there was a direct assertion of that which the defendant knew to be untrue.] He merely put his name upon a bill as by procuration, which act might have been adopted afterwards by the drawee. Here the defendants have taken upon them to assert a thing, without knowing whether it were true or false. *Haycraft v. Creasy*, 2 East, 92, does not apply, because there the defendant acted in perfect good faith, believing all that he stated to be true. The defendants *here assert what they have no reason for believing, and do it for their own advantage. In *Adamson v. Jarvis*, [*802] 4 Bing. 73, BEST, C. J., says, "he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages." And in *Humphrys v. Pratt*, 5 Bligh's Appeal Cases, 154, the same proposition was relied upon for the defendant in error, and the judgment was there affirmed.

But, secondly, if there was in this case a positive warranty, the question of fraud becomes immaterial. Now the printed advertisement, describing the ship as copper-fastened, is introduced, by reference, into the agreement of sale, *Saunderson v. Jackson*, 2 B. & P. 238; and such description amounts to a warranty that the vessel was what is ordinarily understood by the term "copper-fastened." The principle of *Bridge v. Wain*, 1 Stark. N. P. C. 504, applies; and *Shepherd v. Kain*, 5 B. & A. 240, is a direct authority on the point. The undertaking in the memorandum of agreement, that "the brig, with what belongs to her, shall be delivered according to the inventory which has been exhibited," refers not merely to the particulars headed "Inventory" in the printed advertisement, but to the whole contents of that paper. The word "inventory" is evidently meant to have that import, when it is said (at the end of the advertisement), that "inventories" may be had on board, and farther particulars known by applying, &c. The words, "delivered according to the inventory," are not to be confined in reference to the things belonging to the brig, which are mentioned immediately *before. If the advertisement is at all incorporated with the agreement, every part of it must be taken into consideration. In *Kain v. Old*, 2 B. & C. 627, where it was held that an instrument delivered by the vendor before the execution of the contract could not be treated as part of it, the prior instrument was void by the then existing registry act of 34 G. 3, c. 68, s. 14: but for that objection, it does not appear that it might not have been incorporated with the contract. [PATTESON, J. Assuming that to be so, the instrument containing the words "copper-fastened" was signed by the vendor in that case; it is not so here. PARKE, J. It appears from *Shepherd v. Kain*, 5 B. & A. 240, that the description and the stipulation, "to be taken with all faults," were on the same paper.] In *Pickering v. Dowson*, 4 Taunt. 779, the inventory delivered previously to the contract of sale was void under the registry acts, and could not be treated as forming any part of the agreement. That objection would not arise under the present act. [Sir *James Scarlett* for the defendants. It does not appear from that case that the certifi-

cate of registry was not recited in the former instrument. GIBBS, C. J., does not treat it as invalid.] *Pickering v. Dowson*, 4 Taunt. 779, shows that the word "inventory" is well known as applying to the whole description of a vessel, and not merely to the list of stores; and the Court there looked at the entire document. That case is also distinguishable from the present, inasmuch as the inventory there was not the vendors' own, but merely one which they had received from the persons of whom they bought the ship.

*Sir James Scarlett (with whom were *Maule* and *Tomlinson*), contra, [*804] was stopped by the Court.

DENMAN, C. J. The case is now confined to a narrow point. The plaintiff's right to recover will depend upon the question, whether that which he terms the inventory was part of the contract or not. He is to make out that it was. By the memorandum of sale one party agrees to buy, and the other to sell, "the brig called the *Leslie Ogilby*, of the measurement of 193 tons, lying in the West India dock, for 1300*l*." And at the end of that instrument it is said, that on payment of the purchase-money a bill of sale shall be made out to the purchaser at his expense, "and the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited." The question then is, whether those words in the other paper which describe the ship as "the fine brig *Leslie Ogilby*, 193 tons, British built, coppered, and copper-fastened," form part of the inventory spoken of in the memorandum, when we find immediately after them the word "inventory" placed at the top of the catalogue of stores. The memorandum of sale does not refer to the other document generally as the paper known by the name of the inventory, nor is there any evidence of its being so known. The only reference is to "the inventory," and that, upon examination, proves to be the list of stores. This is rendered more clear by the clause in the contract of sale, that "the said inventory shall be made good as to quantity only;" that cannot refer to the ship itself, but must have relation to a list of articles which may be made good by supplying a deficiency in the quantity. I am therefore of opinion, without reference to the [*805] case of *Pickering v. Dowson*, 4 Taunt. 779, that the plaintiff cannot recover. In *Shepherd v. Kain*, 5 B. & A. 240, it was not made a question, whether the advertisement of sale could be incorporated with the subsequent contract of purchase; and the decision on that point in *Kain v. Old*, 2 B. & C. 627, is not applicable here.

PARKE, J. The question of deceit was disposed of by the jury, when they found that the defect in the ship was unknown to the defendants. *Polhill v. Walter*, 3 B. & Ad. 114, only decides that if a person states what he knows to be untrue, and induces another to act upon it to his prejudice, a fraud in law is committed. That case was decided on the authority of *Foster v. Charles*, 6 Bing. 402, 7 Bing. 105, and in both, the party making the representation knew it to be false. Then as to the warranty: without saying how far anything contained in an advertisement of this kind can at any rate be used as a contract of warranty, where a regular bill of sale has been afterwards executed, it is sufficient to observe, that the reference from the instrument of sale to the advertisement, here relied upon, is only furnished by the words, "the said brig, with what belongs to her, shall be delivered according to the inventory;" and by that word "inventory," it was intended, in my opinion, to incorporate with the instrument of sale, not the whole advertisement, but only the list of properties and stores. By the agreement, the inventory is to be made good as to quantity only; which must refer to the things enumerated in that list. If it [*806] was meant that the whole *advertisement should be incorporated in the agreement of sale, one important sentence is unnecessarily repeated; for it is said in the former instrument, that the hull, masts, yards, standing and running rigging and stores, are "to be taken, with all faults, as they now lie;" and the agreement states, that "the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance

for weight, length, quality, or any defect whatsoever." This is an additional reason, though not so strong as the preceding one, for holding that the word "inventory" is not meant to include the whole matter of the advertisement, but only the enumeration of stores. The instrument itself seems to make that distinction; for the word "inventory" is printed about half way down, at the head of the list of stores. If the purchaser intended to stipulate for a copper-fastened ship, he should have had that description inserted in the particular of sale; but I doubt if the vendor intended to give such a warranty. None of the cases which have been cited bear upon this.

TAUNTON, J. The precise point raised in this case was not decided in those which have been cited, turning on similar instruments. In *Shepherd v. Kain*, 5 B. & A. 240, it was taken for granted that the ship was described as copper-fastened in the contract between the parties; it was only decided that the words "with all faults," did not do away with that which the Court considered a warranty. *Kain v. Old*, 2 B. & C. 627, and *Pickering v. Dowson*, 4 Taunt. 779, were cited by the Solicitor-General, for the purpose of *answering by [*807] anticipation any argument that might be drawn from them: his view of them may be correct, but they are not authorities in his favor: and it requires no authority to confirm the impression I entertain of this case. I think that the words in the contract of sale, "shall be delivered according to the inventory," refer only to the words immediately preceding, and mean "what belongs" to the brig; namely, the rigging, tackle, and other things of that kind, and not the brig herself. The inventory is, by that contract, "to be made good as to quantity only:" the argument for the plaintiff is, in effect, that something contained in the inventory should be made good as to quality. The words of the advertisement containing the description of the brig as copper-fastened, form no part of the inventory. The word "inventory" is placed after that description, at the head of a distinct list of articles. If it had been at the head of the paper, it might have been contended that the whole was the inventory. I am of opinion, therefore, that this description of the vessel cannot be imported into the contract as a warranty, and that the plaintiff is not entitled to recover.

PATTERSON, J. As to the first question raised, the decision in *Polhill v. Walter*, 3 B. & Ad. 114, is put distinctly and pointedly on the ground that the party knew the representation he made to be false; and Lord TENTERDEN particularly guards against any other construction, by saying,—“If the defendant had had good reason to believe his representation to be true, he would have incurred no liability; for he would have made no statement which *he knew to be false;—a case very different from the present.” With re- [*808] spect to the other point, I feel great difficulty in attributing to words a sense which they do not ordinarily bear, for the purpose of a particular case; and, here, the word "inventory" is used in the ordinary sense in the document which the plaintiff seeks to incorporate with the contract of sale. Then we are asked to put a different construction upon it, where it occurs in the contract itself. I think that cannot be done, for the reasons which have been already given; and especially for this,—that the defect which the plaintiff claims to have made good is a defect of quality, and not of quantity, for which, alone, the contract of sale provides. Rule absolute.

PRATT v. VIZARD, Gent., One, &c., and BLOWER, Gent., One, &c.
Nov. 20.

A. wishing to borrow money on a mortgage of land, delivered the title-deeds to B., the intended mortgagee, for examination, and said that he would pay all expenses. B. handed the deeds to his own attorneys to be investigated. The negotiation went off, and the attorneys being requested by A. to return his deeds, refused to do so till he paid their bill of costs. On assumpsit brought by A. against the attorneys, to recover back the money so paid:

Held, that the defendants could not be considered as having acted for both parties in the negotiation, and, therefore, had not a lien against A. as his attorneys: That supposing A. liable to B. for the costs incurred, B. could not communicate to his own attorneys a lien upon A.'s deeds, by handing them to the attorneys for investigation. That the undertaking of A. to B., if it amounted to a promise to pay these costs, did not entitle B.'s attorneys to detain the deeds, as it established no privity between them and A.; and that A. might have brought trover for the deeds, and was entitled to recover in this action.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before DENMAN, C. J., at the sittings at Guildhall, after Hilary Term, 1833, the material facts appeared to be as follows:—In July, *1829, [*809] the plaintiff, wishing to raise money by mortgage of an estate, applied for that purpose to Messrs. Rowley and Mansell, who were possessed of 4000*l.* stock, as trustees under a will. The title-deeds of the estate were sent by the plaintiff to Rowley to be inspected with a view to the advance; and the plaintiff, in a letter written about that time to Rowley, said (referring to the deeds so sent), "I shall pay with pleasure all expenses attending the same." Rowley handed the deeds to the defendants, his solicitors, to be examined. The plaintiff had several communications with the defendants in the course of the negotiation, but did not employ any solicitor on his own behalf till November, 1829, when the defendant Blower sent him drafts of a mortgage deed and declaration of trust: the plaintiff then submitted these to Mr. Davison, his own attorney. It was afterwards found that Mansell had not been regularly appointed trustee, and the negotiation was consequently broken off; but Mr. Blower refused to deliver up the deeds to the plaintiff until he should pay the defendants' charges in respect of the business done; alleging that the defendants had received the deeds as attorneys for both parties, and had a lien upon them for the bill of costs. The plaintiff paid the bill under protest, and brought this action for the amount. The Lord Chief Justice directed a nonsuit, giving leave to move to enter a verdict for the plaintiff. The points reserved were, first, whether the plaintiff was entitled to refuse execution of the mortgage deed; and, secondly, whether the defendant had a right to withhold the deeds till the plaintiff paid their bill. The case ultimately turned on the latter point only. A rule nisi having been obtained in pursuance of the leave reserved,

*Sir James Scarlett and R. V. Richards now showed cause. First, [*810] the defendants had a lien; or, at any rate, they are entitled to retain the money which the plaintiff paid them to redeem the deeds. The attorney who negotiates a mortgage, though nominated by the mortgagee, is, in fact, the attorney of the mortgagor also. Or, supposing this not to be so, the plaintiff here, wishing to raise money on mortgage, sent his deeds to Rowley, to be put into the hands of his attorneys for an investigation of the title; then the attorneys, as against Rowley, had a lien on the deeds: and admitting that the plaintiff might have brought trover against them on their detaining the deeds from him; yet if he, upon hearing of the circumstances, went to them and paid their bill of costs, he cannot now recover back money so paid, on an account for which he was liable in *foro conscientiæ*. The deeds had come to the hands of the defendants by the plaintiff's consent; he had, in fact, employed them, and he was bound to pay some one. If he did not pay the defendants in respect of a lien which they had, he paid them on Rowley's account, and as his agents. [PARKE, J. He did not acknowledge, when he paid the bill, that it was a debt due from him to any one.] Secondly, the plaintiff, by his letter, had expressly agreed to pay the expense of investigating his title; and the benefit which he was to derive from the inquiry was a consideration for that promise.

Platt, *contra*. The money was extorted, and paid under protest; unless, therefore, the defendants had a lien, the plaintiff must recover; and the defendants must seek payment of their bill of costs from Rowley, their employer.

It is not correct to say that the mortgagee's *attorney is also attorney [*811] for the mortgagor; the practice is, that each employs his own. The

deeds here were handed by the plaintiff to Rowley, and not to the defendants. In *Hollis v. Claridge*, 4 Taunt. 807, the plaintiff, wishing to raise money, gave some title-deeds, which he proposed as a security, to be inspected by the person who was to make the advance; the latter handed them to his conveyancer; and the conveyancer, on the negotiation going off, claimed a lien upon the deeds as against the plaintiff, for his bill of costs. But the Court of Common Pleas held that the conveyancer had no better title to retain them than the party from whom he received them, and was therefore liable in trover for the deeds at the suit of the plaintiff. Here, as was argued in that case, the defendants' possession of the deeds was the possession of their client; he could not have a lien, and, consequently, they could have none. If the plaintiff had refused to pay the bill of costs, Rowley, and not the defendants, must have attempted to recover against him for the amount. There was no contract between the plaintiff and defendants.

DENMAN, C. J. I am of opinion that this rule must be absolute. Whether or not the defendants in this case had a lien on the title-deeds, depends upon the question, whether or not the plaintiff employed the defendants to do his work in respect of those deeds. Now the evidence shows that he did not. Their employment was for the intended mortgagee, and rather against than for the mortgagor. And although there was a letter in which the mortgagor expressed himself willing to pay *the expenses, that was addressed to the adverse party, and does not establish any privity between the mortgagor and [*812] the attorneys of the mortgagee. The whole question is, whether there was a particular agreement entered into by the plaintiff, giving the defendants a lien upon his deeds, or whether they are, at all events, to be considered as his attorneys in the transaction. I think there was no such agreement, and that the defendants had no lien against the plaintiff as his attorneys.

PARKE, J. The plaintiff, having been obliged to pay this money, and having done so under protest, may recover it back if he might have recovered back the deeds in an action of trover without paying the bill of costs. It is clear from *Hollis v. Claridge*, 4 Taunt. 807, that Rowley could not, by transferring the deeds to the defendants, communicate a lien to them which he himself had not: nor is there any law or usage by which they themselves could have such a lien. They ought then to have shown some special agreement for it; but there was no evidence to go to the jury as to any such agreement. If, therefore, the defendants are to be considered as the attorneys of Rowley and Mansell, they could have no claim upon the plaintiff for the money in question. But it is said that they were in fact attorneys for both parties. Now it is true, that if the mortgage had been completed, and the money advanced, the plaintiff would have had to pay all the mortgagees' expenses; and the defendants would have stood in the place of the mortgagees for the purpose of receiving so much of those expenses as their bill amounted to; but if the negotiation *went [*813] off by the fault of the intended mortgagees, the plaintiff was not liable to make any such payment; and in the mean time, what the defendants had to do as attorneys was rather against than for the plaintiff. Can it then be said that the employment of the defendants as attorneys was ambulatory, and was for one party, or both, according to the event of the negotiation? Not only were they not attorneys for the plaintiff, but another person was; the defendants only looked after the interests of the proposed lender. No privity, therefore, can be established between them and the plaintiff.

TAUNTON, J. I am of opinion that the defendants had no lien on these deeds, either through Rowley or on their own account. The plaintiff deposited them with Rowley, not to be handed over to his attorneys and pledged, but to be investigated by him. The simple delivery of them for that purpose did not entitle him to hand them to the defendants, nor could he communicate to them the right which they now claim. *Hollis v. Claridge*, 4 Taunt. 807, is an authority on that point. Then whether the defendants could have any lien of their

own, depends upon the question whether or not they were solicitors for the plaintiff. Now in the case of annuities, and I believe in that of mortgages also, the law expenses do, in practice, ultimately come out of the pocket of the borrower: but the grantee employs his own attorney; the business is done on the credit of the lender, and the action for work and labor would lie against him, and not against the borrower; though when the business is done, and the money is *handed to the borrower, the attorney takes care to come with his [*814] bill, and is paid with so much of the money borrowed, the mortgagor receiving the advance minus that amount. But there is no lien between the attorney and the mortgagor; that can only arise from one party doing something, and the other having it done for him. The defendants, therefore, in this case, are liable to refund.

PATTESON, J. I am entirely of the same opinion, for the reasons which have been already given. Rule absolute.

ROBINSON v. DAY.

Where a new trial is granted on payment of costs, in a town cause, the costs occasioned by the cause being made a remanet are included.

A RULE was obtained in last Trinity term, calling on the plaintiff to show cause why the Master should not review his taxation of costs between the above parties. The action was for slander, see *Day v. Robinson*, 1 A. & E. 554, the cause was set down for trial at the sittings in London after Trinity term, 1831, and was made a remanet from sittings to sittings until those after Trinity term, 1832, when it was tried, and the plaintiff obtained a verdict. In the ensuing term, the defendant moved for a new trial upon several grounds, and partly on affidavit. A new trial was granted in Easter term last, on payment of costs. Upon the taxation, the Master at first disallowed the costs of making the cause a remanet, and of certain witnesses, brought up by the plaintiff at considerable [*815] expense from Bedford, where *the cause of action arose; but on re-consideration he allowed these costs, stating that a distinction prevailed between country causes, where such costs were not allowed, and town ones, in which they were. The defendant obtained a Judge's order to pay the disputed costs into court, to await the result of this motion. In Trinity term last,

Platt showed cause.¹ The costs were rightly allowed. At the town sittings a cause is usually made a remanet several times; and by the granting of a new trial the expenses thus occasioned will all be incurred anew. It would be hard if these costs were thrown upon the plaintiff, especially where the application for a second trial is grounded upon new matter, suggested by the unsuccessful party on affidavit. [LITTLEDALE, J. That argument would apply in country causes.] There is no good reason that the rule should not be the same in those; but there it seldom happens that the cause is made a remanet more than once.

Kelly, contra. It is desirable that the practice on this point should be settled, in order that parties may know to what they subject themselves when they consent to take a new trial on condition of paying costs. The Court of Exchequer does not allow the costs here claimed. No distinction can be shown in principle between town and country causes, as to the payment of these costs; nor does there appear to be any established practice. The expense incurred arises merely from the inevitable delay of public business. The plaintiff, if [*816] he ultimately obtains *a verdict, will recover these costs as costs in the cause. The terms used in the rule for a new trial mean that the defendant shall pay the costs of the trial merely, in which there has been a miscarriage of the jury. *Cur. adv. vult.*

DENMAN, C. J., in this term (November 25th) delivered the judgment of

¹ Before DENMAN, C. J., LITTLEDALE, PARKE, and PATTESON, Js.

the Court. We are of opinion, that where a rule for a new trial is made absolute in a town cause on payment of costs, the costs occasioned by the cause being made a remanet are included. The rule, therefore, that the Master should review his taxation, must be discharged. Rule discharged.

RULE OF COURT.

IT IS ORDERED, That where a defendant is arrested upon an alias or pluries capias issued into another county pursuant to the rule, Michaelmas term 3 W. 4, sect. 7, the defendant must put in bail in the county where he was arrested.

*In the Matter of Arbitration between WESTZINTHUS and the Assignees of LAPAGE and Co. : and between ROGERS and Co., and [*817] the same Assignees.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of L. at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, L. endorsed the bill of lading, and deposited it with H., who advanced money on it, having previously advanced money on other goods (the property of L.) deposited with him. On the arrival of the oil, L. having previously become bankrupt, and W. not having been paid for it, W.'s agents claimed it of the master of the ship; but the latter delivered it to H., who afterwards sold the goods of L. as well as the oil of W. The net proceeds of the goods belonging to L. were sufficient to satisfy the debt due from L. to H. H. paid himself his debt, and deposited the net proceeds of W.'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between W. and the assignees of L. were referred. The arbitrator having stated the above facts on his award for the opinion of this Court: Held, that W., the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of L., because the property in and the right to the possession was then vested in H., the endorsee of the bill of lading for value; and further, that W. had not, by reason of such claim, any legal right to the possession of the goods after H.'s lien was satisfied: but that in a Court of equity, such transfer to H. would be treated as a pledge or mortgage only, and therefore W., by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to H.'s lien against the assignees of L.

Held, secondly, that W., by means of his goods, had become surety to H. for L.'s debt, and had a clear equity to oblige H. to pay his debt out of L.'s own goods deposited with him in ease of such surety; and all the goods both of W. and L. having been sold, W. might insist on the proceeds of L.'s goods being appropriated to the payment of the debt: and, therefore, that W. was entitled to have all the proceeds of the oil paid over to him.

By rule of this Court, certain matters in dispute between Westzinthus and the assignees of Lapage and Co., and between Rogers and Co., and the same assignees, were referred to an arbitrator, who stated the following facts upon his award:—

In February, 1831, Westzinthus shipped, at Leghorn, twenty-three casks of oil, by the ship Sarah, to John and Frederick Lapage, who then carried on business as merchants in Liverpool under the firm of Lapage and Co, in execution of an order transmitted by them to him, and at the same time drew a bill of exchange on them for the amount of the invoice of the oil. This bill, together with the bill of lading for the oil, was transmitted to certain agents of Westzinthus, with instructions to deliver the bill of lading to Lapage and Co., *upon their accepting the bill of exchange so drawn on them; and [*818] accordingly Lapage and Co. accepted the bill of exchange, and the bill of lading was delivered to them.

Messrs. Hardman and Co., brokers in Liverpool, were in the habit of making advances in cash, and by acceptances, to Lapage and Co. upon goods placed by them in the hands of Hardman and Co. for sale. Under this course of dealing, the transactions hereinafter mentioned took place. On the 14th of March, 1831, Hardman and Co. were under cash advances and had accepted for Lapage

and Co. to the amount of about 6700*l.* upon various goods, all of which were in the possession of Hardman and Co. On the 14th of March, 1831, Hardman and Co., at the request of Lapage and Co., accepted their draft for 1500*l.*, falling due the 15th of July (which was duly paid at maturity), as a further advance upon the goods already in the hands of Hardman and Co., and also on the said twenty-three casks of oil by the Sarah, which had not then arrived: the bill of lading of the oil by the Sarah was, on the same 14th of March, duly endorsed and delivered by Lapage and Co. to H. and Co. According to the agreement, and the course of business between Lapage and Co. and H. and Co., the latter were entitled to hold all the goods and bills of lading as a security for their advances. On the 16th of March, 1831, a similar advance was made by H. and Co. of 1000*l.*, on which occasion a bill of lading of certain oil, then expected by the ship Frederick, was handed and endorsed to H. and Co. by Lapage and Co. The facts and questions as to this oil were the same as those relating to that by the Sarah, and it was to abide the event of the award as to the oil by the Sarah.

[*819] *On the 19th of March, 1831, Lapage and Co. committed acts of bankruptcy; and their acceptance of Westzinthus's bill was dishonored at maturity. On the 26th of March, a commission of bankrupt was issued against them. On the 24th of March, the Sarah arrived at Liverpool; and on the same day, the agents for Westzinthus, who held an endorsed part of the bill of lading, gave notice to the captain, in consequence of the failure of Lapage and Co., not to deliver the oil to them; and they also demanded the delivery of the oil to be made to them as agents of M. Westzinthus under the bill of lading held by them, and tendered the captain the amount of the freight; but no tender or offer was made to Hardman and Co. to repay any part of the money advanced as hereinbefore mentioned. On the 7th of April, 1831, the solicitors of Westzinthus wrote the following letter to Hardman and Co.:—"Gentlemen, As solicitors of M. Westzinthus of Leghorn, we address you upon the subject of twenty-three casks of oil, marked T., consigned by him per the Sarah to Messrs. Lapage and Co. of your town; and of which you have illegally obtained possession, after the same had been stopped in transitu on behalf of the consignor, in consequence of the failure of Lapage and Co. We are informed that Lapage and Co. transferred to you the bill of lading of this oil, together with indigo and other property belonging to them, as a security for 1500*l.* advanced by you to them. We are also informed that you hold other property belonging to Lapage and Co., which you are also entitled to retain as security for the 1500*l.* Without entering, at present, into any question as to the validity of the transfer of this bill of lading, we think it right to give you notice that, in any event, you will be required to

[*820] apply the indigo*and other property really belonging to Lapage and Co. now in your possession, in payment, in the first instance, of your advances, without having recourse to the oil in question, except for any deficiency after you have realized the other securities; and should the oil be more than sufficient to cover such deficiency, M. Westzinthus will claim the benefit of his stoppage in transitu, at least, to the extent of the surplus. If you should think it right, after this notice, to sell the oil before realizing your other securities, M. Westzinthus will hold you responsible; and in that case he will claim any balance which may arise in your hands due to Lapage and Co. not exceeding the proceeds of the oil; and we give you notice not to pay such balance to Lapage and Co., or their assignees or creditors." After the delivery of the oil had been stopped, the captain, on the 27th of March, delivered the oil to Hardman and Co. under an indemnity. At the time of the bankruptcy of Lapage and Co. they were indebted to Hardman and Co. in the sum of 927*l.*, advanced in the manner before described; and as security for this sum, they held goods of Lapage and Co. which had actually arrived, of which the net proceeds, when sold as after mentioned, were 996*l.* 1*s.* 7*d.*; they also held the bill of lading of the oil by the Sarah, of which the net proceeds, when sold as hereinafter mentioned,

were 331*l.* 7*s.* 7*d.*; and the bill of lading of the oil by the Frederick, of which the net proceeds, when sold as hereinafter mentioned, were 1106*l.* 10*s.* 10*d.* After the arrival of the oil by the Sarah and by the Frederick, H. & Co. sold all such oil and other goods; the net proceeds of which amounted respectively to the before-mentioned sums, making a total of 11,399*l.* "Out of this sum, H. & Co. have paid themselves *927*l.* due to them as aforesaid; they [*821] have deposited 1437*l.* 18*s.* 5*d.* (the amount of the two parcels of oil in dispute) to abide the event of this award, and have paid over the residue to the assignees of Lapage & Co. The goods, other than those by the Sarah and Frederick which H. & Co. had sold as aforesaid, had been sold by different persons to Lapage & Co., and not paid for; and such vendors, at the time of the bankruptcy, were creditors of Lapage & Co. for the amount. The bills drawn by Westzinthus and by Rogers & Co. for the amounts of the oil by the Sarah and the Frederick, have not been paid or negotiated; but are still in the hands of the drawers or their agents."

The arbitrator was of opinion, that Westzinthus and Rogers & Co. were respectively entitled to 18*l.* 13*s.* 4½*d.* per cent. on the respective proceeds of the goods per the Sarah and the Frederick (being such part of the said proceeds as bore to the whole the same proportion which the excess of the whole proceeds of the goods sold by H. & Co. over the debt to them from Lapage & Co. bore to such whole proceeds), and ought to stand in the situation of creditors of Lapage & Co., for the residue of such proceeds of the goods by the Sarah and the Frederick respectively: he then awarded and directed that the sums of 61*l.* 17*s.* 3*d.* and 206*l.* 11*s.* 7*d.* (being such percentage as aforesaid), together with such sums as any dividends already declared under the bankruptcy of Lapage & Co. on the residue of such amounts of the said goods respectively (that is to say, on the sums of 296*l.* 10*s.* 4*d.* and 899*l.* 19*s.* 3*d.*) would amount to, should be paid to Westzinthus and Rogers & Co. respectively; and that the residue of such disputed sums should be paid to the assignees of Lapage & Co.; and *that [*822] Westzinthus and Rogers & Co. should be respectively paid such dividends as should thereafter be declared under the bankruptcy on such last-mentioned parts of the sums in dispute; and that the said bills of exchange should be delivered to the assignees. But if this Court should be of opinion that Westzinthus and Rogers & Co. were entitled to the whole proceeds of the said goods respectively, then the arbitrator awarded that such proceeds should be respectively paid to them, and the said bills of exchange delivered to the said assignees; or if the Court should be of opinion that Westzinthus and Rogers & Co. were not entitled, under their stoppage in transitu, to any part of the proceeds of such goods respectively, then he awarded, that so much of the said proceeds as the dividends already declared on the whole sums for which the said goods were sold by Westzinthus and Rogers & Co. respectively to Lapage & Co., amounted to, should be paid to Westzinthus and Rogers & Co. respectively; and the residue thereof to the said assignees, who were to pay to Westzinthus and to Rogers & Co. such dividends as should thereafter be declared upon such whole sums respectively.

F. Pollock had obtained a rule nisi for setting aside so much of the award as gave to Westzinthus, and Rogers & Co., respectively, 18*l.* 13*s.* 4½*d.* per cent. on the amount for which the goods were sold and as directed that they should stand in the situation of creditors to Lapage & Co. for the residue; and the rule proposed that, instead thereof, it should be declared that Westzinthus and Rogers & Co. were entitled only to so much as the dividends already declared amounted to.

**J. H. Lloyd*, for Westzinthus and Rogers & Co., obtained a rule for setting aside the same part of the award, and that Westzinthus and Rogers & Co., should be declared to be entitled to the whole proceeds of the goods. The Court ordered, that the case should be set down in the special paper for argument. The case was argued on former days in this term. [*823]

F. Pollock for the assignees of Lapage and Co. Westzinthus was not entitled to the 18l. 13s. 4½d. per cent., because at the time when his agents claimed the oil he had no right to stop in transitu, Hardman and Co. having then acquired an interest as endorsees of the bill of lading for value. The question is, what is the effect of the endorsement of a bill of lading for valuable consideration by the consignor. Does it reduce the goods, of which it is the symbol, into the possession of the consignee, so as to render them, if he become bankrupt, in his order and disposition within the seventy-second section of the 6 G. 4, c. 16? Or are they to be considered in transitu till they come to the actual possession of the consignee? As to the justice of the case, it may be observed that advances had been actually made on these very goods. That is not inconsistent with the fact that the proceeds of other goods belonging to Lapage and Co., and deposited by them with Hardman and Co., produced the full sum advanced by the latter; for no man who advances money on the security of goods, advances to the extent of the full value, but only in a given proportion to that value, which varies in different trades. Westzinthus, the consignor of the oil, who trusted Lapage and Co. with the bill of lading, and thereby enabled them to obtain [*824] *credit, cannot in justice be entitled to have the proceeds of the other goods applied exclusively in discharge of the debt due from Lapage and Co. to Hardman and Co., and to throw on the residue of Lapage and Co.'s estate in the hands of their assignees, the claim of those persons who advanced money on the credit of the consignor's goods. There is no decision applicable to the present case; but the equity is, that all the goods should bear the debt rateably. It would be a great injustice to allow the consignor to retake his goods after they had been the meritorious cause of an advance. In point of law, the consignor had no right to retake these goods; for the endorsement of the bill of lading to Hardman and Co. for value put an end to the right of the consignor. In *Lickbarrow v. Mason*, 2 T. R. 71, *ASHHURST, J.*, says, that "as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves, if not, it would enable the consignee to make the bill of lading an instrument of fraud." That observation applies here; for the bankrupts Lapage and Co. have obtained credit on the goods. If the consignor is entitled to have them back, then Hardman and Co., who had advanced money on the goods, will be defrauded; and instead of having the goods to which they trusted, will receive a dividend on the estate of Lapage and Co. *BULLER, J.*, in the opinion delivered by him in the same case in the House of Lords, 6 East, 23, note (a), says, "Every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and effectually as if the goods had been actually delivered into the hands of the [*825] *consignee." If the endorsement of the bill of lading for value is equivalent to the delivery of goods of which it is a symbol, and operates as a transfer of property in goods, which can pass by delivery only, this case must be considered as if the goods had actually come to the possession of the consignee, and he had pledged them with Hardman and Co.; and if that be so, it is quite clear that the consignor could not retake them. He had no right to retake them at the time when he made the claim; for Hardman and Co. had not only acquired the legal property in them by the endorsement of the bill of lading, but had advanced money on them, and thereby acquired an equitable title.

At all events, they were then goods in the possession, order, and disposition of the bankrupt, with the consent of the true owner, within 6 G. 4, c. 16, s. 72. Generally speaking, the right of stopping in transitu makes an implied exception to that enactment; but still, if the goods in this case are to be considered as having ever been in the possession of the consignee subject to the consignor's right to stop them; inasmuch as that right had been divested, when Westzinthus made his claim, by the consignee's having endorsed the bill of lading to a third person for value; they did then remain in the order and disposition of the bank-

rupt, and pass to the assignees within the seventy-second section. [PARKE, J. Assuming that possession of the symbol of the property is equivalent to the possession of the property itself, here Lapage and Co. had not the order and disposition at the time of their bankruptcy, but Hardman and Co., and therefore the section does not apply.]

**J. H. Lloyd*, for Westzinthus, and Rogers and Co. The award proceeded on a right principle, viz., that the unpaid vendor had an interest [*826] in the goods, subject to the right of the pledgee: but, that right being satisfied, the unpaid vendor is entitled to have all the proceeds of his goods paid over to him. The doctrine of stopping in transitu owes its origin to courts of equity, and is founded wholly on equitable principles which have been adopted by courts of law; per BULLER, J., in *Lickbarrow v. Mason*, 6 East, 27, note (a), and Lord KENTON in *Hodgson v. Loy*, 7 T. R. 445. It is similar to the re-vendication of the civil law. The general principle is, that if goods have got into the vendee's possession, the right of the vendor is gone; but if he can get them back before they have come into the actual possession of the vendee, he is entitled so to do; and that, because, although he may have parted with the property in them by delivering them to the vendee on board a ship or by transmitting the bills of lading, he still has an equitable lien on them for the price. *Lickbarrow v. Mason*, 2 T. R. 63, shows that the equitable title of the vendor continues, after he has transferred the legal property in the goods by endorsing a bill of lading for valuable consideration. There Turing and Co. had shipped goods at Middleburg by order of one Freeman of Rotterdam, drawn bills of exchange upon him (which he accepted) for the price, and transmitted him bills of lading. Freeman sent the bills of lading to *Lickbarrow and Co.*, at Liverpool, that they might receive and sell the goods on his account, and drew bills of exchange upon them (which they accepted) for the *amount. Between the ship's [*827] departure and her arrival at Liverpool, Freeman became bankrupt, and Turing and Co. sent another bill of lading to Mason and Co., endorsed specially for delivery to them, and they thereupon obtained the goods from the master. Turing and Co. afterwards paid the bills drawn by them upon Freeman; and *Lickbarrow and Co.* paid those which had been drawn upon them by Freeman. There, it was held that the right of the consignors to stop in transitu was gone, though they had an equitable lien for the price, for that could not prevail against *Lickbarrow and Co.*, who had both a legal and an equitable title; a legal title as assignees of the bill of lading transmitted to Freeman, and an equitable title as having paid the bills drawn upon them by the latter for the amount of the goods. There, though the *jus tertii* had interposed and the vendor had enabled the vendee to confer a right upon a third person, the equity of the latter was considered equal only, but not superior, to that of the unpaid vendor. The question, then, in this case is whether the equity of the vendor had not attached by reason of his having asserted his claim to the goods before they were actually delivered to the consignee. Assuming that he had no legal right to the goods at the time when he demanded them, there is no authority to show that when the lien of the assignee of the bill of lading is satisfied, the unpaid vendor's right to the goods does not revive. On the contrary, it may be collected from the opinion delivered by BULLER, J., in the House of Lords, in *Lickbarrow v. Mason*, 6 East, 36, note (a), that if the money there advanced by the assignees of the bill of lading had been repaid, the vendor might then have retaken the goods. He *says, "I am confident that if the goods in question be re- [*828] tained from the plaintiff without repaying him what he has advanced on the credit of them, it will be mischievous to the trade and commerce of this country; and it seems to me, that not only commercial interest, but plain justice and public policy forbid it. To sum up the whole in very few words, the legal property was in the plaintiff; the right of seizing in transitu is founded on equity: no case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them. The whole ar-

gument of the learned Judge here turns upon the equitable right of the assignee to have the goods, until he is repaid for his advances." In the present case, every question of equity, as well as of law, was referred to the arbitrator; and, therefore, this Court must consider itself sitting as a court of equity, and is bound to decide the case on equitable principles. Now, it is quite clear that the representatives of Lapage and Co. would not be entitled in equity to have the goods restored to them without paying the pledgees the money for which they were pledged: *Snee v. Prescott*, 1 Atk. 245, see 6 East, 28, note (a), is a direct authority upon that point, and, so far, that case has never been called in question. But the pledgees having been paid, it could not make any difference, as to their right to retain, whether Lapage and Co., the consignees, or Westzinthus, the unpaid vendor, were the suitors in equity. Hardman and Co., who stand in the situation of pledgees in this case, could not assume a right to determine, by paying themselves out of the goods of one or the other, whether Lapage and [*829] Co., or *Westzinthus should acquire the equitable right, upon their (Hardman and Co.'s) lien being discharged.

Then it is said that the endorsement of the bill of lading by the consignee for value, was equivalent to reducing the goods into his actual possession, and, therefore, that the transitus was at an end when Westzinthus claimed the goods; but the reason why the right of stopping in transitu is divested by such endorsement, is not because such an act is equivalent to reducing the goods into the consignee's actual possession, but because it operates as a transfer of the *legal* property in the goods to the endorsee, and he who has advanced money on the goods has as good an *equitable* title as the unpaid vendor. If such endorsement of the bill of lading were equivalent to possession of the goods, then, if a bill of lading were deposited for a single hour with a banker who advanced money on it, and afterwards returned it on payment of the money, the consignor's right to retake the goods would be divested. [PARKE, J. There, after the lien of the banker was satisfied, the vendor would stand in the same position he was in before the deposit. If, before the deposit, he had a right to stop in transitu, he might do so after. But here, Westzinthus, when he made his claim, had no right to resume the possession; at that time the legal right to the property as well as to the possession of the goods was in Hardman and Co.] The *ius tertii* might operate as a suspension of his right at that time, but as soon as the equity of the third person ceased, the right of the unpaid vendor, in respect of his claim to stop in transitu, must revive. In the case of a bill of exchange, as between the drawer and the payee, the consideration may be gone [*830] into, but it cannot between the drawer and *subsequent endorsees. But if the bill comes back into the hands of the payee, the equitable rights between the original parties revive. Can the right to the goods in this case depend on the fact whether the demand is made a moment sooner or later? Stoppage in transitu is the right to reclaim the goods. Suppose Hardman and Co. had had an interest in the bill of lading to the extent of 500*l.*, and they brought trover against the captain; they could recover no more. [PARKE, J. That is by no means clear. If the transfer of the bill of lading gave to Hardman and Co. a legal right only to the extent of the sum for which it was pledged, they could recover that only; but it transferred the whole legal right to them. If they recover the sum advanced by them only, who is to recover the remainder? Could the consignor, who has no legal property in the goods, maintain an action for the loss of his equity of redemption? PATTESON, J. You do not say that the consignor here could have brought trover.] It is unnecessary to contend that; he clearly could not have done so without satisfying the claim of the pledgee. The question here is, not whether the vendor might maintain an action at law, but whether he has not an equitable title to these goods. Assuming that the lien of Hardman and Co. has been satisfied out of the proceeds of the other goods belonging to Lapage and Co., though they would still be holders of the bill of lading, and therefore the legal owners of the goods, still

they would have no equity, and therefore could not interpose between the vendor and vendee, and prevent the former from reclaiming his goods. What Hardman and Co. might and ought to have done, equity would consider as done. They ought to have satisfied themselves out of the other *goods. If the assignees of Lapage and Co. had filed a bill in equity to have the goods restored to them, they would not have been entitled to have the goods without paying the vendor; and it cannot make any difference, that here the vendor is the person who is driven into a court of equity. Hardman and Co., after their own debt was satisfied, were trustees of these goods for the vendor. If the right of the vendor is to be defeated by the accident of the consignee's having pledged the goods or the bill of lading, the consequence would be, that as soon as goods arrived, the consignee might, by pledging them for the smallest sum, defeat the right of the consignor. As to the argument, that to allow this stoppage in transitu would be a hardship on the general creditors of Lapage and Co., the answer is, that the vendor who has the equitable lien "ought not to be on a footing with the rest of the creditors for whom the assignees are trustees; for the creditors at large trusted to a personal credit, but he who has the lien never gave a personal credit, but trusted to the thing." *Lempriere v. Pasley*, 2 T. R. 490, per ASHEURST, J. The question is not whether there has been an actual delivery, for that was complete as soon as the goods were shipped; but whether they ever came into the actual possession of the vendee. *Wiseman v. Vandeputt*, 2 Vern. 203, shows that an unpaid vendor may by any means prevent his goods coming into the hands of the vendee. Now here the consignor has done all that he could to prevent their coming into the hands of Lapage and Co.

Then, assuming (as the arbitrator has in effect decided) that Westzinthus, the consignor, had an equitable *lien subject to the right of the pledgees, he is entitled to recover the whole proceeds of his goods, on the equitable principle that a creditor having two funds shall take to that which, paying him, will leave another fund for another creditor; and the latter has a right in equity to compel the former to resort to the other fund, or to stand in his place as to that other, if that be necessary for the satisfaction of both creditors; *Aldrich v. Cooper*, 8 Ves. 381; *Lanoy v. The Duke of Athol*, 2 Atk. 444; *Maddock's Principles and Practice of the Court of Chancery*, vol. i. p. 250, 2d edit. No part of the goods to which Westzinthus was equitably entitled, and which stood as a security for Hardman and Co.'s demand, should have been resorted to while there was another fund available. *Ex parte Goodman*, 3 Madd. 373. Westzinthus, by means of his goods, was a surety for the debt of Lapage and Co.; and as such, if he had paid the whole of that debt, would have been entitled to stand in the place of Hardman and Co., the mortgagees of the other goods, and to be paid out of them. *Copis v. Middleton*, Turn. & Russ. 224, 281.

Cour. adv. vult.

DENMAN, C. J., in this term (November 25th), delivered the judgment of the Court:—

In this case Westzinthus, who was the unpaid vendor at the time when his agents made the demand on the master of the vessel on board which the oil was, had no right to take possession on the insolvency of the vendee, Lapage, because the property in, and also the right to the possession of the goods, was unquestionably vested at that time in Hardman, the endorsee of the bill *of lading, for a valuable consideration. The demand, therefore, of Westzinthus, gave him no legal right to the property or possession of the goods; and it appears to us, that he can have no claim at law, except as arising out of the right of retaking the possession of the goods themselves, which right was determined by the endorsee of the bill of lading. It is not necessary to determine what would have been his situation, if either Lapage or himself had paid off Hardman's demand, prior to the notice given to the master, or to the actual receipt of the goods by the vendee.

But it is very properly urged, in the able argument in support of Westzinthus's claim, that every question of equity, as well as of law, was referred to the arbitrator, and that the unpaid vendor had, under the circumstances, an equitable title to the goods, by virtue of the attempted stoppage, subject to Hardman's right thereto: and also an equitable right to compel Hardman, the creditor, to pay himself out of Lapage's own property, which all the other goods (except those of Messrs. Rogers and Co., whose claim abides the decision of this) certainly were. The learned arbitrator appears to have decided in favor of Westzinthus to this extent,—that he had, by virtue of the demand or attempted stoppage in transitu, a preferable right, either at law or in equity, to the general creditors of Lapage; but he has allowed him only a proportion of the proceeds of his goods, thinking that all the goods deposited by Lapage with Hardman should be proportionably charged with the payment of the debt due to him. He has, therefore, deducted 81*l.* 6*s.* 7*d.* per cent. of the proceeds of Westzinthus's goods, being the proportion which the debt due to Hardman [*834] bears to all the proceeds, and *directed the remainder to be paid over to him; and has, therefore, disallowed the equity claimed by Westzinthus to oblige Hardman to pay himself out of Lapage's own goods.

We think that the arbitrator was right in allowing Westzinthus to be in a better condition than the other creditors, but wrong in disallowing his claim to have all the proceeds paid over to him.

As Westzinthus would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession by the endorsement of the bill of lading, for a valuable consideration, to Hardman, it appears to us that, in a court of equity, such transfer would be treated as a pledge, or mortgage, only, and Westzinthus would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage; in analogy to the common case of a mortgage of a real estate, which is considered as a mere security, and the mortgagor as the owner of the land. We therefore think that Westzinthus, by his attempted stoppage in transitu, acquired a right to the goods in equity (subject to Hardman's lien thereon) as against Lapage, and his assignees, who are bound by the same equities that Lapage himself was. And this view of the case agrees with the opinion of Mr. Justice BULLER, in his comment on the case of *Snee v. Prescott* in *Lickbarrow v. Mason*, 6 East, 29, note.

If, then, Westzinthus had an equitable right to the oil, subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become a surety [*835] *to Hardman for Lapage's debt, and would then have a clear equity to oblige Hardman to have recourse against Lapage's own goods, deposited with him, to pay his debt in ease of the surety; and all the goods, both of Lapage and Westzinthus, having been sold, he would have a right to insist upon the proceeds of Lapage's goods being appropriated, in the first instance, to the payment of the debt.

The result is, that Mr. *Lloyd's* rule must be made absolute, and Mr. *Pollock's* Rules accordingly.

FOREMAN and LLOYD, Executor and Executrix of P. JEYES v. F. T. JEYES. Nov. 21.

Plaintiffs having obtained a verdict against defendant under an award in a cause in K. B., the Court of Chancery, upon bill filed, and matter appearing on the award itself, granted an injunction to stay further proceedings. Plaintiffs nevertheless signed judgment, and took defendant in execution. On application to this Court for a rule nisi to discharge defendant out of custody (it being stated amongst other things, that the plaintiffs could not be met with for the purpose of attaching them by process out of Chancery), this Court refused to interfere.

THIS cause was referred at nisi prius to a barrister, who made his award

directing that a verdict should be entered for the plaintiffs, but, at the same time, setting out special matter in favor of the defendant, upon which a bill was filed in Chancery against Foreman and Lloyd by the defendant, for himself and others, creditors of the testator. To this Foreman put in an answer, renouncing any claim under the testator's will, and stating that he had not proved it: Lloyd not putting in an answer, the Court of Chancery granted an injunction to restrain the present plaintiffs from taking further proceedings at law upon the award. Judgment was, however, signed in the name of the plaintiffs, and the *defendant taken in execution by a ca. sa. directed to the sheriff of [836] Northamptonshire, in violation of the injunction.

Miller, in this term, moved before LITTLEDALE, J., in the bail court, for a rule to show cause why the defendant should not be discharged out of custody. The learned Judge said that he would not venture to grant the rule, but suggested that an application should be made to the Court of Chancery; and he referred the case to the full Court, where the motion was now renewed. The affidavits stated the facts of the case at large, and that the plaintiff Lloyd could not be found, and her attorney refused to disclose her residence, so that an attachment from the Court of Chancery would be ineffectual; and it was made part of the motion, that service of the rule on the plaintiffs' attorney might, under the circumstances, be good service. In support of the application, *Davis v. Salter*, 2 Cro. & J. 466, was cited, where the defendants, executors, were restrained by injunction from disposing of any of the testator's property, and an action being brought against them, as executors, in the Court of Exchequer, it was moved in that Court that the proceedings might be stayed; upon which BAYLEY, B., observed that the injunction was no ground for staying the proceedings, but might be for staying execution if the plaintiffs obtained a verdict.

DENMAN, C. J. It would be going very far to stay the enforcement of legal rights on such a ground as this; and I think we ought not to begin the practice. The case cited does not apply. There must be no rule.

*PARKE, J. We can only look to the legal rights of the parties; and the plaintiffs having obtained a verdict by the award, have a legal right [837] to proceed upon the judgment.

TAUNTON and PATTESON, Js., concurred.

Rule refused.¹

¹ The Court of Chancery was afterwards applied to, and Lord BROUGHAM, Chancellor, ordered that the defendant should be discharged.

CHEETHAM and Wife v. BUTLER.

A promissory note payable to A. B. generally, is not one payable to bearer on demand, and re-issuable, within the first class of notes described in 55 G. 3, c. 184, sched. part 1, but, a note payable otherwise than to bearer on demand (not re-issuable), is within class 2, and therefore such a note for 100*l.* requires a stamp of 3*s.* 6*d.* only.

ASSUMPSIT on a promissory note given to the plaintiff's wife before marriage. Plea, general issue. At the trial before DENMAN, C. J., at the Lincolnshire Spring assizes, 1833, the following note, written upon a stamp of 3*s.* 6*d.*, was given in evidence:—"I promise to pay to Mary Meager, the sum of one hundred pounds, for value received." It was objected that the note was within the first class of promissory notes mentioned in 55 G. 3, c. 184, sched. part 1, viz., a note payable to the bearer on demand and re-issuable, and therefore required a stamp of 8*s.* 6*d.*, and *Keates v. Whieldon*, 8 B. & C. 7, was cited. The Lord Chief Justice thought that the note was one within the second class of cases mentioned in schedule, part 1, viz., notes payable in any other manner than to bearer on demand, but not exceeding two months after date, or sixty days after sight (not re-issuable), and therefore that the stamp of 3*s.* 6*d.* *was [838] proper; but, on the authority of the case cited, he nonsuited the plaintiff, giving leave, however, to move to enter a verdict. A rule nisi having been obtained accordingly,

Campbell, Solicitor-General, in this term showed cause. This is a note payable to bearer on demand. Where a note is made payable generally, the words on demand are implied. In *Whitlock v. Underwood*, 2 B. & C. 157, a note payable to bearer generally, was held by this Court to be a note payable on demand within the first class of notes mentioned in the schedule to the stamp act. It is true that in this case, the note is in terms payable, not to bearer, but to the payee by name. But in *Keates v. Whieldon*, 8 B. & C. 7, a note payable to J. Keates on demand, was held first by PARKE, J., at nisi prius, and afterwards by this Court on an application for a new trial, to be a note payable to bearer on demand within the first class of promissory notes mentioned in the schedule to the stamp act. It is true that the Court of C. P., in *Armitage v. Berry*, 5 Bing. 501, and this Court, in *Moyser v. Whitaker*, 9 B. & C. 409, held that a note payable to a party or his order on demand was within the second class of notes mentioned in the 55 G. 3, c. 184, sched. part 1, viz. payable in another manner than to bearer on demand, and in the last of those cases PARKE, J., expressed some doubts as to the authority of *Keates v. Whieldon*; but that case has never been expressly overruled.

Sir James Scarlett and *Humfrey*, contra. In one sense a note payable to a [839] payee named is one payable to *bearer, for being payable to him only, he must continue the bearer; but inasmuch as such note wanting the words bearer or order, is payable to no other person, it is not one payable to bearer in the sense intended by the legislature in the 55 G. 3, c. 184. The obvious ground for imposing a larger duty on notes falling within class 1, than those falling within class 2, is, that notes in class 1, are re-issuable. A note payable to the payee only, cannot be re-issued. Class 1 applies only to notes so framed as to entitle any one who becomes the bearer for a valuable consideration to receive the amount. Here no person but Meager or her personal representative could become entitled to recover the amount. [PATTESON, J. The words, and *re-issuable* were not much considered in *Keates v. Whieldon*, 8 B. & C. 7.]

DENMAN, C. J. We are all of opinion that the decision cannot be supported: and that the note in this case is one falling within class 2, and therefore has a proper stamp.

PARKE, TAUNTON, and PATTESON, Js., concurred.

Rule absolute.

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*CAMPBELL v. RICKARDS and Others.

A merchant at Sydney shipped goods for England, on board the ship C., and by another ship that sailed after her, wrote to an agent in England, and desired him, if he received the letter before the C. arrived, to wait thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods.

The letter was received, and the agent having waited more than thirty days, effected an insurance through the intervention of a broker, who told the underwriters when the C. sailed, and when the letter ordering the insurance was written, but did not state when it was received, nor the order to wait thirty days after the receipt of it, before effecting the insurance. The C. never arrived. The assured brought an action on the policy against the insurers, but failed, on account of the suppression of facts by the broker. In an action by the assured against the broker, for negligence in effecting policy:

Held, that the evidence of underwriters and brokers was not admissible to show, that in their opinion the matters not communicated were material.

CASE against the defendants as agents, for negligence in effecting a policy of insurance, by means of which negligence the plaintiff was prevented from recovering against the underwriters. Plea, general issue. At the trial before DENMAN, C. J., at the London sittings after Michaelmas term, 1832, the following appeared to be the facts of the case:—

The defendants, who were merchants carrying on business in London, were employed by the plaintiff, who resided at Sydney, New South Wales, to effect

an insurance on some New Zealand seal skins, shipped on board the Cumberland from Sydney to England. The instructions to insure, were contained in the following letter, sent by the ship Australia, addressed by the plaintiff to the defendants, and dated Sydney, 28th of May, 1827:—"I will thank you to effect insurance, at market price, on forty-nine casks, containing 4,175 New Zealand fur seal-skins, shipped to the consignment of Mr. W. Emmett per Cumberland, or, in case of death, to your house, for which purpose I enclose you the bill of lading. The Cumberland left Port Jackson for London, via Hobart Town, on the 27th of April, 1827, and, by letters received from Mr. Emmett, was at Hobart Town on the 10th of May, 1827, and was expected to sail from thence in ten or fourteen days from that date. Insurance *to be effected on the goods shipped to my consignment, and the freight [*841] payable at New South Wales. I wish the goods to be shipped by two or three opportunities, and, if practicable, by vessels coming direct to Sydney. To give every chance to Mr. Emmett's arrival in England, I have directed my friend Mr. Harris not to deliver this until thirty days after the arrival of the Australia in London; and should Mr. Emmett arrive after you have fulfilled these instructions, you will communicate to him what you have done, it having been mutually agreed upon, previous to his leaving New South Wales, that in case of any accident to him you should be appointed agent of this concern. In confirmation of which, I annex a copy of my letter to you per Cumberland." The foregoing letter was in a cover, on which were written the following words:—"This letter is to be delivered by Mr. Harris to Mr. Emmett, if he has arrived, and, if not, to be retained in Mr. Harris's possession thirty days from the date he receives it, and then to be delivered to Messrs. Rickards, M'Intosh & Co., London." The Australia arrived in London on the 6th of October, 1827, and on the 8th the letter was delivered to Mr. Harris, who resided in London. He retained the letter for thirty-six days, that is to say, until the 13th of November following; and no news having, up to that time, been received by him of the ship Cumberland, or of Mr. Emmett, who was coming on board of her, he (Harris) then delivered the letter to Richards, M'Intosh & Co., and they then delivered it to their broker, who effected a policy. The latter told the underwriters when the Cumberland sailed, the date of the letter, and the place from whence it was written, but did not state to them *that the letter had been in England thirty days, nor the order to wait thirty days [*842] after the receipt of it before effecting the insurance. The Cumberland never arrived, and an action was brought on the policy of insurance by Rickards & Co., as the agents of the plaintiff, against Murdock, one of the underwriters. At the trial of that cause, several underwriters were called as witnesses, who stated that, in their judgment, the matters not communicated to the underwriters were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the underwriters. A rule nisi for a new trial was afterwards granted, and cause was shown against the rule, *Rickards v. Murdock*, 10 B. & C. 527; and this Court, after taking a week's time to consider of their judgment, discharged the rule for a new trial, on the ground that even without evidence of the opinion of the underwriters, the jury would have been bound to find that the part of the letter not communicated to the underwriters was material. The plaintiff then brought the present action against the defendants for not using proper care and diligence in effecting the insurance. Several underwriters and insurance brokers were called as witnesses on the part of the plaintiff, and the letter and envelope were placed in their hands, and they were then asked whether it was material to have communicated the fact that such letter had arrived in this country thirty days before effecting the insurance. The answer was that it was material. These witnesses also stated that if they had been apprised of the fact, and had been asked to insure the vessel, they would have required a higher premium than that which the *defendants [*843] had paid. This evidence was objected to by the counsel for the defen-

dants, as being mere matter of opinion, but was received on the authority of *Rickards v. Murdock*. The Lord Chief Justice told the jury to find for the plaintiff, if they thought, on the evidence, the defendant had been guilty of gross negligence. The jury found a verdict for the plaintiff. A rule nisi having been obtained for a new trial, on the ground, first, that the evidence of the underwriters was improperly received; and, secondly, that the defendant's omission to communicate to the underwriters the time when the letter was received, was not gross negligence, but a mere error in judgment,

F. Pollock and Follett, in Trinity term, 1833, showed cause.¹ The question of negligence was for the jury. The defendants, as commercial agents, were bound to have sufficient skill, and to use due care to make a valid and effectual insurance; and the evidence of the brokers and underwriters showed that it was well known to persons conversant with the business of insurance, that the fact concealed from the underwriters was material and ought to have been communicated. Secondly, the evidence of the underwriters was admissible. In *Berton v. Loughman*, 2 Stark. N. P. C. 258, where the defence was, that material information, as to the time when the ship sailed, had been withheld from the underwriter, and the letter of instructions upon which the insurance had been effected was given in evidence, *HOLROYD, J.*, held, that a witness conversant with the subject of insurance might give his opinion as a matter of judgment, whether particular facts, if disclosed, would make a difference as [*844] to the amount of the premium. The premium there had been considered as calculated upon an ordinary risk; and the question was not what the private opinion of the individual might be in the particular case, but what, in his judgment, the general opinion would be amongst those conversant with such matters. In *Rickards v. Murdock*, 10 B. & C. 527, such evidence was received by Lord *TENTERDEN* at nisi prius; and a rule obtained for a new trial, on the ground that it was inadmissible, was discharged after argument. The Court must, therefore, have been of opinion that the evidence was properly received, see 2 Starkie on Evidence, 648, 9.

Sir James Scarlett and Maule, *contra*. The evidence of the underwriters was not admissible. The question was not one depending on usage or science. In *Carter v. Boehm*, 3 Burr. 1905, Lord *MANSFIELD*, in delivering the judgment of the Court, said that the whole Court thought that the jury ought not to pay the least regard to such evidence,—that it was mere opinion, not evidence. So in *Durrell v. Bederley*, Holt's N. P. C. 283, Lord Chief Justice *GIBBS*, at nisi prius, said, that the opinion of underwriters as to the materiality of facts, and the effect they would have had on the premium, was not admissible in evidence. Secondly, the defendants were not guilty of gross negligence. Before the decision in *Rickards v. Murdock*, 10 B. & C. 527, it was, at least, doubtful whether the assured were bound to communicate to the underwriters the time when the letter of instructions had arrived. This Court, after argument, thought it necessary to take a week's time to consider of their judgment. Surely a [*845] commercial agent could not be bound to know a point of law which, at that time, was so doubtful. If a special verdict had been found in *Rickards v. Murdock*, 10 B. & C. 527, and this Court had given judgment for the plaintiff, and that judgment had been reversed in the House of Lords, would the defendant then have been liable? Besides, here the plaintiff was himself in fault, having given express directions that the letter should not be communicated within thirty days.

Cur. adv. vult.

DENMAN, C. J., in this term delivered the judgment of the Court.

This action was brought by a merchant residing in New South Wales against his correspondent in London for negligence in effecting a policy of insurance, by means of which the plaintiff was prevented from recovering against the underwriters. The negligence consisted in the defendant's concealing from them, at the time of effecting the policy, a material fact within his knowledge.

¹ Before *DENMAN, C. J.*, *LITLEDAL, PARKER*, and *TAUNTON, JS.*

In Hilary term a rule for a new trial was obtained on various grounds. It was argued that the fact concealed was not material; and the case of *Richards v. Murdock*, 10 B. & C. 527, in which it was held to be so, was denied to be law: at any rate, as that case appears to be at variance with former decisions, it was strongly urged that a commercial man might be ignorant of such a legal point without gross negligence. The plaintiff was also said to be precluded from recovering, because he did not intend that the fact should be communicated. Lastly, some of the evidence was objected to, as received *improperly; [*846] the opinion of brokers and underwriters having been asked, not on a matter of practice in their professions, but upon one of the points on which the jury were to pronounce a verdict; i. e. whether the fact concealed was or was not material, and ought to have been communicated to the underwriters.

Without saying that the verdict appears in all other respects satisfactory to the Court, we are of opinion, that the rule for a new trial must be made absolute on this last ground.

Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than another. In the great case of *Carter v. Boehm*, 3 Burr, 1905, 1913, 1914, a broker, who was called as a witness for the plaintiff, stated, on cross-examination, that, in his opinion, certain letters ought to have been disclosed, and that if they had, the policy would not have been underwritten. The jury, however, found, against the witness's opinion, a verdict for the plaintiff. When his opinion was pressed, as a ground for a new trial, Lord MANSFIELD, in the name of the whole Court, declared that the jury ought not to pay the least regard to it, that it was mere opinion, and not evidence. The same doctrine is laid down in a case of *Durrell v. Bederly*, Holt's N. P. C. 285, by C. J. GIBBS, though he received the evidence on great pressure. He said, "The opinion of underwriters on the materiality of facts, and the effect they would have had upon the premium, is not *admissible in evidence. Lord MANSFIELD and Lord KENYON dis- [*847] tenanced this evidence of opinion, and I think it ought not to be received. It is the province of a jury and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected." In some more recent cases, such questions have certainly been proposed to witnesses: but they have passed without objection. And it may be observed, that the answers will often imply no more than scientific witnesses may properly state,—their opinion on some question of science. This is especially true of medical opinions.

In *Richards v. Murdock*, 10 B. & C. 527, indeed, out of which the present case arises, this kind of testimony was received. In giving judgment on the motion for a new trial, Lord TENTERDEN did not expressly defend its admissibility, but his words are in the alternative. "If such evidence is rejected, the Court and jury must decide the point according to their own judgment, unassisted by that of others. If they are to decide, all the Court agree in thinking that the letter was material, and ought to have been communicated, and that a jury would have been bound to come to that conclusion."

Now, this mode of disposing of the question does not appear to the Court, on reflection, to be quite correct. But we think, that as the jury are to decide on the materiality of facts, and the duty of disclosing *them, this verdict, founded in some degree on evidence that could not legally be [*848] received, ought to be set aside. The rule for a new trial must, therefore, be made absolute.

Rule absolute.¹

¹ The cause was not tried a second time, but was compromised.

BROWN v. DEAN.

A. being arrested and in custody of the sheriff at the suit of B., upon a writ endorsed "oath for 76*l*." C., in consideration of B. discharging A., undertook to give his promissory note at six months, "for 10*s*. in the pound for the debt," on the arrival of the discharge :

Held, that this sufficiently appeared to be a promise to pay 10*s*. in the pound upon the debt for which A. was arrested and then in custody, and was properly declared on as such :
Held, also, that the sum endorsed on the writ was sufficient evidence of the amount for which A. had been arrested, and that no demand of the note was necessary to enable plaintiff to commence this action.

DECLARATION in assumpsit stated that at the time of the promise therein-after mentioned, John Bamford was detained in the custody of the sheriff of Warwickshire at the suit of the plaintiff in an action in the Court of Exchequer, for the recovery of a certain debt, to wit, a debt of 76*l*. due from Bamford to the plaintiff, and thereupon on the 25th of January, 1832, in consideration that the plaintiff would give and procure the discharge of Bamford from such detainer and custody, defendant promised the plaintiff that he would give him his (defendant's) promissory note for 10*s*. in the pound on the said debt; that the plaintiff confiding, &c., did give and procure such discharge, and that Bamford was discharged accordingly, of which the defendant had notice. The declaration then averred, that the defendant was requested to deliver the promissory note, but neglected and refused to deliver or send the same or pay the amount, and that the sum of 76*l*. still remained unpaid. Plea, general issue. At the trial before DENMAN, C. J., at the Spring assizes for Warwick, 1833, the plaintiff proved [*849] that before and on the 26th *of January, 1832, John Bamford was in gaol in the custody of the sheriff of Warwickshire, that he was committed to such custody at the suit of the plaintiff, that the latter on the 30th of January, gave authority to the gaoler to discharge Bamford, and that he was thereupon discharged. The writ of quo minus in the action of Brown v. Bamford in the Exchequer, endorsed, "Oath for 76*l*," together with the sheriff's return of cepi corpus, was proved by the late undersheriff's clerk. The plaintiff also put in the following letter, dated 25th January, 1832, from defendant to plaintiff: "My daughter received a letter from you, saying, if I would give you my promissory note, at six months, for 10*s*. in the pound for the debt, and pay the costs, you would give John Bamford his discharge. This I will do for the sake of my unhappy daughter and her family; therefore, if you will instantly send his discharge, on the arrival of it, I hereby promise to send you the above note." No request to deliver the promissory note was proved. It was objected by the defendant's counsel that there was no evidence of any debt due from Bamford to the plaintiff. The Chief Justice nonsuited the plaintiff, giving leave to him to enter a verdict for 38*l*. A rule nisi having been obtained for this purpose,

Adams, Serjt., and *R. Hayes*, in this term showed cause. It was necessary to prove a request by the plaintiff to the defendant to give the promissory note; for the agreement is equivalent to a promise to pay a collateral sum on request, and then an actual request ought to be made before the action is brought, according to the rule laid down in *Birks v. Trippet*, 1 Saund. 32. [PARKE, J. [*850] Where it is *part of the contract that the thing agreed for shall be done on request, it must be proved, but here the agreement by the defendant is not to give the promissory note on request, but absolutely on the arrival of Bamford's discharge. DENMAN, C. J. By the terms of the agreement, the promise to give the note is made to depend on the arrival of Bamford's discharge, not on any request to be made by the plaintiff.] But, secondly, there was no evidence of any debt due from Bamford to the plaintiff. The declaration alleges that Bamford was detained in custody in an action for the recovery of a debt due from him to the plaintiff: and as that averment cannot be wholly struck out of the declaration without destroying the plaintiff's right of action, it must be

proved; *Williamson v. Allison*, 2 East, 452, per LAWRENCE, J.; *Parker v. Fenn*, 2 Esp. N. P. C. 477; *Webb v. Herne*, 1 Bos. & Pul. 281. [TAUNTON, J. The undertaking itself recognises the existence of some debt, which distinguishes this from cases where there was no such admission by the defendant. DENMAN, C. J. That brings it to the question, what is the meaning of the words in the agreement "the debt?" Do they import the debt for which Bamford was then detained in custody, or some other debt then existing between the parties? see *Shortrede v. Cheek*, 1 A. & E. 57.] There is no proof that the defendant promised to pay 10s. in the pound on a debt of any specific amount. There is nothing to connect the promise of the defendant with the amount of the debt endorsed on the writ. That amounts to no more than a mere statement by the plaintiff or his attorney, that the defendant owed the plaintiff that sum. Assuming that the agreement contains an admission of some debt, the amount of which is not *ascertained, the plaintiff can recover no more than nominal [*851] damages.

Goulburn, Serjt., and *M. D. Hill*, contra. The true construction of this agreement is, that the defendant thereby promised to pay 10s. in the pound, not on any debt existing between the parties, but on the debt for which an action had been brought in the Exchequer, and for which Bamford had been arrested and was detained in custody. The defendant, by his undertaking, admits that a debt had been ascertained to be due from Bamford to Brown, for he promises Brown to pay 10s. in the pound on the debt and costs. The agreement, therefore, is to pay half of an ascertained sum, and that is shown by the evidence to be 76*l*. For although the endorsement of the writ may not be evidence of any debt actually due, it is evidence of the sum for the recovery of which the plaintiff had brought his action, and in respect of which Bamford had been arrested, and was detained in custody. That is the debt for which the defendant undertakes to give his promissory note.

DENMAN, C. J. This case turns upon a very special agreement contained in a letter from the defendant to the plaintiff. The letter refers to a proposal by the plaintiff, that if the defendant would give the plaintiff a note at six months for 10s. in the pound for the debt, and pay the costs, he, the plaintiff, would give John Bamford his discharge; and the defendant promises, that if the plaintiff will instantly send Bamford's discharge, on the arrival of it he, the defendant, will send the above note. At the trial it occurred to me that, as the promise was to pay 10s. in the pound on the debt, proof of a debt of some specific amount should be *given; but it appears to me now that there was sufficient evidence of the contract set out in the declaration. The declara- [*852] tion states that Bamford was detained in custody at the suit of the plaintiff, in an action in the Court of Exchequer, for the recovery of a certain debt, to wit, a debt of 76*l*.; and that thereupon, in consideration that the plaintiff would procure the discharge of Bamford from such custody, defendant promised that he would give the plaintiff his promissory note for 10s. in the pound of the said debt; that is, the debt for which Bamford was detained in custody, and for the recovery of which the action had been brought at the suit of the plaintiff in the Exchequer. The question is, whether there is any evidence to show what that debt was. The proof was, that the detainer was for 76*l*.; from the undertaking of the defendant referring to the detainer, it may be inferred that the parties had already ascertained the debt to be of the amount for which Bamford was detained in custody in the action in the Exchequer. There was, therefore, no variance, and there was evidence at the trial that the detainer was for 76*l*., because that was the sum endorsed on the writ, and which the plaintiff swore to as the debt: for that sum Bamford was arrested and detained in custody. The writ and the endorsement on it (which is required by 2 W. 4, c. 39), see Sched. No. 4, are evidence to show the amount for which Bamford had been arrested.

PARKE, J. I have had considerable doubts in the course of the argument, and at one time was disposed to think there was a variance between the allega-

tion and the proof; but on looking more narrowly into the case, I incline to think the declaration is supported by the *evidence. The declaration states that Bamford was detained in custody in an action brought in the Exchequer by the plaintiff for the recovery of a certain debt, to wit, a debt of 76*l.*, due from Bamford to the plaintiff; that is, that an action was brought for the recovery of a debt, and that that debt was due from Bamford to the plaintiff. It then states that in consideration that the plaintiff would discharge Bamford from such detainer (that is, the detainer in the said action), the defendant promised to give him his promissory note for 10*s.* in the pound on the said debt; that is, the debt due from Bamford to Brown for which the action had been brought. Then, looking at the contract itself, I think the construction put on it by the counsel for the plaintiff is right, and that the promise is to pay half of an ascertained debt. There was no evidence of any dispute between the parties as to the amount: for the letter of the defendant admits the debt to be the sum for which the action was brought; the defendant does not stipulate for any further inquiry as to the amount. Then the only remaining question is, for what amount that action really was brought. Now the act 2 W. 4, c. 39, requires the amount for which a party is to be held to bail to be endorsed on the writ; the endorsement then is evidence of the amount for which the action is brought.

TAUNTON, J. I entirely concur in the answer given, during the argument, to the first objection. Upon the principal question my opinion has fluctuated during the course of the argument, but I now think that the plaintiff is entitled to have a verdict entered for him. All the averments in the declaration have been proved. The declaration states that Bamford was detained in [*854] *custody at the suit of the plaintiff, in an action in the Court of Exchequer: there is no doubt about that: "and that the action was brought for the recovery of a certain debt, to wit, a debt of 76*l.*, due from Bamford to the plaintiff." Looking at the terms of the defendant's undertaking, I think that, although there was no extrinsic evidence of any debt due from Bamford to the plaintiff, yet when the defendant says that he will give a promissory note for 10*s.* in the pound on the debt, and pay the costs, upon the arrival of a discharge, that is an admission that there is a debt due, and that it is of the amount for which the discharge is to be given. That the action was brought for the recovery of a certain debt due from Bamford to Brown, therefore, is perfectly clear; but the amount of that debt is said not to be proved; the proof, however, was, that the action against Bamford was brought for the recovery of a debt of 76*l.* The endorsement on the writ is the best evidence of that. Looking at each averment separately, I think they are proved.

PATTESON, J. The principal question in this case is, whether there is a variance between the allegation and proof; and I think, upon the whole, there is not. The declaration alleges, that Bamford was detained in custody for a debt for which an action had been brought. By the guarantee, the defendant promises to give his note for 10*s.* in the pound for the debt and to pay the costs; the promise, therefore, is to give his promissory note for 10*s.* in the pound on a debt actually subsisting, for which Bamford had been arrested, and for which the discharge was to be given. The endorsement on the writ is good [*855] evidence to show that the amount of the *sum which the party bringing the action claimed to recover was 76*l.* It was unnecessary to prove the averment in the declaration of a request to give the note, because, by the contract between the parties, it was to be given on the arrival of the discharge. The rule for a new trial must be made absolute. Rule absolute.

The KING v. JEFFERSON. Nov. 23.

A quo warranto information was moved for against an officer elected by ballot, on the ground that a large proportion of the persons who voted were not qualified; but it was not shown for whom the votes of those persons were given:

Held, that on this application the officer could not be required to prove his election valid, but it lay on the opposing parties to show (if that were practicable), that his majority was obtained by bad votes.

A RULE was obtained in last Trinity term, calling upon Robert Jefferson to show cause why an information, in the nature of a quo warranto, should not issue, requiring him to show by what authority he claimed and exercised the office of one of the trustees for carrying into effect the several acts of parliament for regulating the harbor of Whitehaven in Cumberland. The grounds stated were, "that a majority of the persons admitted to vote at his supposed election to that office were not qualified to vote; and that it did not appear at the said election, that he, R. J., had a sufficient number of legal votes to entitle him to the said office." By several acts of parliament, recited and continued by 56 G. 3, c. xlv. (local and public), it is provided that, upon a certain day in every third year, from and after, &c., fourteen persons shall be chosen, nominated, and appointed by ballot by the majority of the inhabitants of the town of Whitehaven at the time of such election dealing by way of merchandise in goods subject to certain duties, or being master, or having not less than a sixteenth share, of any vessel then belonging to the harbor of Whitehaven, *which persons so elected shall (with certain others) be trustees for carrying [*856] the said several acts into execution. It was stated on affidavit in support of the rule, that, on the day of election (August 3d), in the year 1832, a ballot was taken for the election of such trustees, and twenty-eight persons were balloted for as candidates; that 1060 persons voted; that Jefferson had 578 votes (the largest number obtained by any candidate except one), and was one of the fourteen declared to be elected, and had since taken upon him the office; that the lowest number of votes for any candidate elected was 497, and the highest number for a candidate not elected, 495. One of the affidavits, made by a person who assisted in taking the ballot, stated that all persons were admitted to vote who asserted themselves to be qualified as dealers. Another affidavit stated the belief of the deponent, founded upon his knowledge of the town and inhabitants, and upon inquiries made by him, that the majority of the persons who voted for Jefferson were not qualified inhabitants, and were persons not dealing, or only dealing colorably, in articles subject to the duties, or were persons to whom shares in vessels had been conveyed for the purpose of the election, and who were not beneficially interested therein; and, further, that if none but qualified persons had voted, Jefferson would not have been elected; and that several of the candidates not elected had a majority over him of legal votes. There were also affidavits giving a list of about 600 persons who had voted as dealers qualified under the statutes, but who, it was alleged, were not so qualified, and of about thirty others, who had voted as ship-owners, to whose qualifications there were also objections made. It was *not ascertained (except in three or four instances, by the affidavits of the voters them- [*857] selves, now put in), for whom any of the disputed votes had been given. In opposition to the rule a great number of affidavits were filed, denying the alleged incompetency of the voters, and showing that parties wishing to dispute the qualifications of voters had an opportunity of doing so as they came to ballot, and that the votes of some were in fact refused, upon objections so taken.

Sir *James Scarlett* now showed cause. Assuming that this is an office for which a quo warranto would lie, no defect of title is shown. Nothing is stated as to any persons who voted for Mr. Jefferson, but a belief that many of those who did so were not qualified. It is not said that any were objected to as they came up. The Court here called upon

Coltman (with whom was *Wightman*), contra. There must be some mode of ascertaining whether the party elected had a majority of good votes or not, and this is a proper course for bringing it in question. [PARKE, J. It has been objected in this Court before, to the taking of votes by ballot on the election of a minister by parishioners, that it made a scrutiny impracticable, see

Faulkner v. Elger, 4 B. & C. 455, 457.] Here it is sworn in support of the rule, that there were 600 bad votes; the party showing cause must prove that he had not such a number of those bad votes as would turn the election against him. [DENMAN, C. J. The bad votes may be sifted off as the voters come into the room; but when they have been admitted to ballot, how can [*858] *any scrutiny take place?] A candidate might prove that he was duly elected. Suppose, for instance, 1,000 persons vote in all: it would not be possible, by merely striking out 600 as bad from the whole number given, to ascertain which candidate was duly elected; but if one could show that, after deducting 600 from those given for him, he had still 300 good ones, it would be impossible for any other candidate to show more than 100 good votes. There is no hardship in requiring this. If a quo warranto went, the party must prove affirmatively that he was duly elected; for that purpose he might produce the persons who voted. [DENMAN, C. J. That would be against the principle of the ballot. TAUNTON, J. Upon this application it is for you to impugn the title; you are not to ask the Court for a fishing information. PARKE, J. According to the mode in which you put the case, no person who had not 801 votes could prove himself duly elected.] That may be inconvenient, but a great injustice would follow if some such proof were not required. The returning officer might admit whom he pleased, and after the election there would be no means of investigating the votes. [TAUNTON, J. That is the vice of the system: we are not bound to find a remedy for it. DENMAN, C. J. It might be remedied by pointing out the bad votes as they came in. PARKE, J. The only remedy would be to exclude bad votes at first.]

Per Curiam. No *prima facie* case is made for this application. The officer is called upon to show title without the possibility of proving it. All the bad [*859] *votes may have been for the opposing party. The rule must be discharged, with costs.

¹ PATTESON, J., was in the Bail Court hearing motions, LITLEDAL, J., having gone to Guildhall.

GRACE PEARSON, THOMAS SPEDDING, and JAMES PEARSON,
v. WILLIAM PEARSON. Nov. 23.

By a contract in writing between plaintiffs (three executors) and defendant (testator's heir-at-law), after reciting an agreement of all the parties, that certain goods of the testator should be sold, and that S., one of the executors and plaintiffs, should receive the proceeds for and towards payment of the testator's debts; defendant agreed, that if he took possession of the said goods, he would pay to S. the value thereof, or give security for such payment, on or before, &c. One of the plaintiffs and the defendant also undertook, if the proceeds of the testator's personal property should not be sufficient for payment of the debts, to raise, and pay to S., a sufficient sum to enable him to discharge them. Defendant took the goods first mentioned, but did not pay for them or give security, and afterwards, finding that they were more than he wanted, he made a verbal agreement with the plaintiffs, that he should select so much of the goods as he wished for, and take the same at the prices they had been appraised at, and that the residue should be taken and sold by the plaintiffs. He accordingly selected and took such goods (being of a smaller value than those first bargained for), but did not pay for them. Plaintiffs, as executors, took the residue:

Held, that supposing the action to be grounded on the written contract, S. was named therein merely as the agent of the plaintiffs, and therefore they need not declare specially upon the contract to pay the money to him.

Seemle, per DENMAN, C. J., and PARKE, J., that the second contract might be considered as substituted for the first, and forming a new and distinct ground of action.

ASSUMPSIT for work and materials, for goods sold, and on the money counts. Plea, the general issue. At the York Summer assizes, 1832, a verdict was taken for the plaintiffs, subject to a reference of the cause to William Turner, gentleman. The arbitrator made his award, in which, after stating that the plaintiffs were executrix and executors of the will of William Pearson, deceased, he set out an agreement in writing, made, March 7th, 1828, between the defen-

dant and the plaintiff James Pearson of the one part, and the plaintiffs Grace Pearson and Thomas Spedding (described in the said agreement as two of the executors of W. P.) of the other part. The agreement recited that W. P. deceased, by his will, left all his real and personal property to the use of the said Grace, his widow, during her life, and after the determination of that estate, to the use of *James, his heirs and assigns for ever, subject, nevertheless, [*860] to the payment of his debts; and that there was an after-purchased estate, not mentioned in the will, to which William Pearson, the defendant, was entitled as heir-at-law: that in order to pay the said debts, and to make a provision for the said Grace Pearson, the said William and James had agreed, with the consent of Grace Pearson and Thomas Spedding, that the said William and James should sell all the household goods and other personal property in and about a certain messuage called the Royal Oak Inn (part of the after-purchased estate), and that the money to arise therefrom should be received by Spedding for and towards the payment of the said debts; and also that the said messuage, and all other real property of the testator, should be appraised and divided, and that the defendant William should be at liberty to take either of the lots: and after these recitals (and others respecting the provision to be made for Grace Pearson), the defendant, William Pearson, did for himself agree with the three plaintiffs, that in case he took possession of the messuage, household goods, &c., above mentioned, he would, upon the signing of that agreement, "pay to the said Thomas Spedding the full value thereof, or give a sufficient security for the payment of the same on or before the 4th of April then next:" and the defendant and James Pearson also agreed, that in case the personal property should not be sufficient to pay the testator's debts, they, the defendant and James Pearson, would jointly raise and pay into Spedding's hands such sum as would enable him to discharge the same. The arbitrator then found, that defendant, with the consent of the plaintiffs, took the household goods and personal property in *the said messuage, which were appraised at 164*l.*, and were [*861] then the property of the three plaintiffs as executrix and executors of W. P. deceased, but defendant never paid or gave security for the same: that defendant, after he had so taken possession, found that there were articles on the premises which he did not want, and it was therefore agreed between him and the plaintiffs, that he should select such parts of the said household goods, &c., as he wished to take, and should take the same at the prices they had been appraised at; and that the residue should be taken and sold by the plaintiffs. The arbitrator found that this latter agreement was not reduced into writing: that the defendant did accordingly select and keep goods to the value of 55*l.*, and that the plaintiffs, as executrix and executors, took the residue and caused it to be sold; that the money arising therefrom was received by the said plaintiffs, as executrix and executors as aforesaid; and that defendant never paid or secured to be paid to plaintiffs the value of the goods finally taken by him, but that he had a set-off against the plaintiffs to the amount of 30*l.* The arbitrator then set out the declaration in this cause, which contained no special count; and he directed a verdict to be entered for the plaintiffs for 25*l.*, if this Court should be of opinion that the action was properly brought by the plaintiffs as executrix and executors, and the declaration rightly framed; otherwise a nonsuit to be entered. A rule nisi having been obtained for entering a nonsuit,

Joseph Addison now showed cause. The contract not being executory but executed, a declaration in *indebitatus assumpsit* was sufficient. [*Hoggins*, contra, being called upon by the Court, stated as his objection *to the plaintiff's right to recover, that the contract relied upon was for the pay- [*862] ment of money to Spedding, and not directly to the executors; and, therefore, that the declaration ought to have been special.] The contract is to pay into Spedding's hands, but the sale is not the less a sale by the executors. Spedding could not have sued on the contract. Suppose the defendant had refused to take the goods, and a stranger had bought them; the money, if paid to Spedding,

would have been paid to him for the plaintiffs; and they would have had to sue for it if not paid. The arbitrator shows his own understanding of the transaction, by stating, as part of the second agreement, that the goods not accepted by the defendant "should be taken and sold by the plaintiffs;" and by further finding that the plaintiffs, as executors and executrix, took such residue of the goods, and caused the same to be sold, and that the proceeds were "received by the said plaintiffs as executrix and executors as aforesaid." At all events, the second contract may be separated from the first, and gives a distinct right of action; *Mayfield v. Wadsley*, 3 B. & C. 357.

Hoggins, contra. The plaintiffs should have declared specially. Their right of action was upon the original written agreement, and was not divested by the verbal arrangement come to at a subsequent time. *Willoughby v. Backhouse*, 2 B. & C. 821, and *Sells v. Hoare*, 1 Bing. 401, are analogous cases. The arbitrator himself has shown that he could not separate the written from the verbal contract; for although he merely states, as the effect of the latter, that the defendant was to take the goods selected by him "at the prices they were [863] appraised at, yet when he comes to mention the breach of that agreement, he says that the defendant has not paid or secured to be paid, the value of the goods so selected, referring to a stipulation which is found in the first contract only. Besides, the plaintiffs were not immediately and absolutely entitled to the proceeds of the goods; Spedding was to pay the debts out of the money raised upon the testator's personal property, and if it should not prove sufficient, the defendant, and the plaintiff James Pearson, were to raise a fund to be placed in Spedding's hands for that purpose. Now, where a plaintiff sues for the payment of money, his claim to which depends upon certain things having been performed according to a special agreement, he cannot resort to the common counts, but must declare specially; *Guy v. Gower*, 2 Marsh. 273.

DENMAN, C. J. I think the plaintiffs are entitled to a verdict. Spedding was one of three executors, who agreed to sell property to the defendant in a particular manner if he thought fit, and he was to pay the price to Spedding, to be applied in payment of the testator's debts. That is only like appointing a banker or agent to receive a sum of money: it leaves untouched the question, who are parties to the contract of sale? And even if this were doubtful, the whole of the written agreement was not carried into effect, and the ultimate purchase was only to the amount of 55*l*. Nothing is said in the last agreement of the manner in which the money is to be paid; there is a contract for buying [864] and selling in the ordinary way, and Spedding is not named. *In either view of the case, it was unnecessary to declare specially.

PARKE, J. I think the plaintiffs have established a contract on which this action is well brought. Spedding must be considered merely as the agent of the executors, to perform certain duties which must otherwise have been discharged by them. A contract to pay to Spedding was a contract to pay them. If, indeed, he had had a particular trust, different from that of the other executors, it might perhaps have been said that the agreement to pay to him was special, and should have been specially declared upon. But he had nothing to do beyond what the executors themselves were bound to do. It also appears to me doubtful whether the subsequent transaction did not raise a new contract upon which they might sue, independently of the former one.

TAUNTON, J., concurred.

Verdict to be entered for the plaintiffs.

¹ PATTERSON, J., was in the Bail Court.

DOE dem. LANGDON v. LANGDON. Nov. 25.

Same v. ROE.

In a second action of ejectment brought for the same premises, the Court will stay proceedings till the costs of the former are paid, although the former action was discontinued before consent rule or plea.

THE lessor of the plaintiff having brought two ejectments for the same premises, a rule nisi was obtained by *Cowling* before LITLEDAL, J., to stay the *proceedings in the second action until the costs of the former were [*865] paid, on grounds which are immaterial, not having been mentioned on showing cause. His Lordship directed the case to be argued before the whole Court.

Barstow now opposed the rule, on the ground that, in the former action, the plaintiff had not proceeded as far as consent-rule or plea, and that the Court ought not in such a case to stay proceedings, unless on special circumstances.

Cowling, in support of the rule, contended, that wherever vexatious or improper conduct appeared in the proceedings of the lessor of the plaintiff, the Court would stay them, even though no trial had been had; and that the fact of the lessor of the plaintiff having dropped the former action before he had entered into a consent-rule was proof of vexation, since, until that step had been taken, he was not liable for costs; and he cited *Smith dem. Ginger v. Barnardston*, 2 W. Bla. 904, where it had been so held by DE GREY, C. J., after consulting the Judges of the other Courts. [*Barstow*. There the plaintiff had previously brought two actions, here only one.]

The Court,¹ however, stopped *Cowling*, saying, that he had shown sufficient cause; and made the Rule absolute.

¹ DENMAN, C. J., PARKE, TAUNTON, and PATTERSON, Js.

*HILL v. The MANCHESTER and SALFORD Waterworks Company. [*866] Nov. 25.

In an action against a corporation on a bond, the condition of which recited, that the company were, by act of parliament, authorized to raise money by bond, and that at a general assembly of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded non est factum: Held, that although the company could not under that plea, show that the bond executed by them was invalidated by collateral matter, they might show that it was void because executed contrary to the provisions of the act of parliament:

Held, secondly, that a clause in the act of parliament, whereby the company were authorized, at any general or special general assembly, to order and dispose of the custody of their common seal, and the use and application thereof, empowered them to make rules and regulations for its custody, but did not require their concurrence in each particular act of sealing; and that a bond to which the seal had been affixed by the company's clerk, under a general authority from the directors, was valid.

By another clause it was enacted, that the clerk should, in a book provided by the company, keep an account of all acts, proceedings, and transactions of the company, and that every proprietor should have liberty to inspect the same, and take copies of the entries: Held, that entries of the proceedings in the book so kept by the clerk were not admissible in evidence on behalf of the company, against one of their own members suing them.

DEBT on two bonds, dated 31st August, 1813, and 21st December, 1814, each in the penal sum of 200*l*. Pleas, after craving oyer of the bonds and conditions, that neither bond was the deed of the company. Each bond contained a recital that the company were by 53 G. 3, c. xx. authorized to raise (in addition to moneys already raised by them under the 49 G. 3, c. xcii. by which the company was incorporated) any sum not exceeding 100,000*l*. by mortgage, annuities, bonds, or promissory notes under the seal of the company; and that at a general assembly of the company of proprietors, held on the 13th of May, 1813, it was resolved that, for the purpose of raising money as authorized by act of parliament, the company should issue bonds of 100*l*. each, bearing an interest of 5 per cent.; and it was further recited that the plaintiff had advanced to the company of proprietors the sum of 100*l*.; and the condition was declared to be for the payment of 100*l*. and interest. At the trial before DEN-

¹ See *Hill v. The Manchester and Salford Waterworks Company*, 2 B. & Ad. 544.

[*867] MAN, C. J., at the London sittings after Hilary term, *1833, the plaintiff produced the bonds, and proved that they had the common seal of the company affixed to them, that the seal had been so affixed by Cole, a clerk of H. Wright the chief clerk, Cole being authorized by the chief clerk and by the directors to affix the common seal to bonds, when directed so to do by the actuary of the company; and that the bonds in question were executed in pursuance of orders from the actuary, in consideration of the plaintiff's having given up certain acceptances of the company held by him. The plaintiff further put in a deed, dated the 17th of April, 1815, under the common seal of the company, whereby they assigned their property to trustees for the benefit of their creditors, and in a schedule thereto the plaintiff was described as a holder of the bonds in question. The defence was that the bonds were void, because they were not executed pursuant to the provisions of the 49 G. 3, c. xcii.,¹

¹ Sect. 7 authorizes the company of proprietors to raise money by mortgage or assignment of the property of the company, under their common seal.

Sect. 15 directs, that all future general assemblies shall be held upon the first Thursday in the month of January and July in every year, at such place as the company shall direct, and that twenty days' notice of such meeting shall be given by advertisement in a Manchester or London newspaper.

Sect. 16 authorizes the company of proprietors, at their first general assembly, to appoint thirteen persons to be directors for conducting the business of the undertaking.

Sect. 18 provides for the subsequent appointment of directors by the proprietors.

Sect. 21 enacts, that to constitute a legal general assembly, ten proprietors possessing 200 shares in the whole, must be present.

Sect. 23 enables the company of proprietors, "at any general or special general assembly, to order and dispose of the custody of their common seal, and the use and application thereof."

Sect. 24 enacts, that if it shall at any time appear that, for the more effectually putting the act into execution, a special general assembly of the company of proprietors is necessary, it shall be lawful for any five of the proprietors, possessing, in the whole, 100 shares in the said undertaking, to cause fourteen days' notice at least to be given of such special general assembly, in one or more of the Manchester and London newspapers, or in such manner as the company of proprietors shall, at any general assembly, direct or appoint, specifying in such notice the reason and intention of requesting such special general assembly, and the time when, and the place where, the same shall be holden; and the proprietors are authorized to meet pursuant to such notice, and such of them as shall be present at such special general assembly shall proceed to the execution of the powers by the act given to the company of proprietors, with respect to such matters alone as shall be specified in such notice; and all such acts, orders, or determinations of the proprietors, or the major part of them so met together, at every such special general assembly (provided that there be ten proprietors present, who shall be possessed of at least 200 shares in the undertaking), shall be as valid with respect to the matters specified in such notice, as if the same had been done at any stated general assembly.

Sect. 25 authorizes the company of proprietors to nominate and appoint, under the common seal of the company, a clerk or clerks, and enacts that such clerk or clerks shall, in a proper book or books to be provided by the company of proprietors for that purpose, enter and keep a true and perfect account of the names and places of abode of the several proprietors of the said undertaking, and of all acts, proceedings and transactions of the company of proprietors and directors respectively; and each of the said proprietors of the undertaking shall and may at all times have recourse to and peruse and inspect the same, and also the book or books to be kept by the chief or other clerk to the company of proprietors, gratis, and may demand and have copies thereof, or any part thereof, paying the sum of 6d. for every hundred words so to be copied.

Sect. 28 enacts, that the directors shall (subject to the orders and directions of the general or special general assemblies) have full power and authority to direct and manage the affairs of the company of proprietors; and makes other provisions as to particular powers and duties of the directors.

The 53 G. 3, c. xx., which received the royal assent on the 1st of April, 1813, authorizes the company to raise a further sum, not exceeding 100,000*l.*, by mortgage or by granting annuities, and for that purpose to assign the undertaking, and the works thereto belonging, under their common seal, or (sect. 10), to give bonds or promissory notes under the said common seal.

Sect. 14. The clauses in the former act, 49 G. 3, c. xcii., to extend and apply to the moneys to be raised, and all other matters and things to happen and arise under this act, as if they had been repeated and re-enacted.

whereby the company were incorporated and *empowered to raise money by mortgage or bond. It was contended that the true construction of sect. 23, which authorized the company of proprietors, at any general *or special general assembly, to order and dispose of the custody of their common seal, and the use and application thereof, was, that bonds which required the common seal, could only be issued in pursuance of the resolution of a general or special general assembly duly convened and constituted; and assuming even that in an ordinary case a bond executed by order of the court of directors would be valid, still as the condition of the bonds in question recited that they were given in pursuance of a resolution of an assembly of proprietors, held on the 13th of May, 1813, it was essential to their validity, that that assembly should have been duly convened and constituted. It was said that the assembly, improperly described in the bonds as a general assembly (which can be held only in January and July), must have been a special general assembly; and then, according to sect. 24, ought to have been convened only by requisition from proprietors to a certain number and value, after fourteen days' notice, and to have consisted of a certain number. To prove that the resolution to raise money by the bonds in question had been come to at a meeting not duly convened and constituted, the defendants produced the books of the company kept by their clerk, and it appeared by entries in them, that, in January, 1810, it had been resolved at a general assembly of the proprietors, that the care and custody of the common seal should be committed to H. Wright, the chief clerk, to be used and *applied on such occasions only as the company of proprietors at any general or special general assembly, or the court of directors for the time being, should order and direct. It appeared further, that the bonds in question, were in fact issued in pursuance of a resolution of a special general assembly of the proprietors convened in pursuance of notice, to take into consideration the general state of the company, and other special matters, on the 5th of December, 1814; that it was adjourned to a following day, and from time to time to the 7th of April, 1815; that at several of the adjourned meetings, there were not ten proprietors present, nor was that number present at the meeting of the 7th of April, 1815, when it was resolved to issue these bonds, nor at another meeting on the 17th of April, 1815, when it was resolved to execute the deed of arrangement with the creditors. At the meeting of April 7th, it appeared by parol evidence, that the plaintiff was present. The entries in the books were objected to by the plaintiff, but admitted by the Lord Chief Justice. The jury having found a verdict for the plaintiff, a rule nisi was obtained for a new trial, on the ground that the bonds were void because they had been issued contrary to the provisions of the act of parliament.

Sir *J. Campbell*, Solicitor-General, and *Butt*, on a former day in this term showed cause.¹ The defence that the bonds are void because the meeting at which it was resolved to issue them was irregularly constituted, cannot be set up under the plea of non est factum; it ought to have been specially pleaded; *Whelpdale's case*, 5 Rep. 119. [*PARKE, J.* The argument is, that the bonds are not the deeds of the *corporation, unless the resolution to issue them was passed at a general assembly of proprietors, or a special general assembly, convened according to the forms directed by the act of parliament.] This is the deed of the company, for their seal was affixed to it by their authorized agent. The act empowers the company to raise money by bond, but contains no particular enactment as to the mode in which the seal is to be affixed to it. It does not, in terms, require that that shall be done by order of a special general assembly. By the resolution of the first general assembly, the common seal was committed to the custody of the chief clerk, to be used on such occasions as the directors should order. They might, therefore, order the seal to be affixed to any deed and thus bind the company; and by sect. 28 of the act, the directors (subject to the directions and orders of the general or special general assembly)

¹ Before DENMAN, C. J., PARKE, TAUNTON, and PATTESON, Js.

have full power to manage and direct the affairs of the company. An act done by them, therefore, in the course of such management, is valid, if it be not contrary to the orders of a general, or special general assembly. Besides, these enactments respecting the constitution of a special general assembly were introduced to regulate the proceedings of the members of the corporation among themselves, and not to enable the company to avail themselves of any irregularity in the constitution of such assemblies to avoid their contracts with a stranger; they are directory, not prohibitory. But, secondly, this defence, if available, is not made out in point of fact, because the entries in the books of the company were not evidence for them. It is quite clear that entries in the public books of a corporation are not evidence for the corporation, unless they [*872] be entries of a public nature; **Marriage v. Lawrence*, 3 B. & A. 142; *Brett v. Beales and Others*, 1 M. & M. 29. There is no clause in the act expressly making the entries evidence. But then it may be said that, as the act (sect. 25) directs that entries of all proceedings shall be made by the clerk, in books provided by the company, and that members shall have access to it, and take copies of entries, therefore entries in such books are evidence against the plaintiff, who is a member of this company; and that he, as such, may be regarded as a partner in a trading concern. But entries in the books of a partnership are evidence against every member of the firm for this reason, that the books are kept either by one of the partners, or by a clerk of all the partners, the partner or clerk being the agent of all the members of the firm. Now the clerk who kept these books, was the agent of the company, not of any individual member or members. At all events, the bonds in this case are recognised by the company's deed of assignment.

Sir *J. Scarlett* and *Tomlinson*, contra. First, the defence, being that the deed was not properly executed, and therefore not the deed of the corporation, may clearly be given in evidence under the plea of non est factum, and need not be specially pleaded. Secondly, as to the admissibility of the books, the authorities only show that entries in such books are not evidence of particular facts concerning the property of the corporation, and not of a public nature. But there is no authority to show that entries of the formal proceedings of a corporation made in due course, and at a time when there can be no suspicion of a false entry, are not evidence. Besides, the plaintiff *here was not a [*873] stranger; he was a member of the company, and therefore a partner, participating in profit and loss, and might have access to the books and entries: and partnership books are evidence against all the partners. Then, thirdly, the deed of composition does not recognise the validity of these bonds, but only the existence of bonds having the seal of the company duly affixed to them. Here the company, being created by act of parliament, has not authority to execute a deed otherwise than according to the particular terms of that act. The words of the twenty-fourth section, respecting the convening of a special general assembly, are not merely directory but prohibitory; for it enacts, that the act of the proprietors so met shall be as valid with respect to the matter specified in such notice, as if the same had been done at any stated general assembly. Now acts done at a general assembly would not be valid unless the number of members required by the act of parliament were present, nor unless notice of the place of meeting were given. Here the notice given for the meeting on the 5th of December, 1814, did not specify the reason of calling it, nor was the required number of members present at all the adjourned meetings, nor at the one where the resolution to issue the bonds was adopted. *Cur. adv. vult.*

DENMAN, C. J., now delivered the judgment of the Court. This action was on a bond for securing 100*l.* to the plaintiff, who was a member of the company. The defendants pleaded non est factum, and fraud and covin in several other pleas, all of which were abandoned at the trial, which took place on the first plea [*874] alone. The *jury found a verdict for the plaintiff, subject to a motion for a nonsuit, if the Court should be of opinion that the plaintiff was not entitled to recover.

The plaintiff proved that the common seal of the company was affixed to the bond by the officer who had the legal custody of it, *Clarke v. The Imperial Gas Light Company*, 4 B. & Ad. 315, and so threw upon the defendants the burden of clearly proving that it was not set by their authority. The plaintiff further showed, that the actuary managing the affairs of the company had directed that the bond should be executed.

The defendants undertook to make out in their defence that though the bond was so executed, several requisitions of the act necessary to the validity of such instruments had not been complied with; and it appeared to the Court that such evidence might be admitted under the plea of non est factum. We thought the doctrine of *Whelpdale's case*, 5 Rep. 119, inapplicable, the defendants' case being, not that the deed, though executed by them, was invalidated by collateral matter; but that having been executed in defiance of the enactments which alone give them power to execute such instruments, it was not in point of law executed at all.

Recourse was had to the twenty-third section of the act, which places the common seal at the disposal of the proprietors at large: but we all think that this clause only empowered them to make rules and regulations for its custody, and does not require their concurrence in each particular act of sealing.

The defendants then contended, that the bond was given for a purpose which required the sanction of a special general assembly; that such assembly was, by the act, to be convened only by requisition from proprietors of a certain number and value, after fourteen days' public notice; and that such [*875] meeting should consist of a certain number; and they attempted to prove that all these important safeguards for the interest of the great body of proprietors, had been neglected in this instance, and the bond executed by the resolution of a meeting at which all these requisites were wanting.

These points of fact, however, could only be established by the books kept by the clerk of the company; and the question now to be decided is, whether they are evidence against the plaintiff? It was argued that they were, because he was a proprietor, and the books of a partnership are evidence against any one of the partners; and more particularly as the act requires such books of the proceedings to be kept, and that all the proprietors shall have free access to them at all reasonable times.

We are, however, of opinion, that the principle on which partnership books are evidence against the partners is, that they are the acts and declaration of such partners, being kept by themselves, or, by their authority, by their servants, and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member; and the free access provided for is only for the purpose of inspection. A proprietor entering into a contract with the company, must be deemed a stranger, see *Dunston v. The Imperial Gas Light Company*, 3 B. & Ad. 125, and can be affected by no entry made under orders from the entire body.

Parol evidence was, indeed, produced, to show that the plaintiff was actually present on the 7th of April, *when the resolution to affix the seal to his [*876] bond was passed; but that the number then attending was less than that required by law, could only be proved by inspection of the book, which was not written in the plaintiff's presence, but made afterwards, from rough memoranda, by the clerk.

In a former trial between the same parties before Lord TENTERDEN, a deed of composition between the company and several persons having claims upon them, including the plaintiff, had been given in evidence, to prove an express recognition of that bond under the seal of the company. The bond was then held by Lord TENTERDEN to be set up by that acknowledgment, even though informal or irregular in its origin, and a rule for a new trial, founded on an objection to that ruling was refused by the Court. The same evidence was received on the trial of this case, and its effect has been much questioned in the late ar-

gument before us. But it is not necessary that we should deliver any opinion on that subject, as we are clearly of opinion that the books of the company are not admissible in evidence for the purpose of establishing the facts therein mentioned against the plaintiff suing the body corporate. The consequence is, that the rule for a new trial must be discharged. Rule discharged.

[*877]

*FINNIE v. MONTAGUE. Nov. 25.

After the Uniformity of Process Act, 2 W. 4, c. 39, the Court directed the signer of K. B. writs to sign a pluries bill of Middlesex, in a suit commenced before the act, and which, if recommenced, would have been barred by the statute of limitations.

KNOWLES moved for an order upon the signer of the writs for K. B., directing him to sign a pluries bill of Middlesex. This action had been commenced before the Uniformity of Process Act, 2 W. 4, c. 39, came into operation, and had been regularly continued by alias and pluries bills of Middlesex. Those writs had hitherto been signed by the officer appointed to sign bills of Middlesex. The Uniformity of Process Act, however, having now abolished the proceeding by bill of Middlesex, the office for signing bills of Middlesex had, as a consequence, been also abolished, and all King's Bench writs are now signed by the same officer. An application had been made to that officer to sign a pluries bill of Middlesex, which it was necessary to issue to continue the present action; but he had refused, on the ground that his official seal would not apply to a bill of Middlesex, but only to writs issued in the new form. The consequence was, that the plaintiff could not continue his action, and, as a new action would now be barred by the statute of limitations, he would be entirely without remedy.

Per Curiam. It is reasonable that the plaintiff should be enabled to continue his action; and as all writs are now signed at the same office, we think the signer ought to sign this writ. Rule granted.¹

¹ This Court had given a like direction in *Starr v. Bowles*, 4 B. & Ad. 112.

[*878] *DOE dem. T. STANDISH and W. BLACKBURN v. ROE.

A. having brought an ejectment, had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtor's Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the Court stayed the proceedings in it until the costs of the first were paid.

A RULE nisi had been obtained to stay the proceedings in this cause until payment of the costs of two former ejectments on the demise of T. Standish, brought to recover possession of lands in the county of Lancaster, formerly the property of Sir F. H. Standish, and then enjoyed by F. H. Standish, Esq., who defended as landlord. One of the causes was set down for trial at the Lancaster Summer assizes, 1818, when the plaintiff withdrew the record. In the following term, the defendant obtained a rule for judgment as in case of a nonsuit, which was discharged on the lessor of the plaintiff undertaking to try the cause at the next assizes. The cause was again entered, and the record again withdrawn. The defendant's taxed costs amounted to 430*l*. In January, 1831, the lessor of the plaintiff, Thomas Standish, was discharged under the insolvent debtor's act. The costs in the above ejectments were inserted in his schedule, and William Blackburn was appointed assignee of his estate. This action was brought upon the demises of the insolvent and assignee. The affidavits in support of the rule stated, that Thomas Standish's discharge under the insolvent act, and the appointment of Blackburn as assignee, had been fraudulently concerted in order to bring an ejectment without paying the costs of the former

ejectments; but that was denied in the affidavits on the other side. In Easter term last,

**J. Williams and Tomlinson* showed cause.¹ The Court will, undoubtedly, in an ordinary case, stay the proceedings in a second ejectment until the costs of the first are paid; but that rule does not apply to a case like the present, where the second ejectment is brought by the assignee of the estate of an insolvent debtor, the first having been brought by the insolvent himself. In *Doe dem. Chambers v. Law*, 2 Sir W. Bl. 180, the second ejectment was brought by the assignee of the insolvent debtor, and the first by the insolvent himself, and the Court stayed the proceedings, only because the assignment was a mere contrivance to defraud the defendant. Here all fraud is negatived. The title of the assignee accrued after the first ejectment was determined by the judgment of nonsuit. *T. Standish*, on whose demise the first ejectment was brought, is not liable now to be sued at law for the costs incurred. They are inserted in his schedule. The first ejectment was brought by *T. Standish* for his own benefit; the second by his assignee for the benefit of the creditors. Not only the parties bringing the two ejectments, but the parties interested in the result, are different. [*879]

Wightman, contra. The general rule is quite clear, that the Court will stay the proceedings in a second ejectment until the costs of the former are paid, provided both be brought to try the same title, *Keen dem. Angel v. Angel*, 6 T. R. 740, *Doe dem. Cotterell v. Roe*, 1 Chitty's Rep. 195, and this rule has been held to apply to a case where the first ejectment was brought by the father of the lessor of *the plaintiff against the father of the defendant, in the second; *Doe dem. Feldon v. Roe*, 8 T. R. 645. Here the second ejectment is brought on the same title as the first, and the defendant ought not to be subjected to the costs of the second until the costs of the first are paid. [*880]

Our. adv. vult.

The judgment of the Court was now delivered by

DENMAN, C. J. We think that the rule for staying proceedings in a second ejectment until the costs of a first are paid, applies as well to a case where the second ejectment is brought by the assignee of an insolvent debtor, the first having been brought by the insolvent, as to a case where the second ejectment is brought by the same party as the first. The proceedings, therefore, on the second ejectment must be stayed until the costs of the first are paid.

Rule absolute.

¹ Before DENMAN, C. J., LITLEDALE, PARKER, and PATTERSON, Js.

TARDREW v. BROOK. Nov. 25.

Defendant in an action for words, after notice of trial, signed a paper, in which, after reciting that plaintiff had consented on defendant's paying the costs and making an apology, to stay proceedings, he made such apology: Held, that this was a positive undertaking by defendant to pay the costs.

Plaintiff in such a case having stayed proceedings, but defendant not paying the costs, the Court will enforce performance of the agreement on his part by rule.

ACTION for slander. After notice of trial, an agreement was come to between the parties, in consequence of which the defendant signed a paper, containing these words:—"Whereas I," &c. "have circulated a report to the prejudice of William Tardrew, of," &c. (stating the report); "and whereas W. T. has commenced *an action at law against me for circulating such report, [*881] and at my request he has consented, on my paying the costs of such action as between attorney and client, and making an apology, to stay the proceedings therein: now I, W. B., being satisfied that the said report is false, do hereby apologize to the said W. T. for my conduct, and express my sorrow for having circulated such report. Dated, &c. W. B." The notice of trial was

countermanded ; and the plaintiff's attorneys sent in their bill of costs, 65*l.* 7*s.*, to the defendant, but he did not pay it. A rule was obtained in this term, calling on the defendant to show cause why he should not pay the plaintiff's attorneys the sum of 65*l.* 10*s.*, with the costs of this application, to be taxed by the Master ; or why the plaintiff should not be at liberty to sign judgment as for want of a plea, and the Master be at liberty to tax the plaintiff's costs under the judgment, as between attorney and client. The defendant, in his affidavit in answer, denied that he had consented to pay the costs, or requested that proceedings might be stayed.

Thesiger now showed cause. Supposing there had been an absolute undertaking to pay these costs, there is no authority for the Court interfering in a summary manner against a person not an officer of the Court, but merely party in a cause ; and the words subscribed by the defendant, "whereas W. T. has consented, on my paying the costs and making an apology, to stay proceedings," do not amount to an absolute undertaking to pay. In *Fricker v. Eastman*, 11 East, 319, a judge's order, that, upon payment of debt and costs on or before, [*882] &c., all *proceedings should be stayed, was held a conditional, not a peremptory order on the defendant.

Follett, contra. The agreement, here, is absolute on both sides. As to the power of the Court, the rule now moved for is precisely similar to one which was made absolute in *Riley v. Byrne*,¹ which has been reported, but not on this point.

PARKE, J.* I think this was not a conditional undertaking. The defendant's signing the apology showed that there was to be an end of the action, and that it was meant that no further proceedings should be taken. I should have thought, but for the authority of the case referred to, that we could not interfere in the manner proposed ; but it is for the benefit of the defendant, who would probably be put to much greater expense if the cause were to go down again for trial. The rule for payment of costs must be absolute.

TAUNTON, J. I am of the same opinion. To a common man's mind, this would certainly not appear to be a conditional undertaking ; and it should be a [*883] very *clear case to warrant us in frittering away the effect of such an agreement.

PATTON, J., concurred.

Rule absolute for payment of 65*l.* 7*s.*, and costs of the application.

¹ 2 B. & Ad. 779. The rule above referred to (and mentioned in the report) was of Hilary term, 1827. It appeared that the cause having been appointed for trial, the defendant proposed to apologize and pay costs ; the plaintiff consented to a settlement on these terms ; and the defendant wrote a letter, apologizing for the libel complained of, and adding, "I undertake to pay all the law charges which you have sustained, as between attorney and client, upon your withdrawing the action." The plaintiff withdrew the record, but the defendant did not pay the costs. *Campbell* obtained a rule nisi in nearly the same words as that in the above case ; and the Court, after hearing *Platt* against the rule (February 8th, 1827), made it absolute, as to the costs of the cause and application, as prayed.

² DENMAN, C. J., was out of Court.

The KING v. The Inhabitants of MATLOCK. Nov. 25.

Where it has been referred to the chairman at sessions, on an appeal, to state a case, and a case has afterwards, on certiorari, been returned to this Court by the clerk of the peace, purporting to be signed by the chairman, this Court will not send it back to be restated, or quash the certiorari, on the ground of the chairman having said that he did not recollect signing the case, and upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, and that deponent believes the chairman did not settle the case.

At the Derbyshire Midsummer sessions, 1832, an order of removal from Wirksworth to Derby was confirmed, subject to a case. Counsel not agreeing

in the statement, it was referred to the chairman to prepare a case; and, after the Spring sessions, 1833, the *ex parte* statement on each side was sent to him for that purpose. A case was afterwards returned to this Court, purporting to be signed by the chairman. The attorney for the respondents was of opinion that the statement so returned did not agree with the facts proved at the sessions; and believing, consequently, that it had not been signed or settled by proper authority, he wrote to the chairman on the subject, sending him a copy of the case as stated. The chairman, in his answers, written in October and November, 1833, said that he had no recollection of having been called upon to sign the case, and that he hoped the counsel, by referring to the clerk of the peace, might be able to have a case drawn to the satisfaction of both. The respondents' attorney having applied without success to the attorney on the other side to consent to the case being withdrawn, a rule was obtained in this term, calling on the appellants to show **cause* why the orders returned with the certiorari in this case should not be sent back to be restated, [*884] or why the certiorari should not be quashed. It appeared by the affidavits, that the signature to the case sent up was not in the chairman's own writing; but the clerk of the peace stated that the original case (transmitted to him May 31st) was signed by the chairman, and that, according to the sessions' practice, the copy sent to this Court need not be under the chairman's own hand.

Whitehurst now showed cause, and contended that, as the signature was now shown to be, in effect, that of the chairman, no question remained to be determined.

N. R. Clarke, contra. If the chairman merely signed a paper *pro forma*, and without exercising his judgment upon it, it is not properly a case sent by him. [DENMAN, C. J. We cannot enter into such questions. If a case comes before us with the signature, and apparent authority, of the chairman, we cannot, without very strong grounds, presume that it is not his.] Some years ago, in the time of Lord TENTERDEN, this Court interfered, where the chairman had signed an *ex parte* case.

DENMAN, C. J. That does not appear to be so here. This is not stated to be the case of either party. No explanation is given by the magistrates themselves. The case comes to us returned to the certiorari by the clerk of the peace, and the matter stated is not sufficient to impeach it.

PARKE, J., concurred.

*TAUNTON, J. If, upon the argument, the case should appear defective, we can send it back to be restated: at present, you are calling [*885] upon us for that which we have no authority to do.

PATTESON, J., concurred.

Rule discharged.

FORD v. DILLY. Nov. 25.

On application to the Court by a sheriff under sect. 6 of the Interpleader Act, a third party served with the rule, and not appearing, is barred by sect. 3 from further prosecuting any claim brought in question by the rule, as well as where such application is made by a defendant under sect. 1.

The Court, on such application, will, on proper grounds shown, order the sheriff, or the execution creditor, to pay to a third party appearing and successfully prosecuting his claim, his costs of such appearance.

THIS was an application on behalf of the sheriff of Hants, under the Interpleader Act, 1 & 2 W. 4, c. 58, s. 6, calling upon the plaintiff and several other persons to appear and maintain their claims to certain goods seized in execution in this suit, or else relinquish the same; and to show cause why the Court should not make such order in the premises as it should think fit, according to the statute. It appeared that the sheriff, in executing a *fi. fa.* against Dilly's goods at the suit of Ford, had seized horses, to which several other persons laid claim. Notice of the rule had been given to those parties, to the defen-

dant, and to the plaintiff, according to the act, and all now appeared except the defendant and the plaintiff, the execution-creditor. The claimants before the Court having made out their respective rights to the property,

R. V. Richards, on behalf of one of the claimants, contended that the Court ought now to make an order for restitution, notwithstanding the plaintiff's absence; *for that he, having had notice of the rule, and not appearing, [*886] ought to be barred from any further prosecution of his claim, according to sect. 3 of the act; that clause being applicable to cases under sect. 6, where the sheriff seeks relief, as well as under sect. 1, where the relief is sought by a defendant. [*Follett*, amicus curiæ, stated that the Court of Exchequer had so held; see *Perkins v. Benton*, 3 Tyr. 51.] *Richards* also contended that the sheriff had been to blame, having seized horses in the stables of a trainer, for a debt due from the owner of the stables; and he suggested that either the sheriff or the plaintiff should pay his client's costs of appearing to this rule; to which point he cited *Bryant v. Ikey*, 1 Dowl. Pract. Cases, 428; and see *Perkins v. Benton*, above cited.

Jeremy, for the sheriff, denied that he had been in fault, or ought to be charged with costs.

The Court made the following rule (reciting that no person appeared on behalf of the plaintiff or defendant):—That the sheriff do forthwith deliver up to, &c. (naming the several claimants who appeared), respectively, the property claimed by them, taken in execution in this cause, and that it be referred to the Master to determine whether the sheriff or the plaintiff do pay to, &c. (the claimants who appeared), respectively, their costs of appearing before this Court, and that the said costs be paid accordingly.

END OF MICHAELMAS TERM.

C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

IN
Hilary Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

FORSTER *v.* TAYLOR.

By 36 G. 3, c. 88, entitled, "An Act to prevent Abuses and Frauds in the Packing, Weight, and Sale of Butter" (s. 2), every cooper, or other person making a vessel for packing butter, is required to brand his Christian and surname on such vessel, together with the exact weight or tare thereof, or in default thereof, he is to forfeit, for every such vessel not so marked, 10s. By sect. 8 every dairyman, farmer, &c., who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid, and shall brand his Christian and surname on different parts of the vessel, therein described, and on the butter contained in such vessel, upon penalty of forfeiting, for every default, 5l.

In an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to defendant, it appeared that the firkins were not marked according to the act :

Held, that the provisions which required the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked ; that the subject-matter of this contract was in such a state, from the vessels not being properly marked, that the sale of it was forbidden by act of parliament ; and consequently, that the contract of sale was void, and the plaintiff could not recover.

Held, further, that although there was a penalty imposed in the same clause of the act, which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty ; but that the clause might be used against him as a defence to an action.

ASSUMPSIT for the price of fifteen firkins of butter sold and delivered by plaintiff to the defendant. At the trial before PATTESON, J., at the Carlisle Spring assizes, 1832, the following facts appeared :—The plaintiff was a farmer, and defendant an innkeeper, both residing in the county of Cumberland. The contract for the purchase, and also the delivery of the butter, *were [*888] proved ; but, after the plaintiff had closed his case, it was objected that the statutes of 36 G. 3, c. 86, and 38 G. 3, c. 73,¹ having made several enactments relative to the sale of butter, the plaintiff should have proved that those requisites had been complied with, and, not having done so, could not recover. The learned Judge, however, was of opinion that the plaintiff was not bound to give the evidence as part of his original case, but that the onus lay on the defendant to prove that the plaintiff had not complied with the statutes. The defendant's case was then gone into, and the jury found that there was a deficiency in the weight of the butter (the evidence as to that being that seven firkins of the butter

¹ See the clauses set out in the judgment.

fell short of the weight required by 36 G. 3, c. 86), and also that the casks were not marked according to the directions of the acts. A verdict was entered for the plaintiff for 15*l.* 11*s.* 6*d.*, which allowed 1*l.* to be deducted for the deficiency in weight (twenty-four pounds), and the defendant had liberty given him to move to enter a nonsuit.

Courtenay and *Blackburne*, in Hilary term, 1833, showed cause.¹ The fact of the firkins of butter not having been branded and marked, and of some of them not having the proper weight, does not invalidate the contract of sale. The acts of parliament prescribe certain regulations for carrying on the trade in butter, and, among others, that every tub, firkin, &c., shall contain a specific quantity, and shall be branded with the name of the cooper, packer, dairyman, or seller of butter. It contains no clause avoiding a contract of sale with [*889] *respect to which these regulations have not been observed; but it imposes a penalty for the violation of each of them. Then, in this case, there has been no more than a breach of a parliamentary regulation protected by a penalty; and, according to *Johnson v. Hudson*, 11 East, 180, *Brown v. Duncan*, 10 B. & C. 93, and *Wetherell v. Jones*, 3 B. & Ad. 221, the contract of sale is not avoided. It may be said that these statutory provisions were intended to protect the buyer against the fraud of the seller, and therefore that, according to *Law v. Hodson*, 2 Camp. 147, 11 East, 300, the contract of sale was void. There the 17 G. 3, c. 42, had required bricks made for sale to be of certain dimensions, and given a penalty for breach of this regulation, but did not expressly avoid every contract for the sale of bricks of less than the required dimensions; still a contract for the sale of such bricks was held to be void. That decision is open to this objection,—that the act, being penal, ought not to have been extended by construction; and that the legislature, when it imposed a penalty for breach of the regulation, must be taken to have given all the remedy intended. It is unnecessary, however, to impugn the authority of that case, for it is distinguishable from the present; since, assuming that the imposition of a penalty for breach of the provision, that bricks made for sale should be of a certain size, vitiates a contract made for the sale of bricks of less dimensions; here, in the stat. 36 G. 3, c. 86, is a clause (subsequent to those which require the tubs, &c., to contain the proper weight, and to be marked in the manner specified), which recognises the validity of a contract of sale, even [*890] though those requisites *have not been complied with. Sect. 6 enacts, “That every cheesemonger, dealer in butter, or other person, who shall sell to any person any tub, firkin, &c., of butter, shall deliver in every such tub, &c., the full quantity appointed by the act, or in default thereof shall be liable to make satisfaction to the person who shall buy the same, for what shall be wanting.” Besides, if the breach of any one of these several regulations for the packing of butter in the vessels described in the act, avoids every contract of sale, a multiplicity of issues might be raised on the trial of every action brought to recover the price of butter sold in casks. It might be made a question whether the tub or other vessel in which it was contained, had the required weight, or whether it was branded with the Christian and surname of the cooper, or of the packer, dairyman, or seller, or whether the vessel had been properly soaked; for the breach of any one of these regulations would, according to the argument, avoid the contract. *Tyson v. Thomas*, 1 M’Clel. & Younge, 119, is distinguishable, because the statute 22 & 23 Car. 2, c. 12, not only imposed a penalty, but a forfeiture of the corn bought or sold.

Aglionby and *Dundas*, contra. This action is not maintainable, because it is brought to enforce a contract made in contravention of the provisions of an act of parliament intended to protect the public, generally, against fraud in the sale and purchase of butter, and more particularly to protect the buyer against the fraud of the seller. It is a well-established rule, laid down by Lord HOLT in *Burlett v. Viner*, Carth. 262, that if a statute inflicts a penalty for doing an

¹ Before LITTLEDALE, TAUNTON, and PATTERSON, Js.

act, the penalty implies a prohibition, *and the thing is unlawful, though there be no prohibitory words in the statute; as where a statute [*891] inflicts a penalty for making a particular contract, as a simoniacal or usurious contract, the contract is void. In *Law v. Hodson*, 11 East, 300, the statute required bricks made for sale to be of certain dimensions, and gave a penalty for breach of that regulation; and that being intended to protect the buyer against the fraud of the seller, was held to render void any contract for the sale of bricks of less than the required dimensions. There it was argued, as here, that the legislature had not avoided the contract, but only subjected the brick-maker to a penalty. The decision in *Little v. Poole*, 9 B. & C. 200, proceeded on the same principle, and there *Law v. Hodson*, 11 East, 300, was recognised as authority. In *Langton v. Hughes*, 1 M. & S. 593, a druggist (after the stat. 42 G. 3, c. 38, which prohibited the using of anything but malt and hops in brewing beer, but before the 51 G. 3, c. 87, which prohibited druggists from selling to brewers under a penalty), sold and delivered drugs to a brewer, knowing that they were to be used in brewing; and it was held that he could not recover the price of them, because the object of the former statute was to protect the public health. There, also, it was contended that the selling and buying were not prohibited; and *Law v. Hodson* was cited, and recognised by the Court. In *Bensley v. Bignold*, 5 B. & A. 335, it was held, that a printer cannot recover for labor and materials used in printing any work, unless he affixes his name to it pursuant to the 39 G. 3, c. 79, s. 27, the provision being made for public purposes; and there the argument was, that the statute contained no *prohibition, but a mere regulation protected by a penalty. So in [*892] *Tyson v. Thomas*, M'Clel. & Younge, 119, it was held by the Court of Exchequer, that an action will not lie for breach of a contract for the sale of corn by the hobbett, which is in contravention of the provisions of the 22 Car. 2, c. 8, s. 2, and there *Langton v. Hughes*, 1 M. & S. 593, was cited with approbation by HULLOCK, B. *Johnson v. Hudson*, 11 East, 180, is distinguishable; because in that case there was a mere breach of revenue regulations protected by a penalty: those regulations attached to the plaintiff personally only, and affected him with the penalty in order to secure the license duty. There was nothing in the statute directly or indirectly prohibitory of the contract. The same observation applies to *Brown v. Duncan*, 10 B. & C. 93, and *Wetherell v. Jones*, 3 B. & Ad. 221; and in the last of those cases Lord TENTERDEN lays it down as a general rule, that where a contract which a plaintiff seeks to enforce is expressly or by implication forbidden by the statute or common law, no Court will lend its assistance to give it effect; and that principle, which was fully recognised and acted upon in the still later case of *Rex v. Gravesend*, 3 B. & Ad. 240, applies to the present case. For here the statute, as it expressly makes it an offence, subject to penalty, for any person to pack any butter for sale in any vessel not marked or branded as therein required, must have intended to prevent the sale of butter in vessels not properly marked. As to sect. 6, there is a preamble to that clause which seems intended to limit it to retail dealers as distinguished from farmers.

Cur. adv. vult.

*LITLEDALE, J., in the course of this term, delivered the judgment of the Court. After stating the facts of the case, and that, in the opinion of the Court the learned Judge was perfectly right in holding that the onus lay, at all events, on the defendant to prove that the plaintiff had not complied with the statutes, his lordship proceeded as follows:—

Upon the question of deficiency of weight, there could be no ground for a nonsuit, because as to eight of the casks, there was no evidence that they were deficient in weight, and the contract not being for one entire sum for the whole parcel, but at the rate of so much per firkin, the plaintiff would be entitled to recover for as many firkins as were of full weight.

On the other point, that the casks were not marked according to the directions of the acts of parliament, we should be rather disposed to think, on a perusal of

the Judge's notes, that there were scarcely sufficient evidence for the jury to have come to the conclusion they did; but we must take the finding of the jury to be right, as there is no question about a new trial, and the amount of the damages is not so large as that it should be granted as on a verdict against evidence. The title of the act of 36 G. 3, c. 86, is, "An Act to prevent abuses and frauds in the packing, weight and sale of butter, and to repeal certain acts relating thereto." And the title of the act of 38 G. 3, c. 73, is "An Act for amending and rendering more effectual, an act made in the thirty-sixth year of the reign of his present Majesty," intituled, &c. (giving the former title).

The former acts made on this subject are one of the 13 & 14 Car. 2, c. 26, of which the title is "An Act for reforming of the abuses committed in the weight [*894] and false *packing of butter;" and another of 4 & 5 W. & M. c. 7, the title of which is "An Act to prevent abuses committed by the traders in butter and cheese."

In these former acts, several of the provisions in the latter acts now in force, or nearly similar ones, are introduced, and, in some instances, much heavier penalties than in the existing acts. The attention of parliament has, therefore, at an early period, and on several occasions, been directed to prevent frauds and abuses, and to provide for the protection and benefit of the public relative to the sale of butter. The regulations as to marking the casks, in the second section of the 36 G. 3, c. 86, are, "that every cooper or other person making a vessel for packing butter shall, on the bottom of such vessel, brand his Christian name and surname at length, to denote that it is the mark of the cooper or maker of the vessel, together with the exact weight or tare, or in default, for every such offence shall forfeit 10s." And in the third section, "that every dairyman, farmer, seller of butter, or other person who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid, and no other, and shall, on the bottom thereof, on the inside, and on the top on the outside, brand his Christian name and surname at length, and shall also brand on the top on the outside, and on the bouge or body of the vessel, the true weight or tare of such empty vessel, and shall also brand his Christian name and surname at length on the bouge or body of every vessel, across two different staves at least, and shall also imprint his Christian name and surname upon the top of the butter," upon pain and penalty of forfeiting for every such offence, the sum of 5*l*.

The first section of the 38 G. 3, c. 73, after reciting, *amongst other [*895] things, "that the act was much avoided by concealing the places of abode of the coopers making the vessels, and of the dairymen or other packers of butter," enacts, "that every cooper or other person making such vessel, shall, on the bottom of the vessel on the outside, in addition to his Christian name and surname, brand the name or his place of abode or dwelling in the manner directed, or in default, shall forfeit and pay the sum of 10s." The second section directs, "that every factor or agent, who shall buy or sell, or for the purpose of sale have in his custody any vessel containing butter for sale, not made and marked according to the directions of the act, shall forfeit and pay 20s." It is to be observed of the latter act, that although it recited that the former act had been evaded by concealing the places of abode of the dairymen and other packers of butter, yet the enacting part leaves them out, and only mentions coopers and other persons making the vessels.

The 36 G. 3, contains several provisions as to the weight of the butter in each cask, the not mixing one kind of butter with another kind, and the mode of salting the butter, but which are not now the subject of discussion; but the provision as to marking the names are made with a view, that if the butter be made or put up in a way contrary to the directions of the act, or be otherwise liable to be complained of, the person who is aggrieved may know where the original fault is committed, and be able to obtain redress.

As the jury have found that the casks were not marked according to the act, it is to be considered what effect that has as to the present action. In Bartlett

v. Viner, reported in *Carthew*, 252, Lord HOLT says, that "every contract made for or about any matter or thing which is *prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." And in the report of the same case in *Skinner*, 322, the Court say, that "in every case where a penalty is annexed to the doing of such an act, though it be not prohibited, yet if such a thing appears upon the record to be the consideration, the agreement is void." And, "in every case, where the statute inflicts a penalty for doing such an act, though the act be not prohibited, yet the thing is unlawful."

Where acts have been passed, containing regulations as to articles which are the subject of sale, and the policy of the acts is for the security of the buyers, and to protect them against the frauds of the seller, it has been held that the seller cannot recover the price. And within this rule the present case appears to us to fall.

The case of *Law v. Hodson*, in 2 *Campbell*, 147, and afterwards, on a motion for a new trial, in 11 *East*, 300, was decided on this principle. The statute 17 G. 3, c. 42, in the first section, directs that bricks shall be made of a certain size; and in the second section, a penalty is given for not doing so: and the bricks, which were the subject of the action, being under the statutable size, it was considered to be a fraud on the buyer, whom the legislature meant to protect, and the plaintiff was held not entitled to recover the price.

Tyson v. Thomas, McClelland & Y. 119, was an action for not delivering twenty hobbets of barley; and it was objected, that the action could not be maintained, the statute *22 Car. 2, c. 8, s. 2, having enacted, that if [*897] any person shall buy or sell any corn by any other measure than the Winchester bushel, he shall forfeit 40s.; and the 22 & 23 Car. 2, c. 12, s. 2, having, besides the former penalty, imposed the further penalty of losing the corn or the value; and as it appeared that the hobbett was an uncertain measure, it was held, that it was a sale in a manner prohibited by the statutes of Car. 2, and that the plaintiff could not recover. It must be observed that the selling by customary measure is now authorized by the 5 G. 4, c. 74, under certain restrictions. *Little v. Poole*, 9 B. & C. 192, was an action to recover the price of some coals. The 47 G. 3, sess. 2, c. lxxviii., contains several regulations as to the sale of coals; it directs the vendor to deliver to the purchaser a ticket which is to contain the number of sacks, the name of the coals sent, the name of the vendor, and the name of the laboring meter, and it subjects the vendor of the coals for not doing so, to a penalty of 20*l*. The ticket did not follow the directions of the act as to the laboring meter; and it was held, that as the provision of the act was to protect the buyer against the fraud of the seller, the seller was not entitled to recover the price. These cases more particularly apply to the acts of parliament which are considered as being for the protection of parties to a contract of sale.

There are several other cases where acts of parliament have been infringed in other respects. In one of *Langton v. Hughes*, 1 M. & S. 593, the plaintiffs were druggists, and they sold drugs to the defendants, who were brewers, knowing that they were to be used in the brewing of beer, which was contrary to the provisions of an act of *parliament; and Lord ELLENBOROUGH there [*898] states, that it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament, cannot be made the subject-matter of an action. There are other cases where contracts have been made on the Lord's day, which are within the statute of 29 Car. 2, c. 7. Others arising out of transactions connected with smuggling. Other cases arising out of transactions where the name of the printer has not been inserted in the document published. Others arising out of contracts relating to unlicensed places of public exhibition or resort, which are carried on in a manner not authorized

by law. Others arising out of disabilities in attorneys and apothecaries not having the proper certificates to practice. Others out of illegal insurances: the names of which several cases need not be enumerated; and the general principle is laid down, that where the provisions of an act of parliament have been infringed, no contract can be supported arising out of it.

There are, however, some cases where the rule has been held not to apply; as in *Johnson v. Hudson*, 11 East, 180, where the plaintiff, a factor, sold tobacco segars, but had not entered himself as a dealer in tobacco, nor had he a license, and the tobacco went without a permit, and it was held that the plaintiff might recover the price, as there was no fraud intended, and there was nothing in the act which rendered the contract illegal, and it was only a breach of revenue regulations protected by a penalty, by which we apprehend is to be understood revenue regulations meant to attach to the plaintiff personally, and affect him [*899] with the penalty in *order to secure the license duty, but in no way to prohibit the contract. It is to be observed also that the Court intimate that the plaintiff was not to be considered as a dealer in tobacco at all within the meaning of the act. In *Brown v. Duncan*, 10 B. & C. 93, the five plaintiffs carried on business as distillers. By the statute 6 G. 4, c. 81, s. 7, each person who is a distiller ought to be named in the license; and by another act, no person who is a vendor or retailer of spirits, ought to be licensed as a distiller within the limited distance. One of the plaintiffs was not named in the license, and he carried on the business of a retailer of spirits within the limited distance. But notwithstanding this, the plaintiffs were held entitled to recover the price of the whiskey sold in their trade as distillers, which had been guaranteed by the defendant; for there had been no fraud on the part of the plaintiffs on the revenue, though they had not complied with the excise regulations, which it was thought wise to adopt, in order to secure, as far as might be, the conduct of the trader in such a way as was deemed most expedient for the benefit of the revenue, and the plaintiff was held entitled to recover. These regulations were considered to be of the same nature as those referred to in the case of *Johnson v. Hudson*, not directly or indirectly prohibitory of the contract on which the action was brought.

In *Wetherell v. Jones*, 3 B. & Ad. 221, the plaintiff was a rectifier of spirits, and sold spirits to the defendant, who was a confectioner. The spirits were above proof, though described in a permit as being under proof. It was held, [*900] that the statute 6 G. 4, c. 80, did not apply to distillers *of spirits; and as there was no provision in the act to regulate the strength of British spirits, the contract was not illegal, nor were the spirits prohibited goods; and it was further held, that the irregularity of the permit, though it arose from the plaintiff's own fault, and was a violation of the law by him, did not deprive him of the right of suing upon the contract, which was in itself perfectly legal,—there being no agreement, express or implied, that the law should be violated by such improper dealing. But it was also there held, that where a contract which the plaintiff seeks to enforce, is expressly or by implication forbidden by the statute or common law, no Court will lend its assistance to give it effect. "But where the consideration and the matter to be enforced were both legal," the Court said they were not aware "that the plaintiff had ever been precluded from recovering by an infringement of the law (not contemplated by the contract) in the performance of something to be done on his part."

But the present case does not come within any of the cases last cited, because here the acts of parliament are made for the protection of the public against frauds, and also the subject-matter of the contract is in such a state, for want of the casks being properly marked, that the sale of it was prohibited by act of parliament.

It is necessary, however, to notice one point arising out of this act of parliament,—that the penalty is given in the same clause which directs the thing to be done; and it might therefore be said that the thing is only directed to be done

subject to a penalty, and not absolutely; and in *Law v. Hodson*, the case most frequently referred to of late on these subjects, in the report in 2 Campbell, 147, Lord ELLENBOROUGH notices that the *penalty is given in a separate clause. In the case of indictments arising out of provisions in acts of [*901] parliament which subject parties to penalties, where the penalty is given in the same clause which enacts the offence, it has been held, that if the offence was not one at common law, you cannot have a general indictment for the offence under the act of parliament, and can only proceed for the penalty. In *Rex v. Wright*, 1 Burr. 543, which was an indictment against the defendant, and charged that he, being a spiritual person, did take to farm several lands against the statute of 21 Hen. 8, c. 13, s. 1, on an application to quash the indictment, Lord MANSFIELD said he always took it, "that where new-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued; for otherwise the defendant would be liable to a double prosecution;—one upon the general prohibition, and the other upon the particular specific remedy." The same limited rule, however, does not seem to have been adopted in civil actions, so as to confine the proceedings against the party offending to the penalty; and we are not aware that the observation of Lord ELLENBOROUGH as to the penalty being given by a separate clause has been noticed at any other time; and, indeed, in many of the cases which have occurred, the penalty is given in the same clause. Upon the whole of this case, we are of opinion that judgment of nonsuit must be entered.

Judgment of nonsuit.

*HUNT v. MASSEY. Jan. 11.

[*902]

In an action by drawer against acceptor of a bill of exchange for 101*l.*, defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in defendant's handwriting, purporting by its date to have been written after he came of age, addressed to a third person, in these words:—"I request you to pay H." (the plaintiff) "101*l.* at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill." This letter was proved to have been delivered to plaintiff's clerk, but it did not appear when.

Held, that the letter must, *prima facie*, be taken to have been written and issued at the time when it bore date; and that, having been written after defendant came of age, and before the bill became due, it would support a count on a promise to pay according to the tenor and effect of the bill.

ASSUMPSIT by the plaintiff, as drawer of a bill of exchange dated the 1st of February, 1832, for 101*l.* payable five months after date, and accepted by the defendant. Plea, general issue. At the trial before DENMAN, C. J., at the London sittings after last Michaelmas term, the following appeared to be the facts of the case:—The defendant accepted the bill of exchange in February, 1832, being then under age; he became of age on the 19th of June, and the bill became due on the 4th of July, 1832. The following letter, in the defendant's handwriting, bearing date the 22d of June, 1832, addressed to his guardian, was given in evidence:—"I request you to pay to Mr. W. H. Hunt 101*l.* at your earliest convenience after the date of this letter, from the money left me by my late grandfather, Robert Andrews, Esq., for which I have given my bill." This letter had been delivered by the defendant to the clerk of the plaintiff, as stated in his examination in chief, on the day it bore date: on his cross-examination he stated he could not state the precise day when it was delivered. It was objected that it ought to have been clearly shown that the letter was written after the defendant became of age: secondly, that the letter did not amount to a promise to pay the bill: and thirdly, that the plaintiff ought to have declared specially; because the plaintiff was liable, if at all, not by reason of his acceptance of the bill, but of a promise made after he

[*903] *had come of age. The Lord Chief Justice directed the jury to find a verdict for the plaintiff.

Platt now moved for a new trial, and contended, first, that some evidence ought to have been given to show that the letter was written at or about the time it bore date, or, at least, before the defendant attained his full age; secondly, that the language of the letter did not amount to a promise to pay, but a mere request to a third person to pay on the defendant's account a sum of money to the plaintiff out of a particular fund: and, thirdly, that if the letter did amount to a promise to pay, it did not support any count in the declaration. The contract in the special count to pay according to the tenor and effect of the bill of exchange, was alleged to have been made on the 19th of June. If the letter amounted to a promise, that promise was made on the 22d of June. [TAUNTON, J. Where a voidable contract is made by a party under age, and ratified after he has attained his full age, is it not usual to declare on the original promise? The first promise here was voidable only, *Gibbs v. Merrill*, 3 Taunt. 307. As soon as it was ratified, it became binding ab initio. PATTESON, J. If the defendant had pleaded infancy specially, the plaintiff might have replied, that after he had attained the age of twenty-one years, he assented to and ratified and confirmed the several promises in the declaration. And the letter would be good evidence to support that replication, for it is an order to the defendant's agent to pay the very money for which he had given the bill. LITTLEDALE, J. The case [*904] might be different if the *defendant had become of age, and written the letter, after the bill had become due; then, perhaps, he could not be said to have promised to pay according to the tenor and effect of the bill of exchange.]

DENMAN, C. J. The letter must be presumed *prima facie* to have been written on the day on which it bore date. It lay on the defendant to show that it was not; and if so, it then amounted to a ratification of the original promise to pay, according to the tenor and effect of the bill of exchange, and might be declared on accordingly.

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred.

Rule refused.

FAWCETT v. CASH. Jan. 13.

On the 5th of March, 1832, A. entered as warehouseman into the service of B., the latter engaging to pay A. at the rate of 12*l.* 10*s.* per month for the first year, and to advance 10*l.* per annum until the salary was 180*l.*: Held, that this was a contract by B. to employ A. for one whole year.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into his employ, in the capacity of a warehouseman, from the 5th of March, 1832, at a salary agreed upon between them, to wit, at the rate of 12*l.* 10*s.* per month for the first year, and after that period at an advance of 10*l.* per annum, until the salary should be 180*l.* per annum, the defendant promised the plaintiff to retain and employ him in his, defendant's, service in the capacity aforesaid, at and for the salary aforesaid, and continue him in such employ for one whole year, to wit, from the day aforesaid.

[*905] Averment, that the plaintiff entered *into the employ of the defendant in the capacity and on the terms aforesaid, and continued in such employ until the 28th of January, 1833; and although the plaintiff, on the day and year last aforesaid, was ready and willing to continue in the employ of the defendant for the remainder of the said year, yet the defendant refused to suffer him so to continue, and discharged him therefrom without any reasonable or probable cause. The second count stated the contract to be to continue the plaintiff in such employment until the expiration of six months from and after notice given by the plaintiff or defendant to the other of them of his intention to put an end to such service, or else to pay the plaintiff a proportionate part of the said wages for six months. The third count differed from the second in stating the con-

tract to be to employ the plaintiff until and after the expiration of three months after notice; the fourth count stated it to be, to employ the plaintiff in defendant's service until the expiration of a reasonable period from and after notice to determine such service. There was also an indebitatus count for wages. Plea, general issue. At the trial before DENMAN, C. J., at the London sittings, after Michaelmas term, 1833, it appeared that on the 5th of March, 1832, the plaintiff entered into the service of the defendant, who signed the following paper:—"William Cash engages to pay Thomas Fawcett 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary is 180*l.*, from the 5th of March, 1832." The plaintiff continued in the defendant's service until the 20th of January, 1833. The plaintiff's wages had been paid monthly to the 5th of January, 1833, and this *action was brought in Hilary term, 1833, to recover 25*l.*, being the wages of 12*l.* 10*s.* per month, from the 5th of [906] January to the 5th of March, 1833. Sir *J. Campbell*, Solicitor-General, contended that there was no proof of any contract by the defendant to continue the plaintiff in his employ for a year; or until six or three months, or a reasonable time after notice, as alleged in the second, third, and fourth counts; and that the action having been commenced in Hilary term, 1833, the year had not expired, and therefore the plaintiff could not recover under the indebitatus count. Sir *J. Scarlett*, contra, contended that there was proof of a contract to continue the plaintiff in the defendant's service for one year at least; that where no time was defined in the contract, the law presumed it to be for a year. The Lord Chief Justice directed the jury to find a verdict for the plaintiff for 25*l.*, but reserved liberty to the defendant to move to enter a nonsuit.

Sir *J. Campbell*, Solicitor-General, now moved accordingly. The agreement was not evidence of the contract (stated in the first count) to employ the plaintiff for one whole year, from the 5th of March, 1832. The words in the agreement, "for the first year," refer to the rate of wages, which, if the contract continued in force for one year, was to be 12*l.* 10*s.* per month; and if for a longer period, was to be increased. If that be so, there is nothing from which it can be inferred that it was to continue in force for a year. It might continue in operation, not only for one, but for four years; for an increased rate of wages is provided if it continue during the latter period; but there is no more ground for saying that it is *an absolute agreement for one year, than for four [907] years. Then if that be so, the payment of the wages monthly being the only circumstance from which the duration of the contract can be collected, it is a contract for one month only. [PATTERSON, J. In *Beeston v. Collyer*, 4 Bing. 309, the plaintiff served the defendant as clerk for a number of years, and his salary during one year was paid quarterly, but, during the last six years, monthly; and it was held that the payment of the wages monthly, did not rebut the general presumption that the hiring was for a year.] There a yearly contract was to be inferred from the continuance of the service, and the payment of the salary during the one year quarterly. Assuming this to be a contract for a year, it was determinable by a month's notice, and ought to have been declared on accordingly. Then as to the other three counts, there was no proof of any contract to employ the plaintiff until the expiration of six or three months, or of a reasonable period after notice by either party to determine the contract.

DENMAN, C. J. It seems to me that the contract alleged in the first count of the declaration was proved. The general rule is, that if a master hire a servant, without mentioning the time, that is a general hiring, and in point of law a hiring for a year. Then, assuming that the agreement in this case does not specify the period for which the service or employment was to continue, it must be taken to be a contract for a year's service; and if a general hiring is, in point of law, a contract for one whole year, the stipulation here that *there is to be an advance of 10*l.* per annum until the salary is 180*l.*, does not [908] make it less a contract for a year.

LITLEDALE, J. The agreement proved is, to pay the warehouseman, 12*l.*

10s. per month for the first year, and an advance of 10l. per annum until the salary is 180l. The parties, therefore, contemplated, first, that the contract was to continue for one year at all events; and, secondly, that it might continue for four: in which case there was to be a yearly advance of salary. In the case of domestic servants, the rule is well established, that the contract may be determined by a month's notice or a month's wages; but that depends upon custom. Here no custom having been proved, the contract must be taken to have been a hiring for a year.

TAUNTON, J. I am of the same opinion. The substance of the first count is, that the defendant undertook to retain and employ the plaintiff in his service as a warehouseman for one whole year; the agreement proved was, W. Cash engages to pay T. Fawcett 12l. 10s. per month for the first year, and an advance of 10l. per annum until the salary is 180l. That imports that the contract was to continue in force for one whole year, and that it might last longer than one year, viz. for four years. It is unnecessary to consider what the effect would have been if the dismissal had taken place after the first year; because it is perfectly clear that the parties intended that the plaintiff should be bound to serve, and the defendant bound to retain and employ the plaintiff for the whole [2909] year. If this had been a case of settlement, *the contract would have been good proof of a yearly hiring.

PATTISON, J. This is not the case of a domestic servant, where the contract might have been put an end to by paying a month's wages or giving a month's warning. There was clearly a contract for one year at least. The words "for one year" do or do not refer to the period of service. If they do, it is in terms a contract for a year; if they do not, then no time is mentioned, and it is a general hiring for a year.

Rule refused.

CROOK v. JADIS. Jan. 13.

In an action by the endorsee against the drawer of an accommodation bill, which had been fraudulently disposed of by the first endorsee, and afterwards discounted by the plaintiff, it is no defence that the plaintiff took the bill under circumstances which ought to have excited the suspicion of prudent men that it had not been fairly obtained: the defendant must show that the plaintiff was guilty of gross negligence.

ASSUMPSIT by the plaintiff, as endorsee, against the defendant, as the drawer of a bill of exchange, dated the 23d of May, 1831, for 1000l., accepted by Lord Foley, and payable eleven months after date. Plea, general issue. At the trial before DENMAN, C. J., at the Middlesex sittings after last Michaelmas term, the defence was, that the bill, as between the drawer and acceptor, was a mere accommodation bill, and had been issued by the defendant to a bill broker to get discounted; and that the latter had fraudulently, and without any authority, sold it to one Howard, for whom the plaintiff discounted it. On the evidence it was contended, that the plaintiff had not used due caution, and that he had taken the bill under circumstances which ought to have excited the suspicion of a prudent man; *that the bill had not been fairly obtained, and [2910] therefore he was not entitled to recover. Lord DENMAN, C. J., told the jury to find for the plaintiff, if they thought he had not been guilty of gross negligence in taking the bill under the circumstances given in evidence. A verdict having been found for the plaintiff,

Sir James Scarlett now moved for a new trial, on the ground that the true question which ought to have been submitted to the jury was, whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent man; Down v. Halling, 4 B. & C. 380.

DENMAN, C. J. I used the expression gross negligence advisedly, because I thought nothing less ought to have prevented the plaintiff from recovering on the bill.

LITLEDALE, J. There must be gross negligence, at least, in a case like the present, to deprive a party of his right to recover on a bill of exchange.

TAUNTON, J. I think the case was properly submitted to the jury. I cannot estimate the degree of care which a prudent man should take. The question put by the Lord Chief Justice, whether the plaintiff was guilty of gross negligence, was more definite and appropriate.

PATTESON, J. I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man.
Rule refused.

*GIBBS and CLAYTON, Executors of ELIZABETH EDWARDS, [*911]
v. SOUTHAM. Jan. 17.

An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made.

DEBT on bond for 1512*l.* given to the testatrix. The condition was as follows:—"That if the above bounden Thomas Southam, his heirs, executors, or administrators, shall and do well and truly pay unto Elizabeth Edwards, her executors, administrators, or assigns, the full sum of 756*l.*, with interest after the rate of 5*l.* for each 100*l.* for a year, without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force." The defendant, in his fourth plea, pleaded that Elizabeth Edwards in her lifetime did not, nor have, nor hath the plaintiffs or either of them, as executors, since her death, after the making of the said writing obligatory, and before the exhibiting the bill of the plaintiffs, &c., demanded payment of the said sum of 756*l.*, with interest, &c. General demurrer and joinder.

G. T. White was to have argued in support of the demurrer (Jan. 17th), but the Court called on

Humfrey for the defendants. The money was not payable before express demand. There could have been no doubt on this point if the money had, in the body of the condition, been expressed to be payable on demand: *Carter v. Ring*, 3 Camp. 459; *Sampson v. Routh*, 2 B. & C. 682. Here the *stipulation for the payment of interest shows that the bond was not to be [*912] forfeited till default upon an actual demand. The plaintiff seeks to recover a penalty, which is a collateral sum; and the cases with regard to payment of money on request, where there is an antecedent duty, do not apply. This was the argument of counsel (*Abbott*) in *Carter v. Ring*, 3 Camp. 459. *Birks v. Trippet*, 1 Saund. 32, shows that where an undertaking is to pay a collateral sum on request, an actual request is necessary before action brought. Here the payment of the penalty is collateral to the payment of the money secured by the condition, just as where the condition is for the performance of any other kind of act. [LITLEDALE, J. It is said in Co. Lit. 208, a, that, "in case of a condition of a bond, there is a diversity between a condition of an obligation, which concerns the doing of a transitory act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to be performed presently, that is, in convenient time; and when, by the condition of the obligation, the act that is to be done to the obligee is of its own nature local, for there the obligor (no time being limited) hath time during his life to perform it, as to make a feoffment, &c., if the obligee doth not hasten the same by request."'] The convenient time cannot be fixed by the Court, and should, therefore, be determined by the demand.

DENMAN, C. J. A bond given to secure the payment of a sum of money generally gives a cause of action *which is not collateral. The obligation to pay arises upon the execution of the bond. I never heard that [*913] want of a demand was an answer to an action like this.

LITLEDALE, J. The plea is no answer. In the case of a single bill the action is a demand. A different rule prevails where there is a bond with a

penalty to secure the performance of a collateral act: there the question is, whether the defendant has shown the performance of the condition. In *Carter v. Ring*, 3 Camp. 459, the money by the terms of the condition was payable upon demand, and issue was joined on the fact of the demand. The passage quoted from Lord COKE shows that here the money was payable immediately, that is, in convenient time. It is not necessary at present to determine how the convenient time is to be ascertained.

TAUNTON, J., concurred.

PATTESON, J. I am of the same opinion. The condition here says nothing as to a demand. Judgment for plaintiffs.

[*914] *BESWICK v. JAMES SWINDELLS. Jan. 17.

Debt on bond. The condition, after reciting that the obligor was about to marry with A., a widow, and thereby to become possessed of a stock in trade; and it was agreed that he should execute a bond to pay to the children of A., by her late husband, 300*l.* within twelve months after her death, in the event thereafter specified, was, that "if the obligor should, within twelve months after the decease of A., pay to her children 300*l.*, if, upon an account taken, the stock in trade and effects in the business (if then carried on by the obligor), should amount to 400*l.*; but in case, upon such account to be taken, the stock in trade should amount to less than 400*l.*; then, if the obligor should pay to the children of A. 120*l.*, the bond should be void."

Plea, that long before the death of A., the obligor retired from and ceased to carry on the trade, and that at the death of A. he had not any stock in trade, and that no account of the said stock in trade in the condition mentioned, was or could be taken at the time of the death of A., or from thence hitherto: Held, on demurrer, that the true construction of the condition of the bond was, that the obligor had an option to continue or discontinue the trade during the life of A.; and that he, having discontinued it, the event on which the money was to come to the children of A. had never happened; and that the plea, therefore, was good.

DEBT on bond, dated 7th of April, 1813, from the defendant and John Swindells (since deceased), in the sum of 400*l.* The condition set out on oyer recited, that a marriage was intended to be shortly had between James Swindells and Elizabeth Etchells, of Stockport, linen draper, by which event James Swindells would become possessed of a considerable stock in trade, goods, chattels, and effects, then her property, and in her possession; and it was agreed upon the treaty for the said marriage, and in consideration of the emolument which James S. would acquire by such marriage, that James S. should execute a sufficient bond to the plaintiff, to pay to the children of E. Etchells, by her late husband, Edward Etchells, the sum of 300*l.* within twelve months next after the decease of E. Etchells, in the event thereafter specified; the condition was, "That if the above-bounden James Swindells, his heirs, executors, &c., do and shall, within twelve months next after the decease of the said E. E., his intended wife, pay or cause to be paid unto the child or children of the said

[*915] E. E. by the said Edward Etchells, deceased, *which shall be then living, or the issue of such of them as shall be then deceased leaving lawful issue (such issue taking only the part or share his, her, or their deceased parents or parent would have been entitled unto if living), the sum of 300*l.* unto and equally between them in the proportions aforesaid if more than one, and if but one child, then the whole to such surviving child, if upon an account of the stock in trade and effects in the linen-drapery, haberdashery, or mercery trade or business, if then carried on by the said James Swindells, shall amount to the sum of 400*l.*; but in case, upon such account to be taken as aforesaid, the said stock in trade and effects shall amount to less than that sum, then if the said James Swindells, his heirs, executors, &c., do and shall pay or cause to be paid unto the child or children of the said Elizabeth E. by the said Edward E., deceased, or the survivor of them, or the issue, &c., in manner before limited, the sum of 120*l.*, within the space of twelve months next after the decease of the said

Elizabeth E., then the before written obligation shall be void and of none effect, but the same shall otherwise be and remain in full force and virtue."

Plea, that after the solemnization of the marriage, and long before the commencement of this suit, to wit, &c., the said Elizabeth his wife died; and that long before the death of his said wife, to wit, on, &c., James Swindells retired from and ceased, and from thence hitherto has ceased to carry on the said trades and businesses, or any of them, or any other trade or business whatever; and that at the time of the death of Elizabeth he had not, nor has he at any time since hitherto had, nor had he at the time of the commencement of this suit, or since, nor has he now, any stock in *trade or effects in the linen-draperly, [*916] haberdashery, and mercery trades and businesses, or in any of them, or in any other trade or business whatever, and that no account of the said stock in trade and effects in the said condition mentioned was or could be taken at the time of the death of Elizabeth, or at any other time from thence hitherto.

Replication, that, at the expiration of twelve months from and after the decease of Elizabeth, to wit, on, &c., there were and still are living two children of Elizabeth by Edward Etchells, and lawful issue of another child of Elizabeth by E. E., deceased in E. E.'s lifetime, to wit, &c.

Special demurrer, assigning for cause, that the defendant by his plea had pleaded matter which was a complete answer to the declaration, and a complete defence to this action, independent of the fact of E. E. having any children by Edward Etchells, yet that the plaintiff had not by his replication answered, traversed, or denied, the matter so pleaded, or any part thereof. Secondly, that it appeared by the said condition set out in the plea, that the said writing obligatory was subject to a condition, breaches whereof ought to have been assigned or suggested by the replication, according to the statute; and yet no breach was so suggested or assigned; and also that if issue were joined on the replication, such issue would be immaterial. Joinder.

Wightman for the defendant. The replication is undoubtedly bad. The question will be, whether the plea be good. The condition of the bond makes the payment of either of the sums of 300*l.* or 120*l.* to the children of E. E. depend on certain contingencies: first, her death; secondly, the carrying on of the business *at that time; and, thirdly, the taking an account of [*917] the stock in trade. The plea alleges, that two of these three contingencies never happened; and, consequently, shows that the money never became payable to the children. The words, "if then carried on," override the whole condition, and make the carrying on of the trade a condition precedent to the payment of either sum of money. [TAUNTON, J. Is not the sum of 120*l.* payable at all events?] That sum is to become payable in case, "on such an account to be taken, the stock in trade be less than 400*l.*" The word such incorporates, by reference, the preceding qualification, that the business be then carried on. The plaintiff could not assign a breach of the condition without averring that the business was carried on by James Swindells at the death of the wife. Assuming, even, that the words of the condition are in this respect ambiguous, still, being introduced for the benefit of the obligee, they must be construed favorably for the obligor and against the obligee: *Sheppard's Touchstone*, c. 21, p. 375. In *Brett v. Pildredge*, cited by WYNDHAM, J., in 1 Siderfin, 102, "a father, upon the marriage of his daughter, made a proviso, that if his daughter should die within two years, then her husband should repay 500*l.* of her portion: the daughter had issue, and afterwards she and her issue died within two years; and it was adjudged that the husband should not repay the 500*l.*; for, by the having of issue, the condition was fulfilled." Construing the words of the condition here favorably for the obligor, there can be no doubt that the carrying on of the trade at the death of the wife was a condition precedent to any money becoming payable to her children; and then the plea is *good, because it shows that, by the terms of the condition itself, the [*918] money never became payable.

Follett, contra. The defendant has not got rid of the obligatory part of the bond by pleading that he had ceased, before the death of the wife, to carry on the business; that he had then no stock in trade of which an account could be taken. In order to take advantage of the condition of the bond, he ought by his plea to have shown performance, or some valid excuse for non-performance. The plea does not show that the bond had become void by performance of the condition; for the condition makes the bond void, not if J. S. shall cease to carry on the business, but if the sums of money therein mentioned be paid to the children of the wife within twelve months after her decease; otherwise the bond is to remain in full force and virtue. It not being averred, therefore, that those sums were paid, the bond remained in force. The effect of the plea is, not that the defendant performed the condition, but that, by the happening of an event, such performance had become impossible. But it ought to have further shown that it had become impossible by the act of God, the act of the law, or of the obligee: Com. Dig. tit. Condition, L. 6, L. 12, L. 13; Sheppard's Touchstone, p. 372. It is there said that, "If A. be bound to B. that J. S. shall marry Jane G. by such a day, and before the day B. himself marry with Jane G., hereby the obligation is discharged, and B. shall never take advantage of it." Here the ceasing to carry on the trade must be taken to be *prima facie* the act of the obligor. It is, therefore, no excuse for his non-performance of the condition: on the contrary, the very act was a breach of the con-

[*919] dition; Com. Dig. Condition, M. 2, M. 4. [PATTESON, J. The words "if then carried on by James Swindells," show that the parties contemplated that it was possible that James Swindells might or might not carry on the business at the death of his wife.] Still the plea must show either performance of the condition, or some valid excuse for its non-performance. To make the bond void by reason of the business not having been carried on at the death of the wife, the condition must be read as if it declared that the bond should be void "if the business shall cease to be carried on at the death of the said Elizabeth." Besides, the words "if not then carried on," are not in the second part of the sentence which provides for the payment of the 120*l*. [LITTLEDALE, J. Those words are incorporated therein by reference, because the second part of the sentence begins with the words "upon such account."] Those words import that the obligor is to pay a certain sum in the event there specified, but not that he is to pay nothing. The true meaning of the parties was, that if the stock in trade was worth 400*l*., the obligor should pay 300*l*., but if not worth that sum, then 120*l*.; whether the business was or was not carried on at the death of the wife. [LITTLEDALE, J. The question is, whether performance of the condition has not been rendered impossible by an event contemplated by the convention of the parties; whether it was not their intention that neither of the sums should be payable to the children unless the business was carried on, at the death of the wife, by James Swindells. DENMAN, C. J. The parties may have meant, that James Swindells was to exercise his discretion whether he would carry on the business or not. It never could have been intended *that he should be obliged to carry it on if it were a losing

[*920] concern.] James Swindells having acquired by marriage the property of his wife, it is absurd to suppose that the parties meant to leave it at his option to do or not to do the act on which the payment of the money is made to depend. But assuming that to be the true construction of the condition, then, as performance before the death of the wife became impossible by the act of the obligor, the condition thereby became null and void, and the bond remained in force; for where the thing to be done by the condition is such as in its nature is impossible to be done at the time of the making of the obligation, there the obligation is good, and the condition only is void: Sheppard's Touchstone, c. 21, p. 372. Here the thing to be done, though possible at the time of making the obligation, was rendered impossible before the time for performance arrived, by the act of the obligor. Suppose a bond were conditioned to pay A. 600*l*., if

the obligor should be at Rome within six months, and he was not there; the non-performance of the condition would be the act of the party himself. The obligatory part of the bond would continue in force. [PATERSON, J. That would be an obligation to pay on a condition that failed.] It may have been the very object of the bond to compel James Swindells to carry on the business. The obligee could derive no benefit from the obligor's having ceased to carry it on; and he ought to have continued to do so, if he meant to avail himself of the condition.

Wightman, in reply. The true construction of the bond is shown, not only by the words of the condition itself, but by the recited agreement of the parties on *which it is founded. That agreement was to execute a bond to pay [*921] to the children, 300*l.* within twelve months after the decease of the wife in the event thereafter specified. Now, the event after specified (independent of the death of the wife), is the taking of an account of the stock in trade in the business, if then carried on by James Swindells. The obligor, therefore, was not bound to carry on the business at all events. If he had fraudulently ceased to carry it on, that, if replied, might have been an answer to the plea. It is not shown that the discontinuance of the business was the act of the obligor. The profits of the trade may have ceased, and the stock in trade may have been entirely consumed without his default. Then, assuming that, according to the true construction of the bond, the obligor might discontinue the trade; or that it ceased without his default, the plea is good; for the fact stated in it is a valid excuse for non-performance of the condition, because it appears by the former part of the record, that the parties had expressly agreed, that, on the happening of the event mentioned in the plea, the condition should not be performed. Secondly, the plea is good, also, because it shows that there never was any breach of the condition or forfeiture of the bond; for it alleges that, before the death of the wife, an event happened which rendered any performance or breach impossible: and the case is not one of those (which are extreme ones) where the obligee becomes entitled to consider the obligation as single: for the words are neither insensible; nor was the condition impossible at the time of making, or against law. Com. Dig. tit. Obligation, E.¹

*DENMAN, C. J. It is impossible to say that this is a clear case on [*922] either side. It struck me, at first, that, by the condition of the bond, the thing to be done by the obligor was made to depend on a contingency which had not happened, and therefore he was not bound to do it. I thought that, as James Swindells had ceased to carry on the business before the death of his wife, and there was then no stock in trade of which an account could be taken, the money had not become payable to the children of the wife; and I now think that first impression was correct. The true construction of the condition appears to me to be, that James Swindells was to have an option to carry on the business or not; and if that be so, then the fact stated in the plea, that he had ceased to do so before the death of his wife, and that there was then no stock in trade of which an account could be taken, was a sufficient excuse for non-performance, because the parties agreed in effect that it should be so; as appears by the condition of the bond set out on oyer. Besides, I am not prepared to say that it must be taken on these pleadings, that the cessation of the trade was the act of the obligor. I think we shall violate no rule of law, by holding that the defendant is entitled to judgment on the ground either that non-performance of the condition was excusable, because, by the contract between the parties, it was not to be performed in the event alleged in the plea, or on the ground that the trade may have come to a determination without any default of the obligor.

*LITTLEDALE, J. I am of the same opinion. It is said that there must be performance of the condition, or a lawful excuse for non-perform- [*923]

¹ This case was argued by *Wightman*, on Friday, the 17th of January, in the absence of *Follett*; when the Court gave judgment nisi for defendant. Afterwards, on the same day, *Follett* was heard for the plaintiff; and *Wightman* was heard in reply on the 24th of January, when the Court gave final judgment.

ance; that there can only be such lawful excuse where performance has become impossible by the act of God, the act of law, or of the obligee; and that here it became impossible by the act of the obligor, because he might have continued to carry on the business. But it seems to me that, according to the true construction of this condition, the obligor was not bound at all events, to carry on the business; and if not, the plea in bar, that it was not carried on at the death of Mrs. Etchells, is a good answer to the action.

TAUNTON, J. The language of the condition is very much involved. The payment of the money is made to depend on several contingencies; if, at the death of the wife, the business is carried on by James Swindells, and if, upon an account taken, the stock shall be of such or such a value. As no account was taken, or could be, at the death of the wife, and the business had then ceased, I think the plea is good; and I am not prepared to say, that the circumstance of its not being possible to take an account of the stock at the wife's death, necessarily implies that there was misconduct in the defendant, or that he, by his improper act, had rendered the taking of such an account impossible.

PATTESON, J. The condition of this bond must be construed like other agreements, looking at what is contained within the four corners of the instrument. It is said that it was absurd to leave it at the option of the *party [*924] bound to do or not to do the act on which the money was to become payable; and it is not denied, that the parties might so agree, and the only question is, whether they have done so here or not. The condition is, that if J. S. shall, within the space of twelve months after the death of the wife, pay to her children then living, 300*l.*, if, upon an account taken, the stock in trade in the business (if then carried on by J. S.) shall amount to 400*l.*; but in case, upon such account to be taken, it should amount to less, then 120*l.* Now, on the face of the condition itself, I think it was meant to be in the option of J. S. to put an end to the trade if he thought proper so to do. Suppose the condition had been to pay the children six months after the obligor's marriage, if it took place; the obligor would not be bound to marry. Here the condition is to pay the money to the children of the wife, provided at her death, J. Swindells shall carry on the business. It is expressly provided, that 300*l.* shall be paid if the stock in trade amount to 400*l.*, and if it amounts to less than that sum, then 120*l.* only. It is clear, therefore, that the parties contemplated that the obligor might diminish the value of the stock; and if so, why might they not agree that he should destroy it altogether? I think the plea is good, and that the defendant is entitled to judgment.

Judgment for the defendant.

[*925] *THOMPSON and Another v. JAMES PERCIVAL and CHARLES PERCIVAL.

A. and B. dissolved partnership, and agreed that the business should be carried on by B. alone; and that he should receive and pay all debts. Sufficient partnership funds were left in his possession. C., a creditor of the firm, afterwards applied for payment of his debt to B., who informed him that A. knew nothing of his debt, and that he, C., must look to B. alone. C. then drew a bill on B., which he accepted, but which was afterwards dishonored: Held, in an action brought by C. against A. and B. (the latter having become bankrupt), that it was a question for the jury, whether it had been agreed between C., the creditor, and B., that the former should accept B. as his sole debtor, and take his acceptance in satisfaction of the debt due from both: Held, further, that such an agreement and receipt of the bill would be a good defence to A.'s suit, by way of accord and satisfaction; and that the fact of B. having had the partnership effects left in his hands, and having agreed with A. to pay all the partnership debts, was evidence of an authority from A. to make such agreement on his behalf.

After a rule for a new trial had been granted on the above grounds, A. also became bankrupt, but C. did not prove his debt under the commission. A.'s attorney having carried down the record by proviso, C. applied for a *stet* processus, alleging that he could derive no benefit from proceeding. The Court refused to interfere.

THIS was an action for goods sold and delivered. The defendant, Charles, pleaded the general issue. The defendant, James, pleaded his bankruptcy, see 2 B. & Ad. 968; and, as to him, a *nolle prosequi* was entered. On the trial before DENMAN, C. J., at Guildhall, after Hilary term, 1833, the following facts appeared:—The defendants were in partnership until the 22d of December, 1829, when an advertisement was inserted in the London Gazette, announcing the dissolution of the partnership, and that the business would be carried on by the defendant James, who would receive and pay all debts. The chief part of the goods in question was delivered before the dissolution: the other part was ordered by James Percival after the 22d of December. It did not appear that, when these goods were delivered, the plaintiffs had had notice of the dissolution. On the dissolution, effects were left in the hands of James sufficient to pay the debts due from the partnership. In the beginning of 1830, the plaintiffs' collector applied for the balance *to James Percival, who told him that Charles knew nothing of these transactions, and that the plaintiffs must look to him (James) alone. The plaintiffs afterwards drew a bill on James, at three months, for the mixed amount, which was accepted by James, and dishonored; and the plaintiffs gave him time to pay, but eventually brought this action against both defendants. Upon these facts, a verdict was taken for the full amount claimed, with leave to move for a nonsuit, if the Court should be of opinion that the plaintiffs had discharged Charles Percival from the debt. A rule nisi having been obtained for that purpose,

Sir J. Scarlett and Chilton in last Michaelmas Term showed cause.¹ Charles the retiring partner was not discharged from his liability by reason of the plaintiffs' having taken James's acceptance, which was afterwards dishonored. Charles was originally liable as principal, and must continue liable, unless the debt appears to have been satisfied, and it lies upon him to show that he is discharged from that liability. There was no evidence of any promise by the plaintiffs to release Charles. They ought to have done some act to discharge him. Their drawing the bill upon the remaining partner was a mere compliance with the terms of the notice that he would pay all debts of the firm. *David v. Ellice*, 5 B. & C. 196, is an authority to show that that act was not sufficient to discharge the outgoing partner. There, one of several partners retired, and notice was given to a creditor of the firm, that the remaining partners had assumed the funds, and would discharge the partnership debts: the *creditor assented to this arrangement, and the debts due from the old firm were transferred to the account of the new; the creditor afterwards drew on the new firm for a part of his balance, which was paid; but that firm subsequently becoming insolvent, he brought an action for the remainder against all the members of the old firm; and it was held that the retiring partner was liable for the debts incurred before the dissolution of the partnership. [PARKE, J. This case differs from that, because here when the bill was drawn, the plaintiffs were told they were to look to James Percival alone.] There was no agreement by the plaintiffs to discharge Charles the retired partner. [PARKE, J. There was strong evidence of such an agreement.] There was no consideration for a promise by the plaintiffs to discharge Charles. Their taking the acceptance of the one partner did not change the nature of the original debt, which was the debt of the two. The mere liability of the one partner on the bill is no consideration for the plaintiffs' discharging the other. In *David v. Ellice*, 5 B. & C. 196, there was much stronger evidence of an agreement by the creditor to discharge the retiring partner; for the balance due to him was transferred to his credit by the new firm, and he was informed of it, and assented to it, and afterwards drew on the new firm for a part of the balance, and they accepted and paid his bill. [PARKE, J. The decision in that case was not satisfactory to the profession. Suppose the plaintiffs and the two partners had met together, and the outgoing partner had then agreed to trans-

¹ Before DENMAN, C. J., PARKE, TAUNTON, and PATTESON, Js.

fer all the effects to the continuing partner, and the creditor had agreed to look [*928] to him only, and had then *drawn the bill upon him.] The transfer of the funds by the outgoing to the continuing partner would be no consideration for a promise by the creditor to release the retired partner. In *Lodge v. Dicas*, 3 B. & A. 611, on a dissolution it was agreed between the two partners, that one should take upon himself to discharge a debt due to a particular creditor, who was informed of the agreement, and expressly undertook to exonerate the other partner from all responsibility; yet, as the debt was not satisfied by the one, nor any fresh security given, the promise of the creditor was decided by this Court to be without consideration, and, therefore, not to constitute any defence to an action brought by him against both partners. In *Bedford v. Deakin*, 2 B. & A. 210, one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right of action against all the three, and retained possession of the original bills; the separate notes having proved unproductive, it was held that the creditor might still resort to his remedy against the other partners, and that the taking the separate notes, and afterwards renewing them several times, did not amount to satisfaction of the joint debt. Here, even if James be considered not as a partner, but as a mere agent (after the dissolution) of Charles, for the purpose of paying the debts of the firm, the latter is not discharged by reason of the plaintiffs' having taken the security of James: *Robinson v. Read*, 9 B. & [*929] C. 449. There a tradesman having supplied goods to a ship, *sent in his account to the owner's agent and ship's husband, and took his acceptance at three months (the usual credit) for the amount, deducting discount; and when the bill became due, consented to a renewal of it, adding interest; he afterwards in like manner took a third acceptance which was dishonored, and the agent then failed, the balance in his hands in favor of the ship-owner having, during all this time, exceeded the amount of the bill, which was, however, unknown to the principal, he never having inspected the agent's accounts. It was held that the tradesman might sue the ship-owner for the amount of his claim, and that it was not discharged by the plaintiff's having taken the acceptance of the agent, and suffered it to be renewed.

Sir *J. Campbell*, Solicitor-General, and *Hoggins*, contra. *Lodge v. Dicas*, 3 B. & A. 611, was decided on the ground that, as the debt was not satisfied by the continuing partner, nor any security given, the promise of the creditor to exonerate the retiring partner was without consideration. Here there is a consideration for such promise. A consideration may arise either from an advantage accruing to the party to whom the promise is made, or a prejudice to the promisee. Here, the plaintiffs, who, before they took the bill, must have been aware of the agreement between the two parties, that James should carry on the business, and that the effects should remain with him, and that he should pay all debts, did not press James to pay their debt, but gave him credit and took his acceptance, and when the bill was dishonored, they again gave him a fresh [*930] credit. If they had pressed *James in the first instance, they might have obtained payment; and if he had not paid, and they had had recourse to Charles, he might have withdrawn his funds. The latter must have been prejudiced by their not enforcing payment. In *Bedford v. Deakin*, 2 B. & A. 210, there was no evidence of any agreement by the creditor to discharge the retiring partner; but, on the contrary, there was an express reservation of his rights against all three. In *Evans v. Drummond*, 4 Esp. N. P. C. 89, a partnership debt was paid by a bill of exchange, which, when due and after notice of dissolution, was renewed by the creditor's taking the separate bill of the remaining partner. There Lord KENYON said,—“Is it to be endured, that when partners have given their acceptance, and where, perhaps, one of two partners has made provision for the bill, that the holder shall take the sole bill

of the other partner, and yet hold both liable? I am of opinion, that when the holder chooses to do so, he discharges the other partner. Here the plaintiffs have taken the bill of C. (the continuing partner), after he admits that he was informed that D. (the retired partner) had nothing to do with the concern. It is a reliance on the sole security of C., and discharges the defendant." In *Reed v. White*, 5 Esp. N. P. C. 122, the action was brought, for cordage sold, against the defendants as owners of a ship. The plaintiff took White's bill, who was the managing owner, or ship's husband, for the amount, which was dishonored and renewed, and again dishonored. For the other defendants it was insisted, that the plaintiff had discharged the other owners, who, in ignorance of this mode of dealing between the plaintiff *and White, had suffered him to [*931] receive large sums of the East India Company for freight, which they would otherwise have detained. Lord ELLENBOROUGH there said,—"If the plaintiff, dealing with White separately, has adopted him, he has discharged the others, and must have a verdict against him."—"The question is, whether it" (the bill) "was intended as a settlement with him alone, and adopting him as the single debtor." Then, assuming that James may be considered the agent of Charles for the purpose of paying the partnership debts, here the plaintiffs have voluntarily given an enlarged credit to the agent by taking his acceptance, and Charles is thereby placed in a worse situation than he otherwise would have been, and therefore discharged: *Strong v. Hart*, 6 B. & C. 160; *Smith v. Ferrand*, 7 B. & C. 19. A receipt given by a creditor to an agent will not operate as a discharge to the principal unless the latter appear to have dealt differently with his agent in consequence of the receipt, as by passing the sum in his accounts, and giving him further credit on the faith of that voucher. *Wyatt v. The Marquis of Hertford*, 3 East, 467, and *Robinson v. Read*, 9 B. & C. 449, proceeded expressly on the ground that the creditor had, by taking the bill of the agent of the debtor, obtained no advantage, and the principal debtor had sustained no prejudice. Here Charles Percival was prejudiced by the plaintiff taking the acceptance of James instead of insisting on payment, because his funds were thereby suffered longer to remain in the hands of James, and were ultimately lost.

Cur. adv. vult.

*DENMAN, C. J., in this term delivered the judgment of the Court. After stating the facts of the case, and observing that as it did not appear that the plaintiffs had any notice of the dissolution at the time either of the order or delivery of the goods, there was no difference between that part of the debt contracted before and that contracted after the dissolution, his Lordship proceeded as follows:—

It appears to us, that the facts proved raised a question for the jury, whether it was agreed between the plaintiffs and James, that the former should accept the latter as their sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both. If it was so agreed, we think, that the agreement and receipt of the bill would be a good answer on the part of Charles Percival to this demand, by way of accord and satisfaction. It is not necessary to determine whether the assent of Charles to this agreement was necessary, in order to give it such an operation: because if it was, there is evidence of a delegation by Charles to James to make such an agreement, for James had the partnership effects left in his hands, and was to pay all the partnership debts. It cannot be doubted, but that if a chattel of any kind had been, by the agreement of the plaintiffs, and both the defendants, given and accepted in satisfaction of the debt, it would have been a good discharge. It is not required that the chattel should be of equal value, for the party receiving it is always taken to be the best judge of that in matters of uncertain value, *Andrew v. Boughey*, *Dyer*, 75 a. Nor can it be questioned but that the bill of exchange of third persons, given and accepted in satisfaction of the *debt, would be a good discharge. But it is contended that the acceptance of a bill of [*933] exchange by one of two debtors cannot be a good satisfaction, because the cre-

ditor gets nothing which he had not before. The written security, however, which was negotiable and transferable, is of itself something different from that which he had before; and many cases may be conceived in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case, cannot be made the subject of inquiry.

The cases of *Lodge v. Dicus*, 3 B. & A. 611, and *David v. Ellice*, 5 B. & C. 196, are said to be against this view of the law. In the former, however, no new negotiable security was given; nor does the difference between the joint liability of two, and the separate liability of one, appear to have been brought under the consideration of the Court. In the latter, no bill of exchange was given, and that decision, on consideration, is not altogether satisfactory to us. We cannot but think that there was abundant evidence in that case to go to a jury (and upon which the Court might have decided), of the payment of the old debt by *Inglis, Ellice and Co.*, to the plaintiff, and a new loan to the new firm; which might have been as well effected by a transfer of account by mutual consent as by actual payment of money.

The cases of *Evans v. Drummond*, 4 Esp., N. P. C. 92, and *Reed v. White*, 5 Esp., N. P. C. 122, are authorities the other way. In the former, *Lord [934] KENYON points out forcibly the altered relation of the parties by the substitution of the bill of the remaining partner for that of the firm; and it is difficult to see on what ground he decided the case, unless upon this, viz., that such substitution under an agreement operated as a satisfaction, as far as regarded the retiring partner; and in *Reed v. White*, Lord ELLENBOROUGH acted upon that authority, and so directed a special jury of merchants, who entirely agreed with him. These cases were afterwards brought to the notice of Lord ELLENBOROUGH, who expressed his approbation of them, in *Bedford v. Deakin*, 2 Stark. N. P. C. 178. That case, however (which was also before the court in 2 B. & A. 210), was distinguished from them, because the creditor there expressly reserved the liability of the original debtors.

If, therefore, the plaintiffs in this case did expressly agree to take, and did take the separate bill of exchange of James in satisfaction of the joint debt, we are of opinion that his so doing amounted to a discharge of Charles. No point was expressly made at the trial as to the proof of such agreement, nor was it required that the question should be put specifically to the jury. We think that this ought to be done, and consequently the rule must be made absolute for a new trial.

Rule absolute.

In February, 1834, Charles Percival became bankrupt. On the 3d of May his attorney gave notice that he should carry down the cause by proviso; and it was so carried down on the 3d of June, without the concurrence of Charles Percival's assignees. The plaintiffs had not proved under the commission.

*[935] *Chilton*, in Trinity term, 1834, moved, on behalf of the plaintiffs, for a stet processus, on the ground that they would otherwise be compelled to proceed in this action, without any possibility of benefit if the cause went on, inasmuch as the certificate would be a bar to debt and costs, if they obtained a verdict; and he contended that, under 6 G. 4, c. 16, s. 59,¹ the Court had an equitable power to grant this rule.

¹ It enacts, "that no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit;" and afterwards, that "the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved, provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him."

Hoggins showed cause in the first instance. The application is novel. The statute, 6 G. 4, c. 16, s. 59, gives the plaintiffs the choice between the two courses of continuing the action, or proving under the commission. As they have not proved, they must be held to have elected to proceed in the action. Again, Charles Percival's attorney has a right to take the record down by proviso, in order to enforce his lien for his costs in the event of the plaintiffs failing to obtain a verdict. The bankrupt had the right himself of carrying the cause down by proviso; for if this application were to succeed, his own attorney's costs would be proved against the estate.

LORD DENMAN, C. J. It does not appear that any authority can be produced, sanctioning our interference *in this case; and in default of a direct authority, we see no ground for our granting the application. The plaintiffs were the best judges as to the propriety of commencing the action in the first instance; and they have not elected to take the course pointed out by the fifty-ninth section of the bankrupt act, of proving under the commission and abandoning the action. [936]

LITTLEDALE, J., TAUNTON, J., and WILLIAMS, J., concurred.

Rule discharged.

SADLER v. NIXON. Jan. 17.

One of several partners in trade, who pays money on account of his co-partners, cannot maintain an action against them for contribution on the ground that he made such payment not voluntarily, but by compulsion of law.

ASSUMPSIT for money paid by the plaintiff to the defendant's use, &c. At the trial before DENMAN, C. J., at the London sittings after last Michaelmas term, the following appeared to be the facts of the case: The plaintiff, the defendant, and another person, being co-partners in trade, employed a builder to repair a building which was their joint property, and in which they carried on their trade. The builder brought an action against the three co-partners for the repairs, and obtained judgment, but took the plaintiff only in execution, who, in order to regain his liberty, paid the whole debt. The present action was brought to recover one-third of the money so paid. It was contended that the plaintiff, one of the three joint contractors, having been compelled to pay money which his co-contractors were jointly liable to pay, was entitled to *maintain [*937] this action. On the other hand, it was said that the plaintiff and the defendants in the first action being not merely co-contractors, but co-partners in trade, one of them could not maintain an action against the other to recover money paid on account of the firm, but that his remedy was by bill in equity; the reason why an action at law in such a case was not maintainable, being, that it would be useless for one partner to recover what, upon taking a general account among all the partners, he might be liable to refund, and this objection applying as well to a compulsory as to a voluntary payment. The Lord Chief Justice was of that opinion, and nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

F. Pollock on a former day in this term moved accordingly. It may be conceded that where one partner voluntarily makes a payment on account of the others, he cannot maintain an action at law against his copartners; but it is otherwise where the payment is by compulsion. In *Merryweather v. Nixan*, 8 T. R. 186, where there had been a recovery in tort against two defendants, and the whole damages were levied on one, it was held that the one could not recover a moiety against the other for his contribution; Lord KENYON there said, that he had never before heard of such an action having been brought, where the former recovery was for a tort; and "that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit." It may be said, that that dictum only goes to show that contribu-

[*938] tion can be recovered at *law where parties have become jointly liable in an insulated transaction, and not where there is a partnership ; but it can make no difference whether the parties were joint contractors in the particular transaction only, or in several others. The principle on which the plaintiff is entitled to recover is, that he has been compelled to pay out of his own funds money which the defendant was jointly liable to pay. [PATTESON, J. In *Helme v. Smith*, 7 Bing. 709, a part-owner of a ship, who, as ship's husband, had incurred the expense of outfit, sued another part-owner for his share of the expense ; it was answered that no action lay, inasmuch as the plaintiff and defendant appeared to be partners ; and TINDAL, C. J., there said, "If, indeed, the plaintiff and defendant were partners, there is an end of the question ; but part-owners of a ship are not necessarily partners."] In that case, the part-owner had paid the money voluntarily and not by compulsion.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered judgment, and said, the Court were of opinion that there was no ground for the distinction taken on the part of the plaintiff ; and, therefore, there would be no rule. Rule refused.

[*939] *The KING v. The Inhabitants of ST. CUTHBERT, WELLS.
Jan. 18.

On special case, the sessions found that J. E. by indenture in 1774, was put apprentice to P. for and in respect of W.'s estate ; and there was a covenant by P. to teach J. E. the business of husbandry. The indenture was executed by the parish officers and W. P. was a farmer and tenant to W., who was a stocking-weaver. J. E. never served P., but lived with W. long enough to gain a settlement by apprenticeship, if he could acquire one by such service. The sessions not having found that P. ever executed the indenture, or assigned the apprentice to, or assented to his service with W., it was held, that a settlement by apprenticeship was not proved.

On appeal against an order of two justices, whereby John Ivey was removed from the parish of St. Simon and St. Jude, in the city and county of the city of Norwich, to the In-parish of St. Cuthbert, in the city of Wells, in the county of Somerset : the sessions confirmed the order, subject to the opinion of this Court on the following case :

The respondents sought to establish the settlement of the pauper in the appellant parish, as derived from his father, John Ivey, who had been placed out as an apprentice by the parish officers of Ditcheat. By the indenture (bearing date the 28d of August, 1774) the churchwardens and overseers of Ditcheat, with the assent of two justices, whose names were subscribed to the indenture, put and placed John Ivey, about eight years of age, a poor child of the said parish, apprentice to Mr. Edward Powell, for and in respect of Mr. William Wilmot, his estate, with him to dwell and serve from the date of the indenture until he should accomplish his full age of twenty-four years ; there was a covenant by Powell to teach Ivey the art and business of husbandry, and the indenture appeared to be executed by one churchwarden and one overseer, and by Wilmot. Powell was a farmer, and the tenant of a farm at Ditcheat, the property of Wilmot, who was a stocking-maker residing at Wraxhall, in Ditcheat, but who afterwards lived in the appellant parish, where *John Ivey, [*940] the pauper's father, lived with him, and was employed as a stocking-weaver. John Ivey, at the time he was bound, was living with his sister, Mrs. Ward, in Ditcheat. It was not proved that he went to Powell's, and Mrs. Ward knew nothing about Powell. Under the directions of the parish officers of Ditcheat, she took her brother to Wilmot, then residing at Wraxhall, in Ditcheat. When she first took him, Wilmot said he was not quite ready for him, and she, at his request, kept her brother for a quarter of a year, Wilmot paying for his board. After that time Wilmot sent for him, and the boy went and lived with him, first at Wraxhall, in Ditcheat, and afterwards in the appellant

parish, for a sufficient length of time to give him a settlement by apprenticeship, if the settlement could be acquired by such service.

Austin in support of the order of sessions. *Holy Trinity v. Shoreditch*, 1 Str. 10; and see 8 Mod. 169, is in point. There Ferrer was bound apprentice to Truby, with intent that he should serve Green, which he did for three years in Shoreditch; and the Court were of opinion that Ferrer gained a settlement in Shoreditch, and said, that it was the same thing as if Truby had turned him over to Green. So in *All-Hallows-on-the-Wall v. St. Olave in Surrey*, 1 Str. 554, 8 Mod. 168, an apprentice was bound to A. in one parish, but by agreement served B. in another; and it was held that he gained a settlement in B.'s parish. In *Rex v. Whitechurch*, 1 B. & C. 574, this Court seemed to think that there must be an actual consent of the first master to the particular service *with the second, and a knowledge of the latter that the service was in the character of apprentice. Here the consent of Powell, the first master, to the service with Wilmot, ought to be presumed after a lapse of sixty years; and Wilmot must have known that the pauper was an apprentice; for he, Wilmot, was one of the parties named in the indenture, and Powell was his tenant. It is clear that an unwritten consent to the second service was good; *St. Olave v. All-Hallows*, 8 Mod. 168.

Biggs Andrews, and *Palmer*, contra. There was no binding to Wilmot, and it does not appear that Powell ever assigned the apprentice to, or assented to his service with Wilmot. The pauper was bound to Powell, and covenanted to serve him; and Powell covenanted to teach him the art and business of husbandry. This was a binding out of a parish apprentice, to which the consent of justices was necessary, and they signed an allowance of an indenture, whereby the pauper was bound to Powell and not to Wilmot. [DENMAN, C. J. It does not appear that any master was bound by this indenture; it is stated merely that the original was signed by the parish officers and the pauper. Powell does not appear to have signed it. [PATTESON, J. There is no statement in the case to show that Powell knew anything of the transaction.]

DENMAN, C. J. There ought to have been a positive finding by the session, of every essential fact. It is not found here that Powell ever assigned the apprentice to *Wilmot, or consented to his serving him. The order must be quashed. [*942]

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred.

Order of sessions quashed.

The KING v. The Inhabitants of BISHOP WEARMOUTH. Jan. 18.

The parish of Bishop Wearmouth has no overseers of the poor, but contains several townships separately maintaining their own poor, and having district overseers. Two of these townships are called Bishop Wearmouth and Bishop Wearmouth Pannas. Paupers, whose settlement was in Bishop Wearmouth Pannas, were, by an order of justices, directed to be removed to the parish of Bishop Wearmouth. The order was served on the overseer of Bishop Wearmouth Pannas, who refused to receive the paupers (on the ground that the township was not named in the order), unless certain expenses were waived. This being refused, the paupers were taken away. The removing parish afterwards served the churchwarden of the whole parish of Bishop Wearmouth with the order, and delivered the paupers to him. The latter took the paupers to the workhouse of Bishop Wearmouth township, where they were maintained:

Held, by DENMAN, C. J., and LITTLEDALE, J., TAUNTON, and PATTESON, Js., dubitantibus, that the inhabitants of the township of Bishop Wearmouth, although they were not bound to maintain the pauper under the order, had reasonable ground for thinking that they might be aggrieved by it, and, therefore were entitled to appeal.

ON an appeal by the township of Bishop Wearmouth against an order directed to the churchwardens and overseers of the poor of the township of Botchergates in the parish of St. Cuthbert, Carlisle, in the county of Cumberland, and to the churchwardens and overseers of the poor of the parish of Bishop Wearmouth, in

the county of Durham, and to each and every of them, for the removal of a pauper and his family from the township of Botchergate to the said parish of Bishop Wearmouth, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The order of removal was made on the 28th of March, 1829, and the execution of it duly suspended; the suspension was taken off on the 12th of September, 1829, *and a further order was then made by the magistrates on [*943] the churchwardens and overseers of the poor of the said parish of Bishop Wearmouth, to pay the sum of 5*l.* 7*s.* 6*d.*, being the expense incurred by the suspension of the said order of removal, to William Kidd or Luke Kidd, upon demand, the said Luke Kidd being the overseer of the township of Botchergate, and father of the said William Kidd.

The parish of Bishop Wearmouth consists of seven townships, each maintaining its own poor separately, and having separate and distinct overseers. Two of these townships are called Bishop Wearmouth and Bishop Wearmouth Panns respectively; and in the latter the pauper and his family were legally settled. There are no overseers of the poor of the parish of Bishop Wearmouth. When the order of removal was made, both the magistrates who signed the same, and the overseers of the removing township, knew of the division of the parish of Bishop Wearmouth into townships, each maintaining its own poor, and that the pauper's settlement was in the township of Bishop Wearmouth Panns, though, in the order of removal, it was declared and adjudged by them to be in the parish of Bishop Wearmouth. The suspended order was not served till after the suspension was taken off; namely, on the 28th of September, 1829. The pauper and his children were taken by W. Kidd from the removing township to the township of Bishop Wearmouth Panns, with directions from the overseer of Botchergate to serve the order on, and deliver the paupers to, the overseer of the township of Bishop Wearmouth Panns, and to demand from him 5*l.* 7*s.* 6*d.* W. Kidd accordingly, on the 28th of September, took the pauper to that [*944] *township, and saw the overseer there, to whom he delivered the order, and demanded from him the above sum. The overseer of Bishop Wearmouth Panns stated that he believed the settlement of the paupers was in his township, but as the order of removal was not directed to the overseers of that township, but to the churchwardens and overseers of the poor of the parish of Bishop Wearmouth, he objected to it on account of its informality. Ultimately, however, he agreed, in order to save further expense and trouble, as he had no doubt of the paupers belonging to that township, that he would waive the objections he had taken to the order, if the overseer of the removing township would consent not to call for the 5*l.* 7*s.* 6*d.* This proposal, however, not being acceded to, W. Kidd (to save expense) took the paupers to the workhouse of a neighboring and distinct parish, leaving them as boarders; and returned home, taking with him the order of removal.

The paupers remained there till the 22d of October following, when Luke Kidd, the overseer of the removing township, having paid for their board, took them with the same order to the same overseer of Bishop Wearmouth Panns, as before, and again attempted to prevail upon him to accept the paupers and pay the money. This, however, he refused to do, for the same reasons he had before assigned, acknowledging, at the same time, that the paupers belonged to his township: whereupon Luke Kidd took the order to Mr. W. Hills, one of the churchwardens of the whole parish of Bishop Wearmouth, and who resided in the township of Bishop Wearmouth, and informed him of the refusal by the overseer of Bishop Wearmouth Panns to receive the paupers. Mr. Hills *ac- [*945] companied L. Kidd to try to prevail on the overseer of Bishop Wearmouth Panns to take the paupers. They found him at his place of business, situate in a distant parish (Sunderland), but he still refusing to receive the paupers, L. Kidd, the overseer of the removing township, served Mr. Hills, the churchwarden of the whole parish of Bishop Wearmouth, with the removal

order, Hills being then in the parish of Sunderland; and the paupers were lodged by him in the workhouse of Bishop Wearmouth township, and maintained by that township till the appeal was heard. It was objected by the counsel for the respondents, that the churchwardens and overseers of the township of Bishop Wearmouth had no right of appeal, and were not entitled to be heard; but the court of quarter sessions determined that they were parties aggrieved, and entitled to appeal. The questions for the opinion of this Court were, 1st, whether the township of Bishop Wearmouth was, under the circumstances, entitled to appeal; secondly, whether the order of removal, so directed and served as aforesaid, was, notwithstanding the objection made to it at the time of such service, a good, valid, and binding order or not.

Aglionby in support of the order of sessions. The inhabitants of the township of Bishop Wearmouth had no right to appeal. The 13 & 14 Car. 2, c. 12, after authorizing two justices by their warrant to remove persons likely to become chargeable, to the parish where they are legally settled, gives, by sect. 2, the right of appeal to all persons who think themselves aggrieved by any such judgment of the two justices; and the 3 & 4 W. & M., c. 11, s. 9, gives it to any person who "shall find himself aggrieved" by any de- [*946] termination of the justices. Here, the inhabitants of the township of Bishop Wearmouth had no ground to think themselves aggrieved by the warrant or order of the justices. They are not mentioned in it. They could not have been compelled to receive the pauper. And, undoubtedly, they were not parties actually aggrieved by the determination of the justices. In *Rex v. Hartfield, Carthew*. 222, 2 Bott. pl. 940, 6th ed., it was determined that a party who is removed may appeal, as well as the parish. [DENMAN, C. J. The officers of the township of Bishop Wearmouth, when looking at the order, directing the removal to the parish of the same name, might, on the authority of *Spitalfields v. Bromley*, 18 Vin. Ab. 468, tit. Removal (H.), pl. 5, have reasonable ground to think they would be fixed if they did not appeal. TAUNTON, J. In *Rex v. Kirkby Stephen*, Burr. S. C. 664, an order was directed to a parish consisting of several townships, and served on one of the townships (of the same name as the parish) which maintained its own poor, and the Court held the order unappealed from, conclusive on the township.] There the officer of the removing parish took the pauper to the township. Here the paupers were not delivered by the officer of the removing parish to the overseers of the appellant township, nor was the order served on them. To give the right of appeal, the appellants must think themselves aggrieved by the judgment of the justices; here, it does not appear that the parish officers of the township of Bishop Wearmouth ever knew of any such judgment having been pronounced. The *order was a good order on Bishop Wearmouth Panns, and was [*947] properly served on that township; the officers of that township were bound to receive the pauper, and if aggrieved by the order, they ought to have appealed against it: *Spitalfields v. Bromley*, 18 Vin. Ab. 468, tit. Removal (H.), pl. 5; *Rex v. Kirkby Stephen*, Burr. S. C. 664. The paupers were settled in that township, and the magistrates knew that they were so settled. In *Rex v. Kirkby Stephen*, Burr. S. C. 664, the intention was to remove to the township of Kirkby Stephen; the order was directed to the parish, but was delivered with the pauper to the township of Kirkby Stephen, which did not appeal; and it was held that the township was bound by the order. There, there did not exist such a place as the parish of Kirkby Stephen for the purpose of maintaining the poor; nor here does there exist such a place as the parish of Bishop Wearmouth for that purpose; but the order in this case was not served on officers of the township of Bishop Wearmouth, nor were the paupers delivered to them by officers of the removing parish; and the officer of Bishop Wearmouth Panns, to whom the order was first delivered, knew that the intention was to remove the paupers to that township.

Armstrong, contra. If the order was properly served on Hills, the township

of Bishop Wearmouth is aggrieved. It was properly served: the officer of the removing parish first took the paupers with the order to Bishop Wearmouth Pannas, and then, after a refusal by the overseer of that township to receive them, to the churchwarden of the whole parish, who resided in the township of Bishop Wearmouth, and the latter was obliged to place them in *the [948] workhouse of that township. It is true, he was not an overseer of the township. [PATTESON, J. Then he was a mere stranger.] The removing parish treated him as an overseer. They abandoned their former service, and delivered the order to him. They are estopped from saying that the order was not properly served. [PATTESON, J. The object may have been to serve him as the representative of the whole parish.] The sessions were right in holding, that Bishop Wearmouth was entitled to appeal, but wrong in confirming the order of removal; because the settlement of the paupers was not in the parish of Bishop Wearmouth, but in the township of Bishop Wearmouth Pannas.

DENMAN, C. J. Great pains have been taken to perplex this case, by the magistrates, and the officers of the removing township. No doubt it was the duty of the magistrates when they ascertained that the parish was divided into townships, and the settlement of the paupers was in one of those townships, to remove the paupers to the township bound to maintain them. If they had done so here there would be no dispute. But the order is to remove to the parish of Bishop Wearmouth generally, which, for the purpose of maintaining the poor, has no existence. Then the officer of the removing township sees the officer of the township, to which the removal ought to have been made, and the latter objects to receive the pauper, because the order is to remove to the parish, unless the former will waive some costs; he refuses to do so. The paupers are then taken to the churchwarden of the whole parish of Bishop Wearmouth. He was not overseer of the township of Bishop Wearmouth, and as far as that [949] township is concerned *in the appeal, must be considered an entire stranger. He took the paupers with the order to another township, which happens to be of the same name with the parish to which the removal was directed to be made. That township therefore had the paupers under an order directed to a parish of the same name: it was not bound to receive them, and was a volunteer to a certain extent; and the question is, whether it comes within the stat. 13 & 14 Car. 2, c. 2, s. 2, which gives the right of appeal to all persons who think themselves aggrieved by any judgment of the Justices. That clause as it seems to me ought not to be construed so as to let in any one who, taking a capricious view of the order, may think himself aggrieved by it, when it is clear that he was not intended to be included in it, but must be confined to those who may have reasonable ground for thinking themselves aggrieved. I think, however, that there was in this case reasonable ground for the inhabitants of Bishop Wearmouth to think they might suffer by this order, whereby the paupers were directed to be removed to a parish of the same name as the township, and that, therefore, they had a right to appeal. They might have a reasonable apprehension that they would be fixed with the pauper if they did not appeal, and, consequently, might think themselves aggrieved by the order.

The appeal was heard, and the order of removal was confirmed on proof of a settlement in the township of Bishop Wearmouth Pannas, the inhabitants of which, for the purpose of this appeal, must be considered as third persons. The sessions have clearly done wrong in this respect, and the order must be quashed.

*LITTLEDALE, J. The order of sessions must evidently be quashed, [950] because it confirms an order of removal to the parish of Bishop Wearmouth, and it appears clearly that the settlement of the pauper was in a township within the parish. It seems to me that the township of Bishop Wearmouth had a right to appeal. They had just reasons to apprehend that they would be fixed if they did not appeal. They therefore come within the words of the stat.

13 & 14 Car. 2, c. 12, s. 2. They had very good reason to think they might be injured by the order; for though the justices thereby directed the paupers to be removed to the parish of Bishop Wearmouth, the officers of the township of that name might suppose that the paupers must be maintained by some one of the townships within that parish, and that their township being of the same name as the parish, was the one intended by the justices. The order was not binding on Bishop Wearmouth Pannu, because not directed to that township.

TAUNTON, J. The order of sessions is wrong, because the paupers were settled in Bishop Wearmouth Pannu, and it was intended to remove them thither; but the sessions have confirmed an order removing them to the parish of Bishop Wearmouth, which does not maintain its own poor. This is not a mere verbal mistake, as in *Rex v. Kirby Stephen*, Burr. S. C. 664, for the names of the parish and township are not the same, and the thing done was not according to the intention. But I have great doubt whether the inhabitants of the township of Bishop Wearmouth *had reasonable cause to think [*951] themselves aggrieved. The statute does not give the right of appeal to every person, who, upon any inconsiderate view of his case, may think himself aggrieved, but only to persons who have reason to think themselves aggrieved. I am not satisfied that the appellant township would have been concluded by this order, if they had not appealed against it. It never had been served on the officers of that township, nor was it served by the officers of the removing township. My doubt, however, is not so serious as to make me differ from the rest of the Court.

PATTESON, J. For the reasons already given, the sessions ought clearly to have quashed the order of removal. It is to be regretted that the magistrates should have ordered the paupers to be removed to a place where they were clearly not settled. *Spitalfields v. Bromley*, 18 Vin. Ab. 468, tit. Removal (H.), pl. 5, goes to this extent, that magistrates are not bound to notice the division of parishes into townships; and, therefore, if they do not know that a parish is so divided, and make an order directing a pauper to be removed to the parish, such an order may not be wrong. But if they are informed, before they make that order, that a parish is divided into townships maintaining their own poor separately, and that the settlement of the paupers is in one of those townships, it is their duty to direct the paupers to be removed to the township bound to maintain them. It seems to me also that the service of the order on the township of Bishop Wearmouth was not good. The order was directed to *the churchwarden and overseers of the poor of the parish of Bishop Wearmouth, but there were no overseers of the poor of that parish. It [*952] was not served on the overseers of the township of Bishop Wearmouth, but of Bishop Wearmouth Pannu. I doubt, therefore, whether the inhabitants of the township of Bishop Wearmouth had any right to appeal, because, not being bound to receive the paupers, they were, to a certain extent, volunteers. At the same time, as the order was served on the churchwarden of the parish, who was, in some respect, the representative of all the townships within it, and he, in fact, placed the paupers in the workhouse of the township, the officers of the latter may be considered as having received and maintained the paupers under the order, and may have thought it obligatory on them so to do, and, consequently, that the township might be aggrieved by it. I therefore yield on this point (though not without much doubt) to the opinion of my Lord and my Brother LITTLEDALE. Order of sessions quashed.

*The KING v. The Inhabitants of BUCKINGHAM. Jan. 18. [*953]

Pauper was hired for a year as a footman and groom, by a West India planter, residing at M., in England, at 7*l.* wages. He went into the master's service in February, 1822, and in May following engaged to bind himself to serve the same master at Berbice, as clerk and overseer for three years from the first day of his arrival there, at a certain

salary. Soon after their arrival at Berbice, the pauper entered on the office of overseer and clerk, but he also continued to act as servant, and lived in his master's house, and did so until the following February, when they returned to England, the pauper acting in the capacity of servant on the homeward voyage, and after his arrival in England. No further contract had ever been entered into for the pauper's service as overseer. The master paid him his footman's wages till the time of their going abroad, and, on their return home, paid him 20*l.* as salary for the service in Berbice; after which he gave him weekly wages, under a new agreement: Held, that there was no dissolution of the first contract, and that the pauper having served forty days under the first hiring, gained a settlement in M.

ON appeal against an order of two justices whereby Thomas Burnell, his wife and children, were removed from Maidsmorton to Buckingham, the sessions confirmed the order as to some of the paupers, subject to the opinion of this Court on the following case:—

The birth settlement of the pauper Thomas Burnell was in Buckingham. On the 28th of February, 1828, he was hired by Henry Smithson, Esq., of Maidsmorton for a year, as a footman and groom, at the wages of 7*l.* and a suit of livery. On the following day he went into the service and continued until the 9th of May following. Mr. Smithson, being a West India planter, was about to visit his property in Berbice, and on the 9th of May, came to an agreement with the pauper, whereby the latter engaged to bind himself to serve Mr. S. in Berbice as overseer and clerk, on his plantations, for the term of three years from the first day of his arrival in Berbice, at the salary, for the first year, of 15*l.*, for the second 20*l.*, for the third 30*l.* current money in Berbice, and Mr. S. promised to pay the above money as it became due (the first-named doing his duty), and to find him his board and lodging, and doctors' charges, as [*954] is usual for overseers in Berbice. On the preceding day (May *8th), Mr. Smithson paid the pauper 1*l.* 16*s.* 9*d.*, the amount of three months' wages.

The pauper continued with Mr. Smithson at Maidsmorton till the 12th of May, and the same day went with him to London, where they continued until the 20th, when they embarked for Berbice. The pauper acted in the capacity of servant to Mr. Smithson during his stay in England, after he quitted Maidsmorton, and during the voyage. They arrived at Berbice on the 10th of August following. A few weeks after landing they remained at a friend's house, and the pauper lived with Mr. S. as servant, and they then proceeded to Mr. Smithson's plantation at Berbice. The pauper then entered into the office of overseer and clerk, and acted also as servant about the person of his master, and lived in his master's house. This continued until February following (1829), when Mr. Smithson having declared his intention of returning to England, the pauper expressed his desire to return also. Mr. Smithson at first objected, but ultimately consented, and the pauper did accordingly accompany his master to England, acting in the capacity of his servant as on the outward voyage. They landed in London on the 10th of May, 1829, and the pauper continued there until the 14th, when they returned to Mr. Smithson's residence at Maidsmorton, and the pauper continued to act as his servant in the house until the 1st of June, without anything having passed as to hiring or terms of service. Three or four days before the 1st of June, Mr. Smithson told the pauper he meant to give him 20*l.* as his salary up to that time, of which he then gave 10*l.*, and promised him the remainder whenever he should want it. On the 1st of June [*955] the pauper was married, and the same day, previous *to the marriage taking place, Mr. Smithson and the pauper came to an agreement for the pauper's service as weekly servant at 4*s.* a week, to live and board in the house as before. Pauper continued in such service until the September following, and then left and received the remaining 10*l.*, his weekly wages having been regularly paid. The pauper was never absent from Mr. Smithson's service a day from its commencement in February, 1828, to its determination in Sep-
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tember, 1829. The whole amount of wages received by the pauper for his service to Smithson was the sums of 1*l.* 16*s.* 9*d.*, 20*l.*, and the weekly wages.

The question for the opinion of this Court was, whether, under the circumstances above stated, the pauper gained a settlement in Maidsmorton.

B. Monro in support of the order of sessions. The pauper did not gain a settlement in Maidsmorton: the contract of hiring, of the 28th of February, 1828, as footman and groom, was dissolved by the agreement of the 9th of May, whereby the pauper engaged to bind himself to serve his master as overseer and clerk in the plantations for three years; *Rex v. Great Chilton*, 5 T. R. 672, is in point. There, an unmarried man was hired for a year from Martinmas, as a servant in husbandry, at 8*l.* a year, with meat, washing, and lodging. In the succeeding January he married, but continued with his master as a menial servant, until the ensuing May-day; some days before which, the master and pauper agreed that the pauper should go (with his wife) as a hind, to reside on, and manage another farm of his master's in *the same township. The [*956] second agreement was for a year from May-day; the pauper to have 5*s.* a week, with a house to live in rent free, and some perquisites. This was held by a majority of the Court not to be a prolongation of the former contract, but a new agreement to serve for a year from May-day, which put an end to the former, as being inconsistent with it. Lord KENYON, who there differed from the rest of the Court, admitted, that if the nature of the service only were varied, that would not defeat the settlement, but he said it would be otherwise if there was a dissolution of the first contract. Here there was a dissolution of the first contract by the agreement of the 9th of May. [DENMAN, C. J. How does it appear that the first contract was dissolved?] There is certainly no express dissolution, but the new contract was wholly inconsistent with the first; the service under the second agreement was to be in a foreign country; and the wages were to be different. If the master had brought an action on the first contract, after the 9th of May, the agreement made on that day would have been an answer.

Biggs Andrews, contra, was stopped by the Court.

DENMAN, C. J. The argument is that the legal effect of the second agreement was to put an end to the first. I think not; and if not, then there were forty days' residence in Maidsmorton under the yearly hiring, and the pauper gained a settlement. The pauper's agreement of the 9th of May, amounts only to an undertaking by him, that when he should go out to Berbice, he would bind himself to serve as clerk and overseer for three years from the day of his arrival there. It does *not appear that he ever did so bind himself; [*957] and, though it is stated that, soon after his arrival at Berbice, he entered upon the office of overseer and clerk, yet he continued to act as servant about the person of his master, and lived in his master's house. The contract contemplated by the second agreement never came into operation.

LITTLEDALE, J., concurred.

TAUNTON, J. It is said that the first contract was vacated by the second, and *Rex v. Great Chilton*, 5 T. R. 672, has been relied upon. Much as I respect the authority of Lord KENYON, I should have concurred with the opinion of the majority of the judges in that case. There, the pauper having been hired for a year from Martinmas, agreed with his master to serve him for a year from the ensuing May-day, at weekly wages; the Court held, properly, that the two contracts were inconsistent, and that the latter put an end to the first. The latter contract, there, was not executory, but absolute, from a given day. But, here, the two contracts are not inconsistent: the pauper engages to bind himself to serve; he does not enter into an actual contract to serve, and it does not appear that any further contract was ever made between the parties. It is not immaterial, that during the whole period of service, he continued to act in his original character of servant. There is no decision to show, where the service is clearly referable to a yearly hiring, that the master's going abroad, and the

service afterwards being in a foreign country, destroys the settlement of the servant.

[*958] *PATTERSON, J. The sessions have found that the pauper continued to act as servant about the person of his master, and that he continued to do so till he came home. That could not be under the second contract, but must have been under the first.

Order of sessions quashed.

The KING v. The Inhabitants of OULTON. Jan. 18.

A female, of full age, who lived with her father, and was the main support of his family, hired herself, with his consent and at his desire, to a farmer, in an adjoining parish, to work at weekly wages during his harvest; she worked for him under this hiring for three weeks, when she received her wages and returned home. In the following autumn, she again hired herself to the same farmer, and served him for a fortnight and two days, and on her return home she gave her wages to her father, who expended them for the use of his family. On both these occasions she intended, and was expected by her father, to return home as soon as the harvest-work was done. The Court of Quarter Sessions having, upon these facts, found that the pauper was emancipated, held by DENMAN, C. J., TAUNTON and PATTERSON, Js., LITLEDALE, J. dissentiente, that their decision was right.

On an appeal against an order of two justices, whereby Hannah Barnes was removed from the parish of Aiktown, to the township of Oulton, in the county of Cumberland, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

John Barnes, the father of the pauper, had a settlement in the township of Oulton, until the year 1830, when he acquired a settlement in the parish of Aikton, the pauper at that time living with him as part of his family. The pauper was born in 1806; she had never gained any settlement in her own right, but always, up to the time of the removal, lived with her father as part of his family. She did the work of her father's house, and before and at the time of the appeal was the main support of his family. In the autumn of 1829, the pauper then being of the age of twenty-three years, with the consent and at the desire of her father, hired herself to one William Wilson, residing at some miles distance in an adjoining parish, at weekly wages, to work for him during [*959] his harvest. She remained living with Wilson, and working for him under the hiring for three weeks and upwards; when she received her wages and returned home, having been absent from her father's house three weeks and two days. In the following autumn she hired herself again, with the consent and at the desire of her father, to Wilson, to assist him in his harvest. On this occasion, she served Wilson, living with him under this hiring, a fortnight, received her wages, and returned home as before, having been absent from her father's house at this time, two weeks and two days. On this latter occasion she gave her wages to her father, who expended them for the use of the family. The pauper had not, on either of these occasions, any intention of abandoning her home, but on both occasions she fully intended to return; and her father expected that she would return to him as soon as the harvest-work at Wilson's was done. The sessions, upon these facts, found that the pauper was emancipated, and did not follow the settlement acquired by her father in Aikton, in 1830. The question for the opinion of this Court was, whether the sessions were warranted in the conclusion they had drawn, that, under such circumstances, the pauper was emancipated.

Armstrong, in support of the order of sessions. The sessions concluded rightly. The pauper being of full age, contracted to work during the harvest, and in performance of that contract, was absent, in one year, three weeks and two days from her father's house. During that period, she had subjected herself to the control of another, and could not return to, or become part of her

*father's family. She thereby became severed from it. In *Rex v. Roach*, 6 T. R. 247, the daughter, after she was twenty-two years of age, [*960] left her father's house, and hired herself to a farmer as wet-nurse, and lived with him eight weeks; at the expiration of which time she returned to her father. It was held, that, having removed from her father's family when, in estimation of law, she wanted no further protection from the father, she could not afterwards be deemed part of that family for the purpose of a derivative settlement. It may be said that, here, the pauper when she quitted her father's house, intended to return, but that is immaterial, because, by her having contracted to serve during the harvest, it was out of her power to return until the harvest was got in. There was a period, therefore, during which, she being of age, was not under the parental control. *Rex v. Sowerby*, 2 East, 276, may be cited on the other side: there the question discussed was, whether the pauper's master, the son of a certificated person, had become emancipated. He always continued part of his father's or mother's family, and never left their house, except for a few weeks in harvest time in one year; and it did not appear that there was any contract of hiring, or if any, upon what terms. At all events, it was, in this case a question of fact for the sessions, whether the absence of the daughter from the father's house for three weeks and two days the first year, and for a shorter time in the second, in execution of a contract voluntarily entered into by her, amounted to a severance from the father's family; and they having found, in effect, that it did, and there being premises to warrant that conclusion, this Court will not disturb their decision.

**Aglionby*, contrà. The pauper was not emancipated, because, by [*961] hiring herself for the harvest, she did not become, or intend to become, permanently free from her father's control. In *Rex v. Rotherfield Greys*, 1 B. & C. 347, *BAYLEY, J.*, says, "In order to constitute emancipation, the party ought to be wholly and permanently free from the parental control; and in *Rex v. Hardwick*, 5 B. & A. 178, *ABBOTT, C. J.* says, that "during the minority of a child, he will remain, almost under any circumstances, unemancipated; but where the new settlement is acquired, by the parent after the child has attained twenty-one, it will not be communicated, unless, in fact, the child continues part of the family. When, therefore, at that period, he is absent, employed in gaining a livelihood for himself, or serving in the militia, he no longer remains a member of the family." *ABBOTT, C. J.*, there, is evidently speaking of an absence likely to be permanent. Here, the pauper, who had hired herself to work during the harvest only, cannot be said to have been getting a living for herself in the sense in which that expression is used by *ABBOTT, C. J.* She continued part of her father's family during the whole time she served Wilson: she always intended to return. Her absence during the harvest, taken in conjunction with that intention, cannot be considered a severance from her father's family. *Rex v. Sowerby*, 2 East, 276, is in point. The principal question there discussed was, whether the master was emancipated. He was the son of a certificated man, and continued to reside in the certificated parish with his father in his lifetime; and after his father's death, with his mother; and never left them, except for a few weeks in "harvest-time in one year. After he [*962] was of age, he carried on business for himself as a twine spinner, living with his mother in a house rented by her, and hired the pauper for a year; and it was held that the master was not emancipated. And *GROSE, J.*, said, "there is no pretence for saying that his going out for a few weeks at harvest time would operate as an emancipation." Here, the pauper's leaving her father during the harvest, intending to return as soon as it was over, was not a severance from his family." In *Rex v. Roach*, 6 T. R. 254, *GROSE, J.* says, "Whether, in a particular case, the leaving of the father's family amount to a severance of the child from the parents, is more a question of fact than of law, it depending on intention. Strictly speaking, the sessions should have found that fact." Now, here, the sessions have expressly found that the pauper had

not, on either of the occasions when she hired herself, any intention of abandoning her home; but that, on both occasions, she fully intended to return, and her father expected that she would return to him as soon as the harvest work was done. No such intention was found in *Rex v. Roach*, 6 T. R. 254; which distinguishes that case from the present.

DENMAN, C. J. It seems to me that the sessions were right in finding that the daughter was emancipated. It appears that she and her father were on very good terms, and that on one occasion she paid her wages to him; but she being twenty-one years of age, and having hired herself during the harvest, it was in her option to pay her wages to her father or not. *Rex v. Lytchet Mataverse*, [*963] *7 B. & C. 226, tends strongly to show that a pauper, who hires himself under twenty-one years of age, and continues to serve after that period, will be emancipated. We are extremely anxious to make the rules on this subject as clear as possible. A party under age is not considered to be emancipated unless some distinct act be shown, producing that effect; as if he marries, and so becomes the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental control; but, where a child has attained the age of twenty-one, and is then separated from the father's family, the burden of proof that the child is not thereby emancipated, lies on the party asserting that fact. In *Rex v. Hardwick*, 5 B. & A. 178, ABBOTT, C. J. says, (His Lordship here read the words of ABBOTT, C. J., already cited, p. 961, ante.) Now here the pauper, after she attained twenty-one, made a contract whereby she bound herself to work during a certain period. In performance of that contract, she was absent from her father's house three weeks, employed in gaining a livelihood for herself. During that period, consequently, she no longer remained a member of his family: and I am, therefore, of opinion that the sessions were warranted in the conclusions they came to, that she was emancipated.

LITLEDALE, J. I am of opinion that the pauper was not emancipated. It appears to me that her temporary absence from her father's house, during the harvest, was not, under the circumstances stated in this case, a severance from his family, and therefore does not amount to emancipation. It is the common [*964] *practice for country people to hire themselves during the harvest; and their temporary absence from home under such a hiring, and when they are of full age, has never been considered such a severance from the father's family as amounts to emancipation. In this case, the daughter did not intend to separate from her father's family; and her intention is very material in a case like the present, where her absence from the parent was for so short a period. For anything that appears, her room or her bed may have been kept for her during her absence. She maintained her father; and her hiring herself during the harvest may have been intended as a means of making her earn something towards his support. It is said that the pauper is emancipated, because, having contracted to work during the harvest, she had, for a time, put herself out of her father's control. That argument would equally apply if she had agreed to work by the day; because, during the hours of work, she would be free from her father's control. There must be a severance of the child from the family of the parent to constitute emancipation. I think that the pauper, here, during the harvest time, while she was working for another, continued, under the circumstances stated in this case, part of her father's family. In *Rex v. Roach*, 6 T. R. 247, Lord KENYON said, "This woman" (the pauper) "was above the age of twenty-one: she had contracted the relation of servant with another family; she was out of her father's family; she was under no other control to him than that arising from moral obligation and gratitude, and I [*965] cannot see how she could afterwards be deemed to be incorporated *with the father's family." In this case, the pauper never contracted the relation of household servant with another family; she was to work in the fields, not in the house. She was, therefore, never out of her father's family, to use Lord KENYON's expression; her wages contributed to his support; she intended to

return home, and her father expected she would as soon as the harvest work was done. In *Rex v. Roach*, 6 T. R. 247, ASHHURST, J., considered the question, whether absence from the father's family amounted to emancipation, to depend upon the intent. He there says, "In some cases, perhaps, it may be difficult to say what shall amount to a severance from the father's family. When a child becomes of age, it is optional in him, either to continue with his parents or not, as he pleases. He is then *sui juris*: and if he leave his father's house and put himself under some other control, this is a kind of public notification that he means to leave his father's family." Now, I think here, that the fact of the pauper having left her father's house, and put herself under the control of another during the harvest, was not, under the circumstances of the case, any indication of an intent to leave her father's family. In *Rex v. Sowerby*, 2 East, 276, it was found that the son of the certificated person never left his father or mother's house, except for a few weeks in harvest time in one year; and it was there considered, that he was not thereby emancipated.

TAUNTON, J. Certainty in the administration of every department of the law is of the greatest importance, and in none more so than in sessions law. The yearly expense of the country is increased greatly by splitting hairs in questions of this description. I cannot distinguish this case from [*966] *Rex v. Roach*, 6 T. R. 247. That decision, whether wisely come to or not, is binding on us. It certainly is not a contravention of any leading principles of law: if it were, I might think it right to reconsider it. It is true that, in this case, the pauper hired herself at the desire and with the consent of her father; but every parent consents and desires (if his mind be properly constituted) that his children should go to service to obtain an honest livelihood. Here the pauper agreed not merely to do harvest work, but to work for Wilson during his harvest. It is by no means uncommon for farmers to employ their own domestic servants to do the harvest work, and to hire others to do the household work. Whether that was the case here does not appear: but the pauper lived with her master during the whole harvest time, and slept in his house; and she was absent on the first occasion, three weeks and two days. And as it is expressly found that, on the second occasion, she gave her wages to her father, it may be fairly inferred that, on the first, she kept them for herself. Then, the only difference between *Rex v. Roach*, 6 T. R. 247, and this case is, that there the pauper served eight weeks, here only three weeks and two days. In each case, the pauper served under a contract; and as it was held in the former case that the pauper was emancipated by having been absent from his father's family eight weeks, I think we are bound to adhere to that decision, and to hold that the pauper was emancipated, here, by her absence for three weeks.

*PATTESON, J. I cannot distinguish this case from *Rex v. Roach*, 6 T. R. 247. The only difference is, that, in that case, the pauper served [*967] eight weeks: here, she served three weeks and two days; but she was bound by her contract, and compellable, to serve her master during that period. It is found, indeed, that she hired herself with the consent and at the desire of her father; but he could not enforce or prevent her so doing, for she was of full age; and that being the case, the onus of showing that she was not emancipated is thrown on that party who contends that she was not so. As to *Rex v. Sowerby*, 2 East, 276, the decision there did not turn on the question of the emancipation of the son; he was born after the father had come into the certificated parish, and always resided with him during his lifetime; and, after his death, with his mother; and the question was, whether or not, after that time, he still resided under the certificate, by living with his mother as part of a family of which she was the head; in which case his hired servant was prevented by the statute, 12 Anne c. 18, s. 2, from gaining a settlement.

Order of sessions confirmed.

[*968] *The KING v. The Inhabitants of LUBBENHAM. Jan. 18.

Appellants against an order of removal, to establish a birth settlement, proved, 1st, the marriage of the father and mother at K. in April, 1749; and, 2dly, the baptism at K. of their four children, viz., a daughter, M., in May, 1751; a son, J., in May, 1753; a daughter, Elizabeth, in January, 1755; and another daughter, S., in December, 1756: Held, that the sessions were not bound to infer from this evidence that Elizabeth was born at K.

ON an appeal against an order removing Elizabeth Wyly and her children from the parish of Lutterworth, in the county of Leicester, to the parish of Lubbenham in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The respondents proved that the pauper, before her marriage with Alexander Benjamin Wyly, gained a settlement in Lubbenham. The appellants gave the following evidence: the marriage of John Brittain and Mary Goode, at Ketton, in the county of Rutland, on the 27th of April, 1749; the baptism of Mary their daughter, at Ketton, on the 26th of May, 1751; the baptism of John their son, at Ketton, on the 27th of May, 1753; the baptism of Elizabeth their daughter, at Ketton, on the 19th of January, 1755; and the baptism of Susannah their daughter, at Ketton, on the 25th of December, 1756. They further proved the marriage of Alexander Wyly, a foreigner, who had no settlement, with the said Elizabeth, on the 18th of January, 1779; and the birth from that marriage of A. B. Wyly, who afterwards married the pauper. The appellants thereupon submitted that they had shown a birth settlement of Elizabeth in Ketton, which settlement devolved upon her son, and was by him communicated to the pauper. The respondents relied on *Rex v. North Petherton*, 5 B. & C. 508.

**Hildyard* and *Sir G. A. Lewin*, in support of the order of sessions. [*969] The sessions have properly decided that the birth settlement of Elizabeth Brittain was not sufficiently proved. *Rex v. North Petherton*, 2 B. & C. 508, shows that a register of baptism is not evidence per se of the place of birth of the party baptized. Here, it will be said, there is a series of registers showing that different members of the family were baptized in the same place (the parish of Ketton), from which it ought to have been inferred that Elizabeth Brittain was born in that parish. But that is not a necessary inference; for the parents may have resided in an extra parochial place contiguous to Ketton, and have brought their children to that parish for baptism. It was for the sessions, at any rate, to draw the conclusion from the evidence; they were not bound to find that Elizabeth was born in Ketton.

Humfrey and *White*, contra. This case differs from *Rex v. North Petherton*, 2 B. & C. 508, as, besides the register of the baptism of Elizabeth Brittain, there were other circumstances connected with it from which the sessions ought to have inferred that she was born in Ketton; viz., the baptism of three other children in that parish.

DENMAN, C. J. The question at sessions was, whether the birth settlement of Elizabeth Brittain was sufficiently proved. The Court of Quarter Sessions thought that it was not, and they have stated in the case the facts on which they came to that conclusion. We must collect that the question intended to be submitted to us was, *whether they were bound to find that the pauper's mother was born in Ketton. I think they were not bound to come to any such conclusion. The order of sessions must therefore be confirmed.

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred.

Order of sessions confirmed.¹

¹ In *Rex v. The Parish or Precinct of St. Katharine, near the Tower of London*, Hilary term, 1831, the sessions confirmed an order for the removal of Alexander Sharp from Knaresborough to St. Katharine's, subject to the following case: In the register of christenings for St. Katharine's was an entry, "1775, Alexander Sharp, of John and

Ann." The pauper, on his examination, stated that he was about fifty-five years old, and came to Knaresborough to reside thirty-four years ago. He spelt his name Sharp; his father, who was a German, spelt it Sharpe. His father's name was John Andrew, his mother's, Ann. Fifteen years ago he was removed by a vagrant pass, from Chester to St. Katharine's, in London, but could not say whether it was to the appellant parish; he was relieved there (but the relief, as such, was not relied upon by the respondent), and he returned to Knaresborough, where he had been chargeable ever since. He had a sister, four years older than himself, who died in London many years ago. His mother died in Derbyshire, on her way to London. The question submitted by the sessions was whether there was evidence from which they might presume a birth settlement in St. Katharine's. This Court held that there was some evidence from which the sessions might so presume.

Order confirmed.

J. L. Adolphus in support of the order of sessions.

Sir G. A. Lewin, contra.

***The KING v. The Inhabitants of GREAT WAKERING. Jan. 18. [*971]**

A. by lease demised a house and land to B. and C. for a term of years, at 16*l.* per annum. There was a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent. B. occupied the whole premises, and paid the rent for five years: Held, that, the demise being joint, the rent was payable by the two jointly, and that each could only be considered as having rented a tenement at 8*l.* a year, and consequently that B. did not gain a settlement, either by renting the tenement, or by being rated and paying rates in respect of it.

ON appeal against an order of two justices, whereby Samuel Bullock, his wife and children, were removed from the parish of Great Wakering to the parish of Great Wigborough, both in the county of Essex, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The respondents having proved a derivative settlement in the appellant parish, the appellants endeavored to establish a subsequent settlement acquired by the pauper, either by renting a tenement in the respondent parish, or by paying rates in respect thereof, under the following circumstances:—

By lease bearing date the 27th February, 1827, made between Catherine Summer, widow, of the one part, and Samuel Bullock (the pauper), and John Clay of the other part, Mrs. Summer, in consideration of the rents and covenants on the behalf of Bullock and Clay to be paid and performed, leased to Bullock and Clay certain freehold premises (therein particularly described), situate in the respondent parish, to hold from the 25th of March then next, for fourteen years, if Mrs. Summer should so long live, at the yearly rent of 16*l.* The lease contained a covenant by Bullock and Clay for themselves jointly and severally, and their heirs, executors, administrators, and assigns, for payment of the taxes, rates, and assessments to be charged on the premises (but there was no covenant for payment of the rent); and, previous to the 29th of September then next, to lay out 30*l.* in repairs on the premises, and to keep and leave the same in repair. It also contained a covenant by Mrs. Summer, with Bullock and Clay, to repay them the 30*l.*, in case they should be evicted by any person claiming lawful title. The lease was duly executed by all the parties.

Bullock (the pauper) was examined, and stated that he hired of Mrs. Summer the demised premises, and that they consisted of three cottages, two of which formed one double tenement, and an acre of land; that he occupied the whole under the lease, and paid the stipulated rent for above five years, inhabiting one of the cottages and cultivating the land, and underletting the residue; that Clay never came near the premises during the five years, and never paid any part of the rent; but that he once lent the pauper some money to enable him to pay the rent then due. The appellants also put in evidence receipts, signed by Mrs. Summer, for rent, as paid by the pauper. Upon this evidence it was objected by the respondents, that the lease constituted a joint demise to Bullock and Clay, at the rent of 16*l.* a year, which was not sufficient to confer

a settlement upon Bullock under the statute 6 G. 4, c. 57, the tenement act in force at the date of the demise. The appellants contended, that the liability to pay the reserved rent was in law several as well as joint, and they proposed to call Mr. Murdoch, the attorney who had prepared and attested the execution of the lease, and who had acted for all parties throughout the transaction, for the purpose of showing that in fact Clay was not intended to be tenant jointly with Bullock, but that it was the intention of all parties that Bullock [*973] *should be the only tenant, and responsible for the whole rent; and that Clay was included in the lease merely as a surety for the due payment of the rent by Bullock. The counsel for the respondents objected to Murdoch's evidence, as tending to contradict the language and vary the effect of the lease; but his evidence was admitted by the sessions, and was to the extent above stated. With respect to the settlement by payment of rates, the pauper proved that, once during his occupation under the lease, he paid a rate to one of the parish officers of Great Waking, and that he was rated for the premises in question, they being stated in the rate to be of the value of six pounds; and that Clay was not rated at all. The sessions were of opinion, that the pauper had acquired a settlement both by renting a tenement and by paying a rate in respect thereof; and quashed the order of removal.

Knox and Cripps in support of the order of sessions. There was a hiring of a tenement by the pauper of sufficient value to satisfy the statute 6 G. 4, c. 57. In *Croft v. Gainford*, 2 Bott. pl. 194, 6th edit., and *Burr. S. C. 311*, and *Marden v. Barham*, 2 Bott. pl. 197, *Burr. S. C. 311*, it was held, that where a tenement is occupied by two jointly, and is under 20*l.* a year value, neither can acquire a settlement; but those cases were decided at a time when it was considered necessary, in order to gain a settlement by renting a tenement, that a party should have credit for the rent, to the amount of 10*l.* a year. That doctrine, however, was exploded in *Rex v. Hooe*, 4 East, 362, where the payment [*974] of the rent to the landlord was guaranteed by *another person; and there it was held to be sufficient if a party came to settle upon a tenement of the value of 10*l.* per annum, whether credit were given to him for the rent or not. Here the pauper was in the actual occupation of the whole premises for the term, and he was liable (by operation of law) severally for the whole rent; for the landlord, if he obtained judgment in an action against the two, might levy whole damages on one; the pauper has, therefore, satisfied the words of the statute 6 G. 4, c. 57, by settling upon or renting a tenement of 10*l.* a year. Secondly, the evidence of the attorney was admissible to show that Clay was only surety, and not tenant; *Rex v. Scammonden*, 3 T. R. 474; *Rex v. Landon*, 8 T. R. 379; *Rex v. Olney*, 1 M. & S. 387; 2 Starkie on Evidence, p. 1076; the appellants were not parties, but strangers to the deed, and, therefore, not estopped by it; *Rex v. Cheadle*, 3 B. & Ad. 832. Thirdly, the pauper gained a settlement by being rated and paying the rates, for they were paid in respect of a tenement bona fide rented by him at 10*l.* a year. Besides, if the pauper is to be considered the tenant of one moiety to the original lessor, there is ample ground for presuming that he was a tenant of the other half to Clay; *Rex v. Duns Tew*, *Burr. C. C. 398*.

Bere, contra. It is quite clear that, before the late statutes, a tenement occupied by two jointly, under 20*l.* a year in value, did not confer a settlement upon either; and neither the statute 59 G. 3, c. 50, nor the statute 6 G. 4, c. 57, was intended to alter the law in that respect. In *Rex v. Tonbridge*, 6 B. & C. 88, *BAYLEY, J.*, in delivering *the judgment of the Court, seemed [*975] to consider that the first of those statutes had made no such alteration of the law. There the premises occupied by the pauper were not of sufficient value, unless he could be considered as sole occupier of a garden. The pauper took the garden, but it was agreed between him and one Maynard that they should share the expense and profit. Maynard paid the pauper half the rent, and *BAYLEY, J.*, observed, that although it was not stated that there was a

joint occupation, yet it must be taken that there was, and if so, it must be considered that the pauper occupied only a moiety of the garden. Here the law will, from the joint demise to the two, imply a joint covenant for payment of the rent. As to the settlement by rates, the statute 6 G. 4, c. 57, requires the same circumstances to give a settlement by paying parochial rates, as by settling upon and renting a tenement; and, therefore, if a settlement was not gained here by renting a tenement, neither was it by the payment of rates.

DENMAN, C. J. It appears to me that this letting did not confer a settlement, because it was a joint letting to two, and as the rent of 16*l.* would be payable by the two lessees, each would be liable only to pay a moiety. But in order to give a settlement, the tenement of each should be of the annual value of 10*l.* In *Rex v. Hooe*, 4 East, 362, the demise was to one only, and his rent was guaranteed by another person, but the latter was not tenant. Whether the parol evidence be admissible or not, is immaterial; because, assuming it be receivable, the letting was in fact to the two jointly, and *the rent therefore payable [976] by the two, and, consequently, neither rented to a sufficient amount. As to the other ground, that Clay may be considered as having let his moiety to the pauper, that is a fact not found by the sessions, and we cannot infer it.

LITTLEDALE, J. The demise being to two as joint tenants, each was entitled to occupy an undivided moiety in his own right. The pauper, therefore, if he occupied the whole, would occupy one-half in his own right, and the other half as bailiff to Clay, and would be accountable to him for the profits. He therefore only occupied, in his own right, a tenement of 8*l.* a year value, which is not sufficient to give a settlement, either by renting or by payment of rates.

TAUNTON, J. The rule laid down by Mr. Nolan (vol. 2, p. 37), is, that where a tenement is occupied by two jointly, and is of the value of 20*l.* a year, both may gain a settlement, for the moiety occupied by each is of the value of 10*l.* per annum; but where the tenement is occupied by two jointly, and is under 20*l.* per annum, neither can acquire one; and he adds (from the case of *Croft v. Gainford*, 2 Bott. pl. 194, 6th edit.), that "if the law were otherwise, the inconveniences arising from it would be intolerable; for if forty persons, for the same purpose, were to rent a tenement of this value, each of them would be entitled to a settlement; the manifest design of the statute would be thereby eluded, and the parishes would be loaded with poor." Here, no settlement was gained, because the rent for the whole *premises [977] was only 16*l.* per annum, and it was payable by the lessees jointly; and supposing that the parol evidence was properly received, it does not vary the case; for, although it may have been intended that Bullock should be sole tenant, and Clay surety, still the demise by the lessor was the two jointly, and the rent therefore was payable by them. There is no ground for saying that there was a settlement by rates; for that depends on the same circumstances precisely, as a settlement by settling on or renting land.

PATTESON, J. This is a joint lease to the two as regards the landlord. Whether the parol evidence was admissible as between the parties to this record is immaterial. I think it was admissible as between them, though it would not be so as between the parties to the instrument. All the authorities show, that if there be a joint-tenancy, each of the parties should be interested to the amount of 10*l.* With respect to an underletting by Clay to the pauper, there were some circumstances to warrant such an inference; but the sessions have not drawn it, and we cannot.

Order of sessions quashed.

*The *KING v. The Trustees of the NORTHLEACH and WITNEY Roads*. [978]

A local turnpike act directed that the trustees should keep books in which they should enter their accounts, and also their orders and proceedings; and that all persons should have access to such entries. By a subsequent local act it was directed, that the trustees should keep a book, in which they should enter their accounts, which book

should be open to the inspection of the trustees, or of any creditor on the tolls. The general turnpike act, 3 G. 4, c. 126, s. 73, re-enacted the latter provision as to all turnpike road accounts, and sect. 72 directed that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts, as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where, by that act, it is otherwise ordered:

Held, that these clauses of the general, and of the second local act, superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors, in the respective cases of orders and accounts.

To ground an application for a mandamus to inspect books, quære, whether it is sufficient to show that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favor, and that he refused to accept it otherwise than as a right. Per DENMAN, C. J.

A RULE had been obtained, calling on the trustees for repairing the Oxfordshire district of roads mentioned in an act of parliament, 24 G. 2, c. 28, and other subsequent acts, to show cause why a mandamus should not issue, commanding them to permit and suffer Mr. James Scarlett Price to have recourse to the books containing their accounts and entries of moneys collected, received, expended, and laid out, and their orders, acts, and other proceedings and things by them done in pursuance of the said acts, and in execution of the powers thereby given to them, at a reasonable and seasonable time in that behalf. The statute 24 G. 2, c. 28, directs that three books containing accounts respectively of the moneys collected, laid out, &c., and of all orders, acts, matters, and things, made or done by the trustees upon, in, or in respect of the three divisions into which the said roads are for that purpose distributed by the act, shall be kept [*979] as therein mentioned, "to which *said three books all persons shall be at liberty to have recourse, and to inspect or peruse the same at all reasonable and seasonable times, without any fee or reward." The party making the present application, and certain other inhabitants of Burford, being advised that the said clause was still in force, gave notice to the trustees that they should attend at the office of the clerk, for the purpose of inspecting all orders, acts, matters, proceedings and things recorded or entered in the book or books which the act required the said trustees to keep for entering such orders, &c., in respect of the Oxfordshire division of the said roads. The parties attended accordingly, and the trustees offered to grant them the required inspection as a favor, but not as a matter of right. The applicants declined accepting it on these terms.

It appeared that by a statute, 1 & 2 G. 4, c. cix. (local and personal, public), relating (among other things) to the part of the above roads now in question, the former acts, except as varied, altered, or repealed by the present act, were kept in force as to these roads, subject to the amendments, variations, and additions in this act contained: and it was directed that the clerk to the trustees should keep a book or books, in which he should enter true accounts of all sums of money received and paid in each district respectively on account of the said roads, which book should, at all seasonable times, be open to the inspection of the trustees, or any creditor or creditors on the tolls, without fee or reward; and that they should be at liberty to take copies of, or extracts from the same; and a penalty was imposed on the clerk if he should refuse to permit, or should [*980] not permit the said *trustees or such creditors, or any of them, to inspect such books, or take such copies, &c. Section 73 of the General Turnpike Act, 3 G. 4, c. 126, is, in every material point, precisely the same.

F. Pollock now showed cause, and contended that the clause of 24 G. 2, c. 28, relied upon in support of the rule, was superseded by sects. 72 and 73 of the General Turnpike Act: that it was expressly altered, as to entries of accounts, by 1 G. 4, c. cix., if still in operation since the general act, or, at all events, by sect. 73 of the general act; and, consequently, that a mandamus to

permit persons who were neither trustees nor creditors to inspect the accounts as well as orders, could not be granted.

Talfourd, Serjt., *contra*. The clauses referred to in the statute of 1 G. 4, and sect. 73 of the general act, although they direct that inspection of the accounts shall be granted to trustees and creditors under a penalty, do not take away the right of inspection which the public had before. There are no words which repeal the former act in this respect. [TAUNTON, J. If they are in direct opposition to the former clause, they must operate as a repeal of it, though it would not be so if there were a mere variation, and the several clauses were not inconsistent with each other.] There is nothing in the later acts that contravenes the clause in question in the former. Their provisions are more limited, but the peculiar right which they give to trustees and creditors is not inconsistent with the general right of the public.

*DENMAN, C. J. I think the parties are not entitled to this mandamus. The effect of sect. 4¹ of the General Turnpike Act is to incorporate [981] rate that statute with all particular acts; and therefore sections 72² and 73 of the general act must be taken as part of 24 G. 2, c. 28; and if they are inconsistent with the clause of that act relating to the accounts and orders, the latter must be considered as not continued; otherwise the very evil would ensue which that act was intended to prevent; namely, the want of uniformity in the laws regulating turnpike roads *throughout the kingdom. I also doubt, on [982] another ground, whether a mandamus lies in this case. The books were offered on the application of the parties, as a matter of favor, not of right. It might be important to assert the right, but then the person who made the application might have said that he accepted the liberty of inspection as a right, not as a favor. If upon that the books had been withheld, a mandamus might have been applied for, supposing the parties had been in other respects entitled to it.

LITTLEDALE, J. The statute 1 G. 4, c. cix., declares that the former acts shall continue in full force, except as they are thereby varied, altered, or repealed; and in a subsequent clause it directs, that the trustees shall cause a book to be kept, in which shall be entered accounts of the moneys received and disbursed, which book shall, at all seasonable times, be open to the inspection of the trustees, or any creditor or creditors on the tolls. The former act, 24 G. 2, c. 28, directed books to be kept containing accounts of all moneys collected

¹ Sect. 4. "And whereas it is of great importance that one uniform system should be adhered to in the laws for regulating the management and maintenance of turnpike roads throughout the kingdom; be it therefore enacted, that from and after the 1st day of January, 1823, all the enactments, provisions, matters, and things in this act contained, shall extend, and be deemed, construed, and taken to extend, to all acts of parliament now in force, and to all acts which shall hereafter be passed, for making, widening, turning, amending, repairing, or maintaining any turnpike road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act; and as to such enactments, provisions, matters, and things as shall be expressly referred to, and varied, altered, or repealed by any such act or acts as shall be hereafter passed."

² Sect. 72 enacts, "That all orders and proceedings of the trustees or commissioners of every turnpike road, together with the names of the trustees or commissioners present at every meeting, shall be entered in a book or books to be kept by the clerk to the said trustees or commissioners for that purpose, and be signed by the chairman of the meeting or meetings at which such orders or proceedings shall be from time to time made or had; and that such book or books shall be open at all seasonable times to the inspection of any of the trustees or commissioners, without fee or reward; and such orders and proceedings so entered and signed by the chairman of such meeting or meetings as aforesaid, shall be deemed and taken to be original orders and proceedings; which said book or books, as well as the book or books in which the oath or affirmation directed to be taken by the said trustees or commissioners shall be entered, and also the book or books directed to be kept for registering mortgages and assignments, and all entries in such books respectively, shall and may be read in evidence in all courts whatsoever, in all cases of appeal, and in all prosecutions, suits, and actions whatsoever."

and expended, and of all orders, acts, matters, and things made and done upon, in, or in respect of the said roads, to which books all persons should be at liberty to have recourse. The act of 1 G. 4 varies this provision, as far as regards the entries in the books of moneys received and expended, by varying the description of persons who are to have access to those entries. Before, all persons were to have access to the books; by this act a limitation was introduced. And I think the alteration is such as to render the original clause so far inoperative. But then there is a further provision in the statute of 24 G. 2, that the books [*983] shall *contain entries of all orders and acts made and done in respect of the roads, to which all persons may have recourse. If, however, the parties now applying wished to avail themselves of this part of the clause, they should have limited their motion to the entries of orders and acts. The clause of 24 G. 2, c. 28, referring to these, is not varied by 1 G. 4, c. cix.; but the clause of that act respecting the accounts has the effect of establishing two distinct provisions for the inspecting of receipts and disbursements, and of orders and other proceedings; and this distinction is supported by sects. 72 and 73 of the general act, which evidently subjects the two sets of books to different powers of inspection. The variation in this respect is reasonable in both statutes; creditors and trustees ought to be enabled to inspect the accounts, but there is no reason that all persons should. I agree with my Lord and my Brother TAUNTON, that the act 3 G. 4, c. 126, has done away with this general power; and, upon the construction of that, and of the two local statutes, I am of opinion that the rule ought to be discharged.

TAUNTON, J. Supposing that the parties applying for this mandamus are entitled to it upon the statement made by them, as to which it is unnecessary to say anything, I think the act 3 G. 4, c. 126, takes away the general power of inspecting accounts, given by 24 G. 2, c. 28, because the provisions of the two statutes cannot stand together.

PATTESON, J. As to the inspection of accounts, the provisions of the General Turnpike Act, and of the last local act, are the same. As to inspecting the orders and *proceedings, the latter act makes no regulation; therefore, [*984] the entries, as far as they relate to these, are subject to the general act; and in any view of the case, a claim for all persons to inspect the books cannot be supported.

Rule discharged.

The KING v. ALLEN, Gent. Jan. 21.

A rule nisi was granted for a mandamus to the principal of Clifford's Inn, to attend the benchers of the Inner Temple, and produce the records and regulations of the society of Clifford's Inn, to enable the benchers to decide on the validity of his election to that office. But on cause shown, the rule was discharged, no sufficient proof appearing, that the benchers of the Inner Temple had a compulsory authority over Clifford's Inn for this purpose.

A RULE was obtained in last Michaelmas term, calling on William Henry Allen, gentleman, an attorney of this Court, to show cause why a mandamus should not issue, commanding him to attend before the masters of the bench of the Inner Temple on such day as they might appoint, and to take with him the rules and regulations of the Honorable Society of Clifford's Inn, to enable the said masters of the bench to decide upon the validity of his election to the office of principal of that society. The application was made under the following circumstances:—

John Symson Jessopp, Esq., barrister at law, one of the ancients or rulers of the society of Clifford's Inn, in Trinity term last presented a memorial to the benchers of the Inner Temple, stating: That Clifford's Inn is one of the most ancient inns of Chancery, and has, from the earliest period, been subordinate to the benchers of the Inner Temple; that it is governed by a principal and twelve ancients or rulers; that in May last, a meeting of the rulers and fellows of

Clifford's Inn was holden, for the purpose of electing a principal from among the rulers; that the petitioner and Mr. Allen were *candidates; that the petitioner gave notice that Mr. Allen was not qualified to hold [985] the office; but that the election notwithstanding proceeded, and Mr. Allen was declared to have the majority of votes, though he was, in fact, not qualified according to the rules of the society, for several reasons, which were stated in the memorial. To show the authority of the benchers of the Inner Temple to interfere in this case, the memorial referred to the following passage in Dugdale's *Origines Judiciales*, chap. 70 (under the head, "Orders necessary for the government of the inns of Court, &c., 1574"):—"The reformation and order for the inns of Chancery, is referred to the consideration of the benchers of the houses of court to which they are belonging."—p. 312. Also the following words from the same work, chap. 72:—"That the inns of Chancery shall hold their government subordinate to the benchers of every of the inns of court to which they belong; and that the benchers of every inn of court make laws for governing them."—p. 322. It was further stated in the memorial, that an exercise of the power of deciding between conflicting claims of candidates for the office of principal of Clifford's Inn appeared among the records of the society of the Inner Temple in July, 1677, when the election of one Richard Graham was confirmed by the benchers of the latter society, and his competitor, one Summers, was directed to deliver up to him the books, records, &c., of the society of Clifford's Inn, with which direction it appeared, by the records of Clifford's Inn, that Summers complied. This memorial was taken into consideration by the benchers of the Inner Temple, who appointed a day for hearing Mr. Jessopp on the subject of the election, and summoned Mr. Allen to attend on that day, as well *as the steward of Clifford's Inn, with the records of that society. Mr. Allen refused to attend, or to produce the records, which were in [986] his custody; and the benchers, consequently, declined to proceed in the case, but stated to Mr. Jessopp, that they were willing to resume the subject in the ensuing Michaelmas term, if he thought proper to apply to them in that term for a further order upon Mr. Allen.

In Michaelmas term, Mr. Jessopp, without having made such application, moved this Court for a mandamus to Mr. Allen to appear before the benchers of the Inner Temple, in order that they might decide upon his qualification. The Court thought that Mr. Jessopp ought, before moving for a mandamus, to apply to the benchers, according to their suggestion, for a further order upon Mr. Allen, and to try the effect of such order. The application was made, and an order thereupon issued by the benchers, that Mr. Allen should, at a time named, attend them, and produce the books and regulations of Clifford's Inn. The order was duly served: Mr. Jessopp attended at the time named, but Mr. Allen refused to do so; the rules and regulations were not produced; and the benchers, under these circumstances, declined proceeding upon Mr. Jessopp's application. The present rule nisi was then moved for, and granted.

Mr. Allen's affidavit, in opposition to the rule, contained various statements in answer to those of Mr. Jessopp, upon the merits of the election. It further stated, that the deponent did not attend upon the summonses of the benchers of the Inner Temple, because he believed and was advised that they had no jurisdiction to interfere in the management and control of the society of *Clifford's Inn, except by the voluntary assent of both societies, or when [987] chosen to be referees by the disputing parties; that the deponent never heard of any claim or exercise of such jurisdiction, or of the case referred to in Mr. Jessopp's memorial, and that no account of such case was to be found in the books of the society of Clifford's Inn; that he understood and believed that society to be of earlier origin than the society of the Inner Temple, and never to have been in any way subservient thereto; that he had been informed and believed, that the society of the Inner Temple had never desired or claimed, and did not then desire or claim, to exercise any jurisdiction over Clifford's Inn; and

that he also believed, that the society of the Inner Temple had no means to enforce any rule or order against the society of Clifford's Inn, or against any other persons not of their own body.

Follett, in this term (January 21st) showed cause. No authority or case has been cited, which goes the length of proving that the society of the Inner Temple has, in point of right, the power now contended for, or has, in fact, exercised such a power. And if an instance could be given in which that power had been exerted, it is clear, upon principle, that the Court cannot issue a mandamus to one voluntary society to attend upon another, and comply with its order. The Court then called upon

Jessopp, *contrâ*. The authorities given in the affidavit in support of the rule establish the power contended for. [*LITTLEDALE, J.* It does not appear that the benchers of the Inner Temple themselves come forward to assert it.] They [*988] directed the parties to attend them for the purpose *of deciding the point in dispute, and they made a formal order on Mr. Allen to produce the records and rules of Clifford's Inn. [*Sir James Scarlett*, as a bencher of the Inner Temple, here stated, that that society did not intend, by the steps which they had taken, to give an opinion upon the point of jurisdiction, but only to put Mr. *Jessopp* into such a course of proceeding as would enable him to bring his case before this court.] The passages cited in the memorial, from Dugdale, show what was the opinion on the subject in his time. [*LITTLEDALE, J.* We cannot notice them, unless he refers to authorities.] The case of Mr. Graham, stated on the memorial, is an instance in which the power contended for was exercised by the Inner Temple. [*DENMAN, C. J.* The parties there may have consented to the exercise of jurisdiction. We do not know that the proceeding was in invitum. We ought to see, by the roll itself, that it was of that nature, and that, upon such proceeding, the one party was rejected for unfitness, and the other declared to be elected.] Mr. Allen denies that there is any account of the case in the records of Clifford's Inn, but he withholds the books by which the fact might be ascertained. The question is, whether the benchers have done wrong in taking the memorial into consideration, or Mr. Allen in disobeying their order. No ground is stated in his affidavit, for disputing the jurisdiction, except his own information and belief.

DENMAN, C. J. If any example had been produced of an exercise of the authority in question by the benchers of the Inner Temple, we might perhaps have granted this mandamus, to put the subject into a course of inquiry. But no instance has been given. It does not appear that any principal of Clifford's [*989] Inn has ever been *called upon by the authority of the benchers to show before them that he was a proper person for the office, or properly elected. There might perhaps be other objections stated, but this is decisive. Before we call upon this party to submit his title to examination, it ought to be shown that the persons who are to examine have authority to do something with respect to the election. But on this point nothing appears. I do not think it is correct to say that a question arises whether the benchers have done wrong in calling upon Mr. Allen to come before them, because it appears that that was only done to give Mr. *Jessopp* an opportunity of putting the matter in such a train that it might be brought before this court. Without throwing the slightest censure on those gentlemen, we may discharge the rule, upon the ground that the requisite authority has not been proved.

LITTLEDALE, J. No doubt this Court will take notice, in a general way, that the society of the Inner Temple exercises a jurisdiction over the Inn of Chancery called Clifford's Inn; but to grant a mandamus for the particular purpose now suggested, we should have evidence that the benchers of the Inner Temple have before exercised the authority which we are called upon to put in motion. They have a general superintendence over the Inn, but we cannot say that it enables them to decide this matter.

TAUNTON, J. I cannot find, by anything we have heard, that the benchers

of the Inner Temple have the authority which has been ascribed to them : and we ought not to grant this mandamus, when it may appear that there is no jurisdiction to do what is required.

*PATTESON, J. The instance referred to by Mr. *Jessopp* is not one in which the benchers of the Inner Temple are supposed to have exercised [*990] an authority to compel anything to be done ; it merely appears that they decided some question when it was brought before them. We ought at least to have had one instance in which an authority of this kind was exercised by them compulsorily. The rule must, therefore, be discharged. Rule discharged.

The KING v. The Justices of NORFOLK.

A resolution of a court of quarter sessions, that whenever an appeal against an order of removal shall be entered and respited, notice thereof shall, within one month after such entry and respite, be given to the officers of the removing parish, is void, and where the Court of quarter sessions had dismissed an appeal for want of such notice, this Court granted a mandamus to them to hear it.

AN appeal of the churchwardens and overseers of the poor of the parish of Swardston, in the county of Norfolk, against an order for the removal of G. Fowler, his wife and children, from the parish of Trowse Newton in the same county, to Swardston, was entered at the January sessions for that county and respited until the April sessions. Before the April sessions, fifteen days' notice of trial was given by the appellant parish. It was objected by the respondents, that no notice of the entry and respite of the appeal had been given as required by a rule of the court of quarter sessions, whereby it was resolved that, whenever an appeal against an order of removal should be entered and respited, notice thereof should, within one calendar month after such entry and respite, be given to the officers of the removing parish. The sessions thought this a good objection, and dismissed the appeal. A rule **nisi* had been obtained [*991] for a mandamus to the justices to enter continuances and hear the appeal.

Sir J. *Scarlett* and *Austin* in this term (January 16) showed cause, and contended that the sessions had a right to make reasonable rules to regulate the practice of their court, and this rule was reasonable.

Follett and *Palmer*, contra. By the 9 G. 1, c. 7, s. 8, it is enacted that no appeal from any order of removal of any poor person from any parish to another, shall be proceeded upon in any court of quarter sessions, unless reasonable notice be given by the appellants to the respondents, the reasonableness of which notice shall be determined by the justices at sessions ; and if it appear to them that reasonable notice was not given, they are to adjourn the appeal till the next quarter sessions, and then finally hear and determine the same. That statute requires only one notice to be given. The effect of the resolution of the court of quarter sessions, if it were to prevail, would be to deprive the party of this right of appeal unless he gave two notices, one of his having entered and respited it, and another of his intention to try his appeal.

DENMAN, C. J. The court of quarter sessions are to say whether reasonable notice of appeal has been given : they are to judge what notice is reasonable, but they have no right to require any other notice than the one required by the legislature. Here, they have attempted to require a notice of the entry and respite of the appeal ; but their province is only to determine whether a reasonable notice of appeal has been given, *and, if they find that notice not [*992] reasonable, to adjourn the appeal to the next sessions, and then finally determine it. This Court will not be disposed to control the discretion of the justices when it has been fairly exercised ; but it is desirable that the Court of quarter sessions should not vary their rules from time to time, and that they should rather lean to the hearing of appeals than to dismissing them on technical grounds.

LITLEDALE, J. concurred.

TAUNTON, J. The sessions had no right to make the rule in question; and, consequently, the non-compliance with that rule was no ground for their refusing to hear the appeal.

PATTESON, J., concurred.

Rule absolute.

SOUTER v. DRAKE.

In every contract for the sale of an existing lease there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise; and without showing such title, the seller cannot maintain an action at law against the buyer, for refusing to complete the purchase.

Where a lessee in possession contracted to sell the residue of his term, being three years and a quarter, at the rent of 42*l.* per annum, the vendee paying 30*l.* for the fixtures, as per list: Held, that it was not to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease, that the vendee intended to waive his right to call for the production of the lessor's title.

DECLARATION stated that the plaintiff was lawfully possessed of a messuage or tenement by virtue of a certain indenture of lease for the residue of a term of years, at the rent of 42*l.*, together with certain fixtures therein of a [*993] large value, and that on the 24th of February, *1831, the defendant agreed with the plaintiff to take the said house and the said lease for the remainder of the term from Lady-day then next, at 42*l.* per annum, and to pay to the plaintiff 30*l.* for the said fixtures as per list thereof, and in consideration thereof the plaintiff promised to assign the lease to the defendant, and to deliver up possession of the messuage together with the fixtures as per list at Lady-day. The declaration, after stating mutual promises to perform the agreement, averred that the plaintiff delivered to the defendant an abstract of his title to the lease and premises for the purpose of his making and preparing a proper assignment thereof, and that he the plaintiff was ready and willing to execute an assignment of the lease and premises, according to the effect of the agreement, and of his promise and undertaking, and was at Lady-day ready and willing to deliver possession thereof, together with the fixtures as per list, and afterwards on the 23d of March, 1831, required the defendant to accept and take possession of the messuage or tenement, together with the fixtures, and prepare the assignment, and to pay to the plaintiff the said sum of 30*l.* Breach, that the defendant would not take the messuage and premises, and fixtures, or prepare the assignment, or pay the 30*l.* for the fixtures, but wholly refused so to do. Plea non-assumpsit. At the trial before DENMAN, C. J., at the London sittings after Michaelmas term, 1832, the due execution by the defendant of the agreement mentioned in the declaration was admitted; and it appeared that the residue of the term agreed to be purchased was three years and a quarter. It was proved that the plaintiff had produced an abstract of the lease and assignment of it to himself; but the defendant's solicitor insisted that the purchaser [*994] could not be compelled to perform the contract, unless the vendor substantiated the validity of the lease, by showing a good title in his lessor to the freehold out of which it was derived. This the plaintiff refused to do. The Lord Chief Justice directed a verdict for the plaintiff, but reserved liberty to move to enter a nonsuit. A rule was obtained accordingly, and in Trinity term, 1833,

Comyn, showed cause.¹ The plaintiff, who was a vendor of a leasehold estate in his own possession, was not bound to show that the lessor, under whom he held, had a good title to demise. The cases which will be relied upon on the other side arose in courts of equity, and are all collected in *Purvis v. Rayer*, 9 Price, 488, but there is no decision at law to the effect that the purchaser of a leasehold estate can call upon the vendor to produce the title of the lessor under whom he holds. On the contrary, in *George v. Pritchard*, Ryan & M. 417,

¹ Before DENMAN, C. J., LITLEDALE, PARKER, and PATTESON, Js.

which was an action by the vendee against the vendor of a lease, for the deposit, it was ruled at nisi prius, that a vendor was not bound to produce his lessor's title without an express stipulation to that effect. Lord TENTERDEN there said, "On looking to the agreement, I do not find a syllable to warrant the averment in the declaration, that the defendant undertook to make out a good title to the lease. Without such a stipulation, a party selling a lease is not bound to produce his landlord's title, a thing which in most cases would be utterly impossible. The cases the other way are only cases in equity, and although it might be true that the vendor, on a bill for a specific performance, could not compel a purchaser to take a lease without showing *the lessor's title, still I shall hold that, in a court of law, the purchaser cannot recover his deposit on account of such title not being produced, unless the vendor has expressly contracted to furnish his lessor's title." [PATTESON, J. In *Romily v. James*, 6 Taunt. 268, which was an action brought to recover back the deposits paid on a contract for the purchase of lands in fee-simple, upon the alleged insufficiency of the title, GIBBS, C. J., (p. 274), said, that in a court of law the plaintiff "must stand by the judgment of the court as they find the title to be, whether good or bad."—"If he had gone into a court of equity, it might have been otherwise; I know a court of equity often says, this is a title, which, though we think it available, is not one which we will compel an unwilling purchaser to take; but that distinction is not known in a court of law."] In most cases it is impossible for a lessee to produce the title of the lessor; that circumstance must be known to a purchaser, and he must therefore have contracted subject to an implied condition not to call for the production of the lessor's title. Assuming even that, in general, the purchaser of a leasehold interest would be entitled to insist on the production of the lessor's title, here both parties intended that the title should not be produced. That is shown by the terms of defendant's agreement, and of his undertaking to accept the fixtures, and may also be inferred from the small value of the property, the short residue of the term (three years and a quarter), and the absence of any premium for the lease.

Thesiger and Hayes, contra. It is a stipulation implied in every agreement for the sale of a leasehold estate, *where the contrary is not specified, that the vendor shall make a good title to the lease which he (being the lessee or assignee) professes to sell; and, therefore, that he shall show that the original lessor under whom he holds had such title. If so, the vendor cannot, without showing the title of his lessor, recover damages at law for the breach of a contract of purchase, or compel specific performance of it in equity. It may be collected, even from the judgment of Lord ELDON in *White v. Foljambe*, 11 Vesey, 337, that his opinion was, that the party proposing to buy a leasehold estate may call on the vendor to show the title of his lessor, although the decision there proceeded on a different ground. In *Deverell v. Lord Bolton*, 18 Ves. 508, the same learned judge says, "The proposition, that a vendor of a leasehold interest cannot produce his lessor's title, is not to be represented as universally true. I know instances to the contrary. The vendor ought, therefore, where he sells with that restriction, to describe that it is the interest he has that is to be sold;" and he afterwards says, *ibid.* 512, "My clear opinion is, that (assignees of a bankrupt), advertising to sell a freehold estate, undertake, whether they say so or not, to make a title." And in *Waring v. Mackreth*, *Forrest's Rep.* 129, 137, MACDONALD, C. B., in delivering judgment, says, "there is no difference between the purchase of a leasehold interest, and a fee simple, the party having agreed to purchase that interest, has a right to see whether it can be granted to him or not." In *Fildes v. Hooker*, 2 Mer. 427, Sir W. GRANT, M. R., considered it to be an implied stipulation in the contract of sale of a leasehold estate, that the *vendor should produce the title of his lessor. He there says, "Whether the interest contracted for be leasehold or freehold, it seems reasonable that he who

comes for a specific performance, should be prepared to show that he is able to give what he seeks to compel a purchaser to take. What is contracted for is not merely a piece of parchment containing certain covenants: it is an interest in land which is agreed to be given him." In *Purvis v. Rayer*, 9 Price, 488, a bill was filed by the seller of a leasehold estate for years for specific performance. The title was referred to the master, who reported that the seller could not make a good title; on the ground that he could not produce his lessor's title. The plaintiff excepted to the report, and it was there decided, after a very elaborate argument in which all the authorities were cited, that a person offering for sale a leasehold estate, could not, in the absence of any express stipulation to that effect, compel a person contracting for the purchase to take the estate, without showing the title of his lessor, and thus satisfying the purchaser that he himself had a right to the thing which he proposed to sell, and that it was of the nature which he represented it to be. *RICHARDS, C. B.*, there said, *Sugden on Vendors*, MSS. note 336, "the question was whether, when a man sells a leasehold estate, he could compel the purchaser to take it without showing him his title. *White v. Foljambe*, 11 Ves. 337, was the first case on this point. There is no case that goes the length of showing that a lessor is not bound to show his title."—"The general rule is, that where a vendor offers anything for sale, the vendee is entitled to have the thing he buys with a moral certainty that he has the thing he buys. If a man sell an inheritance he must show a title to the inheritance; so if a life estate. [*998] Then what is the difference where a lease is sold?" That decision manifestly proceeded upon the principle that a person who agrees to sell any estate, whether leasehold or of inheritance, by his very contract impliedly undertakes to show that he has that which he professes to sell, and therefore, if the estate be leasehold, to produce his lessor's title. If this be correct, the seller of such leasehold interest cannot, without showing the title of his lessor, maintain an action against the purchaser for not completing the contract. If the rule upon this subject be different in a court of law from what it is in a court of equity, there will be a great anomaly, for it has been held in an action brought to recover back the deposit on a purchase, on the vendor's failure to make good a title, that a court of law will collaterally inquire whether the title be good in equity as well as at law, because, where the contract is to make a good title, it means a good title both at law and in equity; *Elliott v. Edwards*, 3 B. & P. 181; *Maberly v. Robins*, 5 Taunt. 625. Besides, there are authorities in courts of law to show, that a lessor or vendor of a leasehold estate is bound to show his own lessor's title. In *Keech v. Hall*, Doug. 22, Lord MANSFIELD said, "Whoever wants to be secure when he takes a lease, should inquire after and examine the title deeds." In *Temple v. Brown*, 6 Taunt. 60, the Court of Common Pleas declined to decide the general question, unless the parties would put it on the record, so as to afford an opportunity of having their judgment reviewed. In *Roper v. Coombes*, 6 B. & C. 534, where an agreement [*999] was to grant a lease for a large premium, this Court considered the contract to be for sale of a lease, and as the intended lessor could not show, and in fact had not, a title to grant it, the other party was allowed to recover back his deposit. In *Spratt v. Jeffery*, 10 B. & C. 261, PARKE, J., said, "there can be no doubt that the vendor of a lease unconditionally, undertakes to give a good title, but every person may enter into a qualified contract.

Cur. adv. vult.

DENMAN, C. J., in this term delivered the judgment of the Court.

This case, which was tried before me at Guildhall, and in which a rule for entering a nonsuit was obtained, and argued before my brothers LITLEDALE, PARKE, PATERSON, and myself, turns on the question whether a lessee in possession who contracts in general terms to assign his lease can be called on by the proposed assignee to show that the lessor had a good title to demise. However this proposition may have been doubted in former times, the observations

of Lord ELDON in *White v. Foljambe*, 11 Ves. 337, and in *Deverell v. Lord Bolton*, 18 Ves. 505, and of Sir W. GRANT in *Fildes v. Hooker*, 2 Mer. 424, certainly went far to decide it in the affirmative, though the judgment in each case proceeded upon another ground. But in the case of *Purvis v. Rayer*, 9 Price, 488, Lord Chief Baron RICHARDS, after great consideration, and evidently after consultation with Lord ELDON, held that the purchaser of the residue of a term for years from a vendor in possession, had a right to call for the lessor's title.

All these were cases in equity arising on bills for *specific performance : and Lord ELDON, and more particularly Sir W. GRANT, both [*1000] advert to the possibility of a distinction between them and actions for damages to be recovered at law for breach of contract. We cannot, however, help thinking, that the opinions of these eminent judges, and the decisions, especially that of *Purvis v. Rayer*, 9 Price, 488, are authorities upon the general question, whether it arise in a court of law or equity, and that the true ground of refusing relief by a specific performance in these cases is, that the vendor by his contract was bound to make out a good title in all respects to the subject agreed to be sold, including the right of the lessor to demise, and that he had not done so. If that is his contract he must equally fail in a court of law, unless he can prove a performance of it on his part. And no reason occurs to us why, as the courts of law and of equity would put the same construction on a contract for the sale of a freehold estate, they should do otherwise in respect of a contract for sale of a leasehold.

The cases at law have not been numerous on the subject of contracts to grant or sell leases. That of *Gwillim v. Stone*, 3 Taunt. 433, was disposed of before the subject was so much considered as it has since been in the cases in equity. Besides, the points actually decided were, first, that on a contract to grant a lease, there is no engagement necessarily arising by implication of law that the lessor had sufficient power to grant such a lease, and should show a good title; for the court arrested the judgment on the ground that it was not a good breach of an agreement to grant a lease, to state that the defendant had not shown and had not sufficient title; and the second point *decided was that there [*1001] was no contract implied in point of fact, to deliver an abstract of title, on an agreement to grant a lease. In *Temple v. Brown*, 6 Taunt. 60, the question arose as to the latter point, but cannot be considered as having been decided by it. In *George v. Pritchard*, 1 Ryan & Moody, 417, on an agreement in general terms to sell an existing lease, Lord TENTERDEN was of opinion that no contract to make out a complete title could be implied, and that the vendor, without an express stipulation, was not bound to produce his lessor's title: and he considered the cases in equity as deciding merely that a vendor on a bill for a specific performance could not compel a purchaser to take a lease without showing the lessor's title. On the other hand there is a decision of Lord ELLENBOROUGH which appears by no means unworthy of consideration, 3 Camp. 451. In an action for work and labor brought by Mr. Denew, the auctioneer, against Mr. Deverell, the plaintiff in the chancery suit against Lord Bolton above referred to, the defence was negligence in conducting the sale: several witnesses proved it to have been long the constant usage of auctioneers employed to sell leasehold property, to insert a proviso in the particular, that the vendor shall not be called upon to show his lessor's title. The jury found a verdict for the defendant with his Lordship's full approbation. He thought the plaintiff guilty of gross negligence, in not adhering to the practice, which he observed had very properly sprung up among auctioneers, to insert such a proviso. We have, therefore, that learned judge's opinion of the reasonableness of the practice, and the fact that it has prevailed in the ordinary course of business, which is strong to show the *general understanding that a vendor is bound to make out a good title in all respects, upon the sale of a leasehold, unless the contrary is expressed. [*1002]

For the reasons above given, we come to the conclusion, that, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity; and we cannot adopt the distinction acted upon in *George v. Pritchard*, 1 Ryan & Moody, 417.

It was, however, contended, that, admitting the general doctrine, the terms of the instrument, in this case (as in that of *Spratt v. Jeffery*, 10 B. & C. 249), showed that both parties intended to waive the question of title: and that this was to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease.

From these circumstances, and from the agreement "to take the lease and fixtures as per list," we might think it very probable that the contracting parties never thought of the title. But this cannot be stated higher than as a very probable conjecture; and it would be dangerous to defeat the general rule by speculations on the possible intention of the parties.

It follows that the purchaser had a right to call for proof of the lessor's title before he parted with his money; and as no title was shown, this action for refusing to complete the purchase cannot be maintained. Rule absolute.

[*1003] *The KING v. The Justices of the West Riding of YORKSHIRE.
Jan. 21.

(Case of the LEEDS and WHITEHALL Roads.)

The General Turnpike Act, 4 G. 4, c. 95, s. 87, gives an appeal to the sessions to any person who shall think himself aggrieved by anything done by any two justices in pursuance of that act, or any local turnpike act; and declares that the determination of the sessions shall be final and conclusive, and that no proceeding to be had in pursuance of that act shall be removed by certiorari. The sessions on appeal against a certificate of two justices, that a turnpike road, made under a local act, had been completed, and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, this Court refused to grant a mandamus to them to hear the appeal, on the ground that their decision was contrary to the local act.

A local turnpike act recited, "that the making and maintaining a new turnpike road from Leeds to join the Wakefield and Halifax turnpike road, at a certain point, and several branch roads (therein also described) from and out of the said main turnpike road, would be an advantage to the inhabitants of Leeds and Halifax, and to the public in general;" and it authorized the making of the said several roads, and enacted, "that the said new roads should not be respectively opened to the public, or become public roads, until two justices should have certified that the said roads respectively, and the works thereon respectively, were completely made and fit to be travelled upon throughout the whole length of such roads respectively."

Semble, per LITLEDALE and TAUNTON, Js., that the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed and fit to be travelled on, but that the main road, when so completed, and certified so to be by two justices, became a public road, although the branch roads were still unfinished.

In 1826, an act of parliament was passed for making and maintaining a new road from Leeds to Whitehall, near Halifax, and several branch roads therefrom, all in the West Riding of the county of York. The preamble was in the following words: "Whereas, the making and maintaining a new turnpike road from Leeds in the West Riding of the county of York, to join the Wakefield and Halifax turnpike road at or near Whitehall in the township of Hipperholme-cum-Brighouse in the parish of Halifax in the said Riding, passing through or into the several townships or places of Leeds, Holbeck, &c. (naming several more), all within the riding aforesaid, and the making and maintaining several branch roads from and out of the said main turnpike road, will be a

[*1004] *great accommodation to the inhabitants of the townships of Leeds

and Halifax, and of the several townships and places lying near the said roads, and to the public in general, &c." The act, after authorizing the making and maintaining the several roads, contained the following clause: "Provided, always, and be it further enacted, that the said new roads shall not be respectively opened to the public, or become public roads or highways, until two justices of the peace acting for the West Riding of the county of York, legally assembled at a special sessions, shall have certified that the said roads respectively, and the bridges, culverts, and embankments, and other works thereon respectively, are completely made and fit to be travelled upon throughout the whole length of such roads respectively." Two justices acting for, and residing within, the wapentake of Agbrigg and Morley in the said Riding, certified that they had viewed so much of the main turnpike road, authorized to be made by the act of parliament, as was situate within the wapentake aforesaid, and lay between Whitehall and the centre of the river Aire, in the township of Holbeck in the said Riding; and that such part of the said main road, and the bridges, culverts, embankments, and other works thereon, were completely made, and fit to be travelled upon throughout the whole length of such road. Two other justices, acting for and residing within the wapentake of Skyrack in the said Riding, certified that so much of the said main road, &c., as was situate between a certain turnpike road called the Wellington Bridge road, and the centre of the river Aire, both in the township of Leeds, were completely made, and fit to be travelled upon throughout the whole length of such road. At the Michaelmas West Riding sessions, an appeal was entered by Briggs, a rated inhabitant of Wike (one of the places enumerated in the preamble of [*1005] the above Turnpike Act), against these certificates. On the hearing of the appeal, the counsel for the appellant objected that the certificates were void, because all the branch roads authorized to be made by the act had not been completed; and thereupon the Court, after hearing the point argued, and without going further into the merits of the appeal, adjudged, that as the certificates were given before the branch roads were completed, they were therefore void. Before the adjudication, the counsel for the respondents tendered evidence in support of the certificates; but the Court refused to hear it. A rule nisi having been obtained, calling upon the defendants to show cause why a mandamus should not issue, commanding the Justices to enter continuances and hear the appeal,

Sir G. A. Lewin and Baines now showed cause. The court of quarter sessions have decided that the certificate of the justices was void, because it was granted before the branch roads were completed. That decision, whether right or wrong, is made final by the General Turnpike Act, 4 G. 4, c. 95, s. 87.¹ The attempt *is by the present rule to obtain the opinion of this [*1006] Court upon the very point of law decided by the sessions. Unless the Court determine that point in favor of the respondents, it is useless to grant a mandamus, because, if the certificate was valid before the appeal, it is so now; *Rex v. Cumberworth*, 3 B. & Ad. 108, shows that the judgment of the sessions, even on the point decided by them, is right. There, the trustees were authorized to make a road from one place to another, and the making of the entire road was held to be a condition precedent to any part of the highway becoming reparable by the public. The Road Act in that case recited that the making

¹ It enacts, that if any person shall think himself aggrieved by any determination made, or matter or thing done by any justices of the peace in pursuance of that act, or any local act for making or repairing any turnpike road, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace for the riding, &c., wherein the cause of complaint shall arise; and the said justices at such sessions shall hear and finally determine the causes and matters of such appeal; and the determination of such general or quarter sessions shall be final and conclusive to all intents and purposes; and no proceeding to be had or taken in pursuance of that act, shall be removed by certiorari or any other writ or process, into any court of record at Westminster.

of the one turnpike road would be a great advantage to the public. Here the recital is, that the making of the several roads will be of great advantage to the public; the making of all those roads, therefore, was a condition precedent to any of them becoming highways reparable by the public. But, however that may be, this Court has no jurisdiction to review the decision of the quarter sessions, except on a case sent up for their consideration; *Rex v. The Justices of Carnarvon*, 4 B. & A. 86; and it will not, therefore, grant a mandamus to hear this appeal.

F. Pollock, Milner, and Dundas, contra. *Rex v. Cumberworth*, 3 B. & Ad. 108, is distinguishable from this case, because, there the Turnpike Act contemplated the making of one road only. Here, the Turnpike Act contemplates the making of several, and it contains a proviso, "that the said new roads shall not [*1007] be respectively opened to the public, or become public roads or highways *until two justices shall have certified that the said roads respectively, and the bridges, and other works thereon respectively, are completely made, and fit to be travelled upon throughout the whole length of such roads respectively." The true meaning of that clause is, that when any one or more of the roads shall be made and certified, such particular roads are to become public roads. But it is said that the sessions have adjudged the certificate to be void, and that their decision on that point is final. If the sessions had heard all the evidence, and then decided on a point of law, this court would not interfere, but they decided on a preliminary objection, and rejected evidence in support of the certificate. [PATTERSON, J. The object of that evidence must have been to show, not that the certificate was valid in point of law, but that, in point of fact, the main road was completed. By the general turnpike act, any person thinking himself aggrieved by any determination of the justices in pursuance of that act, or any local act, for making any turnpike road, may appeal to the sessions, and the sessions are to hear and finally to determine the causes and matters of such appeal." Now, here, one of the grounds of appeal was that the certificate was granted before all the branch roads were completed. That fact having been admitted, the sessions have decided that the certificate was for that reason void: their decision in that respect could not have been altered by evidence.] If the sessions had heard the evidence that the road was completed, and that it was an advantage to the public, they would have paused before they decided as they did on the point of law.

[*1008] *DENMAN, C. J.* Assuming that the judgment of the Court of Quarter Sessions does decide that the certificate was void in point of law, I am of opinion that this Court has no power to interfere; because the eighty-seventh section of the General Turnpike Act (4 G. 4, c. 95), makes the decision of the sessions final and conclusive, and takes away the certiorari. The effect of holding that, in consequence of the special nature of the judgment, we might grant a mandamus to them to hear the appeal, would be to repeal the eighty-seventh section, and to enable the justices to shrink from the responsibility cast on them by the legislature, and to throw it on this Court. It is unnecessary to decide whether the sessions were right in holding that the certificate, in this case, was premature. I think that they were perfectly right in deciding at once on the point of law without going into evidence which could not possibly alter their judgment on that point. We are of opinion that the sessions have done what they were authorized to do by the statute; and that we ought not to grant a mandamus to review their decision, because we should be thereby doing indirectly what the statute prohibits us from doing directly.

LITLEDALE, J. I think we ought not to grant this mandamus. The sessions have decided that the certificate was void, and the General Turnpike Act makes their decision final and takes away the certiorari. As to the question on the act of parliament, I think that the certificate was not premature. The statute provides "that the said new roads shall not be respectively opened to [*1009] the public, or become public roads or highways, *until two justices shall have certified that the said roads respectively, and the bridges-

and other works thereon respectively are completely made and fit to be travelled upon throughout the whole length of such roads respectively." The effect of that clause, in which the word respectively occurs four times, is to make each road, as soon as it is complete and certified, a public road. I cannot entertain any doubt that the certificate was not premature. It is unnecessary, however, to decide that point, because the sessions have adjudicated upon it, and the legislature has declared that their judgment shall be final.

TAUNTON, J. It is not necessary to decide the point on the construction of the local act. If it were, I should say that my opinion accorded with that expressed by my brother LITLEDALE. We are asked here to issue a mandamus to the sessions to rehear the appeal, because they have adjudged that the certificate was void, without receiving any proof. It is admitted that one of the questions submitted to the court of quarter sessions was whether the certificate was premature. Now, when the legislature by the General Turnpike Act, took away the certiorari, it must have intended to take away our power of questioning the legality of the determination of the court of quarter sessions, and to make that a court without appeal. If therefore we made this rule absolute, on the ground that the decision of the sessions was wrong, we should indirectly be repealing the eighty-seventh section of the General Turnpike Act, which makes that court supreme judges in matters of this sort. The rule therefore must be discharged.

*PATTESON, J. It is not denied that section 87 of the General Turnpike Act, gave an appeal from the certificate of the two justices [*1010] to the court of quarter sessions, and consequently that that court had jurisdiction; nor is it denied, that at the sessions there were two points to be decided; first, a point of law, whether the certificate was premature and void, on the ground that the branch roads had not been completed; and secondly, a question of fact whether the main road was completely made. If the preliminary question was decided in favor of the respondents, the second became wholly immaterial, and there could be no ground for receiving evidence. It is undoubtedly no ground for granting a mandamus, that the court of quarter sessions refused to hear useless and irrelevant matter. The sessions decided that the certificate was void; and their judgment is made final by the General Turnpike Act. I do not say what my opinion would have been upon the point raised on the act of parliament, because I will not encourage parties to obtain the opinion of the court on speculative points. Rule discharged.

*JANE GRAHAM, Executrix of JOSEPH GRAHAM, v. BARRAS. [*1011]

A ship was insured from April 1st, 1831, to January 1st, 1832, warranted not to sail foreign after the times limited in certain club rules. The rules or warranties of the club limited the times of sailing to different parts of the world, and by a distinct warranty (the ninth) it was declared, that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship was then ready for sea. The vessel insured was bound for the Bay of Fundy, from Dublin, and the last day for sailing, by the rules, was the 1st of September. She cleared out on the 31st of August, and dropped down the Liffey on the 1st of September, with an incomplete crew (though a full complement was engaged before the ship cleared out), to a place within the port of Dublin, where she lay at anchor the rest of the day. During that day the whole crew came on board, and on the 2d she proceeded on her voyage, having been prevented from doing so on the 1st by an unfavorable wind. She was afterwards lost:

Held, per LITLEDALE, J., and semble per TAUNTON, J., that the policy must be construed as incorporating the ninth article of warranty, and not merely the several directions as to the times of sailing; DENMAN, C. J., and PATTESON, J., dubitantibus:

Held, by all the Court, that the ship did not actually sail till after the 1st of September, and that she was not ready for sea at the time of clearing out, the whole crew not being then on board: Also, LITLEDALE, J., dubitante, that the words in the ninth article of warranty, "provided the ship is then ready for sea," if incorporated with the policy, must be limited to the point of time at which the clearances were obtained,

and that as the vessel was not then ready, for want of a full crew, there had not been a constructive sailing on or before the 1st of September, according to the ninth warranty.

By one of the rules it was provided, that vessels might sail after the limited time on payment of an additional premium as per scale; and by another rule, every member of the club, before the commencement of each voyage, was to give his acceptance for the premium; and parties "neglecting to give notice" were subject to a penalty: Held (assuming that these rules can be incorporated with the present policy), that a party whose ship had sailed too late and been lost could not afterwards obtain the benefit of the extended time, by submitting to the penalty and paying the extra premium.

ASSUMPSIT on a policy of insurance. At the trial before ALDERSON, J., at the Spring assizes for Northumberland, 1833, a verdict was found for the plaintiff for 100*l.*, subject to the opinion of this court upon the following case.

The policy, dated 23d of March, 1831, was upon the ship *Castlereagh*, the property of the said Joseph Graham, at and from the first day of April, 1831, at noon, to and with the 1st day of January, 1832, at noon, warranted not to sail foreign after the time restricted in the Liberal Premium Club Rules. Copies of the policy and rules were annexed to and formed part of the case. On

[*1012] the 31st of August, 1831, the said ship, having a full crew *ready to take her out to sea, though not all actually on board, was lying moored at St. George's Dock, Dublin, under charter to proceed with freight to St. Andrew's in the Bay of Fundy, and on the same day she was cleared out in the usual way at the custom-house of Dublin. About half-past three in the morning of the 1st of September, the ship, with only the master, mate, one seaman and two boys (not then having a sufficient crew on board for the voyage), dropped down the river Liffey with a fair wind to the Pigeon Hole within the port or harbor of Dublin, assisted by a boat's crew. The ship arrived at the Pigeon Hole about five o'clock in the morning, and came to anchor at the Pigeon Hole within the harbor or port of Dublin. The master returned to the city of Dublin after mooring the vessel in the Pigeon Hole, and after collecting the rest of the crew and procuring his despatches, rejoined his vessel in the Pigeon Hole about six o'clock in the afternoon of the same day. About that hour and not before, the residue of the crew, which was then complete, came on board the ship at the Pigeon Hole. In the afternoon and evening of the 1st of September the wind was unfavorable for the *Castlereagh's* going out to sea, but a little before midnight it became fair, it being then low water, and she went out as soon afterwards as she could, with a fair wind. On the 2d of September, about half-past three o'clock, and with the tide at half flood, she weighed anchor, and sailed from the Pigeon Hole and proceeded on her voyage, and ultimately, and not before, quitted the port of Dublin about half-past five o'clock on the morning of the 2d of September. The Pigeon Hole is about two miles below the custom-house, and from the Pigeon Hole to the mouth of the port of Dublin, is two

[*1013] *miles further. On the morning of the 1st of September it was high water at Dublin at forty-nine minutes after five, and at the evening tide it was high water between six and seven. The tide in the Liffey is a six hours' tide. Ships of the burden of the *Castlereagh* may safely proceed out of the port at half flood. The tide in the Liffey ebbs at about two or three knots an hour, and ships may drop down out of the harbor from the Dock or Pigeon Hole with the tide. It was not proved that the defendant was a member of, or had any ships insured in the Liberal Premium Club. The *Castlereagh* was totally lost in December, 1831.

The question for the opinion of the court was, whether the sailing of the *Castlereagh* under the circumstances above detailed constituted a sailing within the terms of the warranty. If the court should be of opinion that it did, a verdict for 100*l.* was to be entered for the plaintiff, otherwise a nonsuit to be entered.

The following are the rules and warranties of the Liberal Premium Club, chiefly referred to in the argument:—

Warranties. Art. 6 provides that ships are "not to sail to Quebec from ports on the east coast of Great Britain after the 10th of August, from ports on the west coast of Great Britain, or ports in the British Channel and Ireland, after the 15th of August, nor to any other ports in British America from ports on the east coast after the 25th of August, nor from ports on the west coast of Great Britain, ports in the British Channel, Ireland, or ports in Europe westward of the Downs, after the 1st of September; but allowed to sail to the Bay of Fundy, and all ports on the east coast of Nova Scotia, as far north as Cape Canso, at all times, on payment*of an additional premium, as per scale on the sum insured." Articles 7 and 8 contain similar restrictions on voyages to certain ports in Europe. Article 9 is as follows:—"The time of clearing at the custom-house to be deemed the time of sailing, provided the ship is then ready for sea, as relates to the sixth, seventh, and eighth warranties; but ships allowed to proceed to any port for the purpose of clearing outward, provided such port and time of sailing be within the limits of the warranties; but in case of not clearing, the master's letter, or such other proof as the committee may think satisfactory, to be deemed sufficient."

Rule 1 declares, "that this association shall be conducted upon the principle of paying premium for each voyage or passage, agreeably to the scale hereunto annexed." By rule 3, "each and every member shall, on or before the commencement of each voyage or passage, give, or cause to be given, his acceptance to the secretary, for the amount of premium for such voyage or passage as he may be proceeding upon, agreeably to the scale of premiums" (which was prefixed to the warranties and rules); "the time of breaking ground in ballast, or when at the ballast-marks with a cargo, to be deemed the beginning of a voyage or passage. Neglecting to give notice, to be liable to a fine on the sum insured of 1 per cent. in the coal and coasting, 2½ per cent. in the Baltic and North Sea, and 5 per cent. in the American and other trades, in case of loss or average; and neglecting or refusing to return bills accepted, ten days after having been applied to by the secretary, to cease being insured, on receiving written notice to that effect."

*This case was argued in the present term (January 17), by—

Alexander for the plaintiff. The ship sailed, according to the meaning of the warranty, on the 1st of September at latest. She had cleared out at the custom-house on the 31st of August; and on that day, and on the 1st of September, when she dropped down the river to the Pigeon Hole, she had a full crew, though they were not all on board. If she sailed on one of those days, her being detained at the Pigeon Hole by an unfavorable wind till the 2d, was not material. It was not necessary to her sailing, that all the crew should be actually on board: by the ninth warranty, the time of clearing is the time of sailing, and at that time the captain at least must be on shore. Nor can the accidental absence of one or two of the seamen be material, especially where it is not even alleged that any mischief ensued. The ship, on the 31st, and when she dropped down the river, had everything ready for the prosecution of her voyage, and in that respect the case differs from *Pittegrew v. Pringle*, 3 B. & Ad. 514. There, there was no time during the first of September (the last day for sailing), at which the ship was ready for sea; and Lord TENTERDEN, in his judgment, insisted on that fact. At all events, when the whole crew were on board, which happened on the 1st of September, the ship had sailed within the meaning of the policy. For a ship to sail, according to the ordinary acceptation, some movement is necessary; but these articles allow of a constructive sailing, which depends, not on any locomotion, but on the vessel having cleared, and being in a condition to prosecute her voyage. But, further, if there was not a sailing within due time, the sixth article*of warranty provides that vessels may sail to the Bay of Fundy (to which this ship was bound) at all times, on payment of an additional premium, as per scale on the sum insured. The payment of that additional premium is not a condition precedent

to such latter sailing; circumstances may preclude the possibility of its being stipulated for and paid beforehand; but it may be recovered afterwards, and the scale would fix the amount. The case of a voyage being commenced without previous notice and payment of the proper amount of premium, is provided for by the third rule, which imposes a penalty in such cases. The omission does not avoid the policy. [DENMAN, C. J. How can you make that rule part of the present policy? The policy only incorporates the club rules so far as they point out the times of sailing, not for other purposes.] The sixth warranty, referred to by the policy, must be read in connexion with the third rule, which is necessary to explain it. By sailing later than the 1st of September (if he has done so) the assured rendered himself liable to an additional premium capable of being ascertained; and that liability, though there has been no payment of the premium, is equivalent to it for the purpose of this action, upon the same principle upon which it has been held that in an action for a personal injury, the plaintiff may recover the amount of his surgeon's bill as damages, though it be unpaid, *Dixon v. Bell*, 1 Stark. N. P. C. 287; S. C. 5 M. & S. 198. [DENMAN, C. J. According to your argument, parties might, in the case of such an additional premium, be made insurers against their will. They might have reasons for not wishing to accept the risk on such a premium. And the assured would never pay it unless *where a loss happened.

[*1017] DALE, J. Supposing that the time may be extended on payment of an additional premium, ought not the assured to state beforehand, what extension of time he will want? And when is he to give that notice to the insurers? Can it be given after the warranty has failed? DENMAN, C. J. He must do it when he makes his bargain.] The party may not know that he will want the additional time, soon enough to give notice. It is sufficient that when he takes the extended time, a liability to the further premium arises.

W. H. Watson, contra. As to the last point: this is not a question between the plaintiff and the Liberal Premium Club; and their rules are only applicable so far as the present policy refers to them with respect to the times of sailing. The scale of premiums cannot be connected with the present policy: the premiums in the scale are on voyages to different parts of the world; the policy is a time policy. Even supposing the rules applicable, parties are not to be made insurers against their will. [DENMAN, C. J. There is no doubt that, if the assured wishes to avail himself of the extension of time, paying the additional premium, the insurers must be apprised of that intention at the time of commencing the voyage; it is not to remain in the breast of the assured.] Then as to the other points. It is established by *Ridsdale v. Newnham*, 3 M. & S. 456, *Lang v. Anderdon*, 3 B. & C. 495, and *Pittegrew v. Pringle*, 3 B. & Ad. 514, that, in order to sail, according to a warranty like this, a ship must break ground with a bona fide intention to prosecute her voyage, having her clearances, and being, in every *respect, fitted to perform the voyage.

[*1018] Then do the warranties in the present case introduce any variation of that rule? The policy here, by its terms, incorporates so much of the sixth, seventh, and eighth warranties as relates to the times of sailing to particular places, and no more. The ninth warranty is no part of the regulations so incorporated: it is not a restriction upon them, but only a provision added, on the part of the club, to define what shall be a sailing, under their policies. If that warranty applies to the present case at all, it must in toto; but the latter part cannot apply. In *Pittegrew v. Pringle*, 3 B. & Ad. 514, the agreement of the parties was to be governed by "the rules and regulations as to the periods of sailing and limits of navigation, which govern the principal insurances of North Shields:" here the rules and warranties in question are only adopted as to a particular point, viz., times of sailing. But, assuming that the ninth warranty is to be taken as part of the policy, still there was no sailing within the limited time. The time of clearing is to be deemed the time of sailing, "provided the ship is then ready for sea." To comply with that regulation,

the ship ought, at the time of clearing, to be ready for sea in every respect short of heaving the anchor: it is not enough that a crew is engaged, the men must be on board. It cannot have been intended that, if a vessel cleared without being ready for sea, and became ready afterwards, though at the last moment, that should operate as a compliance with the regulation. Then, if the vessel be not ready for sea at the time of clearing, according to the letter of the rule, she must actually sail, according to the definition *of sailing laid down [*1019] in the cases, within the stipulated time. But here the ship never had her complement of men on board till six in the evening of the 1st of September, and she did not actually sail till the 2d. Her dropping down the river, with an incomplete complement of men, on the 1st, was merely preparatory to the voyage, *Ridsdale v. Newnham*, 3 M. & S. 456. There was, therefore, in this case, neither a constructive sailing within the ninth warranty, nor an actual sailing within the time limited by the sixth.

Alexander, in reply. The ninth warranty and the preceding ones must be taken together, because the ninth is introduced to explain what the parties mean by the word "sail," and its effect is to give that word a peculiar sense. The vessel here had cleared, and had also every requisite to make her ready for sea, on the 1st of September. She did, therefore, constructively sail on the 1st. In *Ridsdale v. Newnham*, 3 M. & S. 456, the ship had not obtained her clearances on the last day. So, in *Pittegrew v. Pringle*, 3 B. & Ad. 514, there was no period on the last day, at which the ship was ready for sea. In *Lang v. Anderson*, 3 B. & C. 495, the question turned upon an actual sailing.

DENMAN, C. J. This is an action on a time policy, the warranty being, not to sail foreign after the time limited in the Liberal Premium Club rules. I feel great doubt on the first question raised for the defendant, namely, whether the rules can be referred to for any purpose but to ascertain the times to which the vessel is restricted in sailing to different parts of the world. But if the ninth *article of warranty is to be considered as referred to by the policy, [*1020] the question then is, whether that warranty has been complied with. (His Lordship then read it.) By this regulation the time of clearing is to be deemed the time of sailing, "provided the ship is then ready for sea." It certainly is most convenient for both parties to have such a stipulation as this, that the time of sailing may be referred to a period of time capable of being ascertained by both; and the time of clearing is such a period. The simple question then is, whether the ship was ready for sea when she was cleared? Now at that time there was a crew engaged, but where they were, whether within ten miles or forty, does not appear. It cannot be said that the ship was ready for sea when she had only the master, mate, one seaman and two boys on board, and could not get down the Liffey without assistance. I think the rule as to an extension of the time of sailing does not apply to this policy, and if it did, that the facts here do not entitle the plaintiff to claim the benefit of it.

LITTLEDALE, J. There was no sailing, in this case, according to the ordinary sense of that word, by the 1st of September. Then the question is, first, whether the ninth warranty, which gives a different interpretation of the term "sail" is to be considered as inserted in this policy? and I think we ought not to construe the policy so strictly as to hold that warranty excluded. The next question is, whether the assured complied with the condition of sailing, according to that warranty? At the time when the clearances were obtained the crew were not actually on board; it does not appear how that happened; whether they were ready to come on board when *it was thought proper to call for them, or whether they were at a distant place, or dispersed over [*1021] the town or harbor of Dublin; at all events they were not on board. Then we have to inquire, whether the words "time of clearing," in the warranty, are to be considered as giving a continuing protection down to the time when the crew joined the ship; and I rather think that the words ought not to be restrained to the actual time of clearance, but that the "clearance" is a continuing thing,

and overrides the whole time down to the period on the 1st of September when the complete crew was on board. On the other point, whether the assured can now take advantage of the rule allowing an extension of the time on payment of a higher premium, I entertain no doubt. The claim to do so is attended with innumerable difficulties.

TAUNTON, J. The policy warrants that the ship shall not "sail foreign" after the times limited by the Liberal Premium Club rules; that is a warranty that, as to her time of sailing, she shall conform to those rules; and, by one of the rules, it is provided, that no vessel insured shall sail to any port in British America from a port in Ireland, after the 1st of September. Then the simple question is, did this ship sail after the 1st of September or not? Had she actually sailed on that day? I think not, because on that day, after arriving at the Pigeon Hole, she remained stationary, and did not proceed to sea. Then my Lord has expressed a doubt whether the ninth article of warranty ought to be taken into consideration in construing this policy. I rather think that it ought; but, giving the plaintiff all the advantage of it, I still think he is not entitled to recover. By that regulation *the time of clearing is to be deemed the [*1022] time of sailing, provided the ship is then ready for sea. I cannot refer that word *then* to anything but the point of time when the clearance was obtained: if she had not her whole crew on board when the ship was cleared, she was not "then ready for sea" according to the warranty. *Pittegrew v. Pringle* goes the whole length necessary for determining this case. PARKE, J., 3 B. & Ad. 522, there says, "The vessel certainly had not everything ready for the performance of her voyage on the 1st of September, nor could it be said, when she got under sail, that nothing remained to be done afterwards; for she had to take on board what was material for the prosecution of the voyage, a larger portion of ballast." So here, the ship had not everything ready for the performance of her voyage, because she had not her full crew; as in that case a larger quantity of ballast was wanted, so here the vessel required a larger number of men. I come to the present conclusion with the more confidence, because there is no case that conflicts with it. Of *Lang v. Anderdon*, 3 B. & C. 495, where the vessel was held to have sailed, it is sufficient to say as LITLEDALE, J., observes in *Pittegrew v. Pringle*, 3 B. & Ad. 522, that she was on her voyage in the regular course for ships of that size, on the day warranted.

PATTESON, J. I am also of opinion that the plaintiff cannot recover. Supposing that the ninth clause of warranty is to be considered as forming part of the policy, I think the vessel was not ready for sea according to that clause. The words "then ready for sea," must be referred to the 31st of August, when [*1023] she *obtained her clearances, and, at that time, the crew appear to have been wandering about Dublin. They were, indeed, engaged; but, if that were held sufficient, it might as well be said that a ship was ready for sea if a cargo was procured but not on board. I have, however, a very great doubt indeed whether the ninth clause of warranty is incorporated in the policy. This is a time policy, not a policy on the voyage. There were a number of places to which she might sail, and the rules ascertain the times for sailing to those places. It appears to me that the policy refers plainly to the times of sailing so pointed out, and not to the regulation which declares what shall be evidence of the ship having sailed.

Nonsuit to be entered.

The KING v. The Inhabitants of ST. MARY-AT-THE-WALLS,
COLCHESTER. Jan. 22.

Pauper, on the 16th of May, 1811, being in the local militia, hired himself to the Colonel of his regiment, to serve for a year, and served under that contract. On the 4th of May, 1812, the regiment was assembled for training, and continued in training till the 19th of May. During that time the pauper was under military control, though he also served the Colonel as an indoor servant. While the regiment was assembled, he

received pay from the crown, and also his wages from his master: Held, that the pauper gained a settlement by hiring and service, the fact of his being a militia-man having been known to the master at the time of the hiring.

ON appeal against an order of two justices, whereby Thomas Lester, his wife and children, were removed from the parish of Stratford St. Mary, in the county of Suffolk, to the parish of St. Mary-at-the-Walls, in the borough of Colchester: the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper's father had gained a settlement in the parish of St. Mary-at-the-Walls. In the year 1811, the *pauper was a private in the 1st regiment of Essex Local Militia, commanded by Colonel Strutt. On the [*1024] 24th of April, 1811, the regiment was assembled for training at Colchester, and continued there in training till the 15th of May following, up to which day the pauper was a drummer upon the permanent staff of the regiment. On the 16th of the same month, the pauper then being off the permanent staff, Colonel Strutt, who knew that the pauper was in the local militia, hired him for a year at the wages of 10*l*. The pauper served the Colonel under that hiring. He resided in the parish of St. George, Hanover Square, in London, until the 4th of May, 1812, upon which day the regiment was again assembled for training at Colchester. Colonel Strutt went there to take the command, and the pauper accompanied him, and was reported as belonging to the regiment. Each officer being by the rules of the service allowed a soldier from the ranks as a personal servant, the pauper was chosen by the Colonel to be his servant. The regiment continued to do duty at Colchester till the 19th of May in that year, during which time the pauper was under military control, but he was only paraded once, and served the Colonel during the whole period as an indoor servant. The pauper received pay from the Crown whilst the regiment was assembled; he also received his wages from his master for the same period. Upon the 16th of May, 1812, the Colonel paid the pauper his wages of 10*l*., and upon that day hired him for a year from that time at the wages of 14*l*. the year. Under this second contract, the pauper continued in the service of Colonel Strutt till November, 1812, when he was discharged; having remained from the 16th to the 19th of May, 1812, at *Colchester, under military control, serving the Colonel as before [*1025] mentioned.

Austin and Palmer, in support of the order of sessions. The pauper, being a local militia-man, could make only a conditional contract to serve for a year; viz., provided he was not called upon to do duty in the militia. Here, in fact, during the first year for which he was hired, he was called on to serve as a militia-man, and was subject to the control of the Crown during eleven days of that year. There was neither hiring for a year, nor a year's service under the contract. Under the second contract, there was not a year's service. [PATTERSON, J. The master, at the time of hiring, knew that the pauper was in the local militia; and the 52 G. 3, c. 38, s. 65, enacts, that no service under that act of any apprentice shall be deemed an absence from service, or a breach of any agreement as to service, or absence from service, in any indenture of apprenticeship. The very point now raised was decided in *Rex v. Elmley Castle*, 3 B. & Ad. 826.] That case is inconsistent with *Rex v. Taunton St. James*, 9 B. & C. 831, where the judges, after an elaborate argument, decided that that section of the Militia Act applied only to contracts existing at the time of the ballot or enrolment, and not to contracts subsequently made. In *Rex v. Elmley Castle*, 3 B. & Ad. 826, the sixty-second section of the Militia Act, 52 G. 3, c. 68, was not adverted to; but in *Rex v. Taunton St. James*, 9 B. & C. 831, it was observed by BAYLEY, J., that that section, which enacts that the enrolment of servants shall not vacate or rescind contracts between master and servant, except in certain cases, applies to contracts existing at the time of the enrolment; for such contracts *only could be vacated or rescinded by [*1026] the enrolment; and that the sixty-third section, which provides that

no ballot, enrolment, and service under that act, shall extend to make void, or in any manner to affect any contract of service, notwithstanding any agreement in such contract, and that no service under that act of any servant shall be deemed or taken to be an absence from service, or a breach of any agreement as to any service or absence from service, &c., applies only to the same class of contracts. In *Rex v. Elmley Castle*, 3 B. & Ad. 826, the case of *Rex v. Taunton St. James*, 9 B. & C. 831, was not much noticed [TAUNTON, J. PARKE, J., did refer to and distinguish that case; he says, "in *Rex v. Taunton St. James*, the objection was, that the pauper was not, when he hired himself, capable of making an absolute contract to serve for a year; and, therefore, having made such contract without reference to his liability as a militia-man, he was not lawfully hired for a year, and gained no settlement. But here, the pauper did communicate the fact of his being a militia-man to the master." PATTESON, J. The pauper, if he had not informed the master at the time of the hiring that he was a local militia-man, would have made an absolute contract which he had no power to make; but here the master was aware of that fact.] Then the hiring was conditional, and the event contemplated in the condition occurred during the year for which the pauper was hired; and, therefore, there was no yearly hiring. [DENMAN, C. J. As the master knew that the pauper was liable, during the year, to be called on to serve in the militia, did [*1027] he not, during the time for which the *pauper was actually serving, dispense with his service?] That is the question, and *Rex v. Westerleigh*, Burr. S. C. 753, and *Rex v. Winchcombe*, Dougl. 391, will be relied upon in support of that position; but those cases were spoken of with disapprobation by Lord ELLENBOROUGH in *Rex v. Beaulieu*, 3 M. & S. 229.

Knox, contra, was stopped by the Court.

DENMAN, C. J. In *Rex v. Elmley Castle*, 3 B. & Ad. 826, *Rex v. Taunton St. James*, 9 B. & C. 831, was clearly before the Court; it was cited by the counsel, and referred to by one of the judges. Those cases were decided within the space of three years of each other, and my brother LITLEDALE concurred in both judgments. The ground of distinction taken in *Rex v. Elmley Castle* is very satisfactory. This case falls within it, and the pauper, therefore, gained a settlement by his service with Colonel Strutt. The order of sessions must be quashed.

LITLEDALE, TAUNTON, and PATTESON, Js., concurred.

Order of sessions quashed.

[*1028] *The KING v. The Inhabitants of PRESTON. Jan. 22.

Where an instrument is not required by law to be stamped within a particular time after its execution, the Court, upon its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping.

An indenture of apprenticeship, without premium, was executed April 27th, 1825, but not stamped till July, 1832, when a 1*l.* stamp was put on it, and a 5*l.* penalty paid. Afterwards a double duty (2*l.*) was paid. The indenture was offered in evidence, to prove the settlement of a pauper by service under it. Held, that as it was not within stat. 8 Ann. c. 9, which limits the time for stamping indentures, the Court was not called upon to notice the circumstances under which the stamps were affixed.

ON appeal against an order, removing John Chaplin from the parish of Monks Eleigh to the parish of Preston, both in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, John Chaplin, by indenture dated the 27th of April, 1825, was bound apprentice for six years to Robert Cousins of Monks Eleigh. There was no premium, and the indenture at the time of the binding, and until the 6th of July, 1832, had no stamp. The pauper served the six years under the indenture, residing all the time in Monks Eleigh. On the 6th of July, 1832,

1*l.* for the stamp, and 5*l.* for the penalty, were paid to the commissioners of stamps, who caused the indenture to be stamped with a 1*l.* stamp; and a receipt to be duly written thereon for the sums of 1*l.* and 5*l.* respectively. These sums, as appeared by the cross-examination of the overseers of Preston, were provided and paid by the appellant parish. This evidence was received subject to an objection by the appellants' counsel to its admissibility. On the 18th of August, 1832, the pauper gave a written notice to his former master R. C. to procure the indenture to be stamped with the double duty; see stat. 20 Geo. 2, c. 45, s. 6. The master refused, and in consequence of such refusal the pauper, on the 5th of September, 1832, signed a written request to the commissioners of stamps to affix the double duty, and paid them the further sum of 1*l.*, and a second 1*l.* stamp was accordingly affixed to the indenture.

*The question for the opinion of the Court was, whether or not the pauper gained a settlement by his service under this indenture. [*1029]

Austin and *Gurdon* in support of the order of sessions. The indenture is void, because it was not duly stamped. It was not rendered valid by the payment of the 1*l.* duty and 5*l.* penalty, nor by payment of the two 1*l.* duties. The duty of 1*l.* is imposed on indentures where no premium is given, by the 55 G. 3, c. 184. The act repeals the duties granted by former statutes; but enacts (s. 8), that all the powers, provisions, clauses, regulations, directions, and penalties contained in and imposed by the several acts relating to the duties thereby repealed, shall be of the same force and effect with respect to the duties thereby granted, as far as the same are or shall be applicable, and shall be applied, &c., so far as the same shall be consistent with the provisions of that act, as fully and effectually, to all intents and purposes, as if the same had been therein repeated and specially re-enacted. *Rex v. Chipping Norton*, 5 B. & A. 412, shows that the provisions and penalties of former stamp acts were considered to be kept in force by 44 G. 3, c. 98, which repealed former duties, but contained a clause similar to that just cited. And in *Rex v. Church Hulme*,¹ it was ex-

¹ *REX v. The Inhabitants of CHURCH HULME. May 28th, 1831.*

The 55 G. 3, c. 184, does not repeal the provision of 8 Ann. to c. 9, as to the time for stamping indentures of apprenticeship; and therefore, an indenture of apprenticeship (a premium having been paid with the apprentice), must be stamped with the ad valorem duty, within the time prescribed by the statute 8 Ann. c. 9, ss. 36, 37, 38, and if not so stamped, is wholly void.

On appeal against an order of two justices, whereby Thomas Longstaff, and his wife and two children, were removed from Church Hulme to Nether Knutsford, in the County of Chester, the sessions quashed the order, subject to the opinion of this Court on a case, by which it appeared that the pauper, by indenture of the 30th of September, 1820, bound himself, with the consent and approbation of his father, to serve Peter Orme, then residing in the appellant township, as an apprentice, for five years; and Peter Orme, in consideration of the sum of 10*l.*, which was given with the apprentice, covenanted to instruct him, &c. Under this indenture, which was duly executed by all the proper parties, the pauper served his master in the appellant township upwards of three years. The indenture was not stamped until after the order was made for the removal of the pauper, and within a few days of the sessions, when it was stamped at the instance of the inhabitants of the respondent township, and not of any of the parties to the indenture, though they were living. The sessions, on production of the indenture, finding that it had been stamped with the proper duty stamp required by 55 G. 3, c. 184, sch. A., part I. (viz. 1*l.*), upon payment of a penalty of 5*l.*, within a few days of the trial of the appeal, quashed the order.

Coltman, and *J. H. Lloyd*, in support of the order of sessions. The indenture was void, because it was not stamped within the time required by the statute 8 Ann. c. 9. By the 44 G. 3, c. 98, all the numerous duties upon indentures then in force were repealed after the 10th of October, 1804, and one consolidated duty imposed in lieu thereof. The duties in force before that time were of two kinds. 1st. The deed stamp or duty upon the instrument: 2d. The premium stamp, or ad valorem duty upon the premium contracted for with the apprentice. By the 5 W. & M. c. 21, s. 3, a duty of 6*d.* was imposed on the indenture; and unless the paper or parchment was stamped before it was written upon, it could be stamped afterwards only by payment of the duty and a penalty of 5*l.* Several acts followed imposing further duties and penalties. By 87 G. 3, c. 136, the penalties were consolidated, and the commissioners were required by s. 2, where no duty had been paid, or less than was due, to affix the stamp on payment of the duty, and one

[*1030] pressly *held that the provisions of the statute 8 Anne, c. 9, and of other stamp acts, were kept in force by the 44 G. 3, c. 98, and the subsequent acts relating to stamps. Now here the stamps imposed are to be

penalty of 10*l*. only for every skin of parchment, &c. This is the last stamp act which specifies any particular sum as a "penalty," and this remained in force at the passing of the 44 G. 3, c. 98. But by section 8 of that act, every penalty, &c., for any offence committed against any act in force before or on the 10th of October, 1804, for securing the duties under the management of the commissioners of stamps, and the several clauses, powers, provisions, directions, matters, and things therein contained, are declared to extend to, and are to be respectively applied and put in execution for and in respect of the several duties by this act imposed, in as full a manner, to all intents and purposes, as if all and every the said clauses, &c., were particularly repeated and re-enacted in the body of this act. The other stamp acts repealing duties previously imposed, contain similar provisions: viz., 30 G. 2, c. 19, s. 25; 16 G. 3, c. 84, s. 16; 28 G. 3, c. 58, s. 12; 35 G. 3, c. 30, s. 5; 37 G. 3, c. 19, s. 8; 37 G. 3, c. 90, ss. 6 & 9; 44 G. 3, c. 98, s. 8; 48 G. 3, c. 149, s. 8; 55 G. 3, c. 184, s. 8. Since the 44 G. 3, c. 98, as well as since the 37 G. 3, c. 136, the commissioners have had no power to stamp without requiring payment of a penalty of 10*l*., as well as the duty itself. Then as to the premium duty, that was imposed by the 8 Ann. c. 9, s. 32, which lays certain ad valorem duties: by sections 36, 37, and 38, of that act, the times are specified within which every indenture shall be stamped with the ad valorem duty payable by that act; and, by section 39, unless so stamped, the instrument is declared void. By the 20 G. 2, c. 45, however, relief was granted under the following conditions and restrictions. By sect. 5, where the master had neglected to pay the duty under the 8 Ann. c. 9, as required by that act, he was enabled to get it stamped within two years after the expiration of the apprenticeship (provided no prosecution had been commenced against him for such neglect), on payment of double the duty required by the 8 Ann. c. 9. In such case the apprentice was enabled to follow his trade, and the indenture was available in law, and might be given in evidence. By section 6, where the master had neglected to pay, and upon request by the apprentice, refused to pay within three months, and the apprentice paid the double duty, the apprentice might sue the master for double the premium, might be discharged from his indentures, and, by sect. 7, have the same benefit of the time he had served as he might have had in case of assignment. By sect. 8, where a prosecution had been commenced against the master, if the apprentice paid the double duty within a certain time, then he was to be allowed to follow his trade, and the indenture was made available in law, and might be given in evidence. In *Rex v. The Inhabitants of Chipping Norton*, 5 B. & A. 412, the indenture was executed before the passing of the 44 G. 3, c. 98, and it was decided that it was void, because, though it was stamped at the time it was produced in evidence, with the stamp required by the 55 G. 3, c. 184, it had not been stamped within the time required by the stat. 8 Ann. c. 9, and it was held that the pauper by serving under it gained no settlement. That authority decides the present case, unless it can be shown that the provisions of the stat. 8 Ann. have been repealed by some subsequent statute.

Cottingham, contra. The stat. 44 G. 3, c. 98, repeals the former stamp acts. [Lord TENTERDEN, C. J. It repeals the duties imposed by those acts, but it, as well as other later stamp acts, studiously retains all the other provisions.] It retains them so far as they are not altered by that act; but the provisions in question are of that class which, as appears from the preamble, the act was intended to abolish. *Rex v. Chipping Norton*, 5 B. & A. 412, was the case of an indenture executed before the passing of the 44 G. 3, c. 98.

Lord TENTERDEN, C. J. I cannot distinguish this case from *Rex v. Chipping Norton*. The case went on the ground that the provisions of the stat. 8 Ann. c. 9, were in force, and therefore that an indenture of apprenticeship must be stamped with the premium stamp, within the time required by the statute. That case is decisive of the present, if the provisions of the stat. 9 Ann. still continue in force. Now, it has not been shown that they are repealed; on the contrary, it appears that the legislature, in the statutes repealing duties previously imposed, has studiously retained all the provisions, clauses, regulations, directions, &c., contained in the several acts relating to the duties repealed. That being so, no settlement was gained by the pauper in *Knutsford*. The order of sessions must be confirmed.

LITLEDALE, J. I think the provisions in question are continued by 55 G. 3, c. 184, s. 8, as well as by the preceding acts.

PARKS, J. The respondents were bound to show either that the decision in *Rex v. Chipping Norton* was wrong, or that the provisions in question, in stat. 8 Ann. c. 9, had been repealed by some act since 44 G. 3, c. 98. It appears to me that neither can be done.

TAUNTON, J., concurred.
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Order of sessions confirmed.

considered as a deed *stamp, and as a stamp on an indenture without premium, under 55 G. 3, c. 184 (Sched. part 1, tit. Apprenticeship). [*1031] The deed stamp comes within the provision of 37 G. 3, c. 136, s. 2, by which the commissioners are required, *where no duty has been paid, or less than was due, and the accumulated penalties would exceed 10% above [*1032] the duty, to stamp the instrument upon payment of the proper duty, and one penalty of 10%. Here only 5% have been *paid as a penalty.¹ With [*1033] regard to the second stamp, if it was in the nature of a premium stamp, subject to the regulations of the 8 Anne, c. 9;² the payment of 2%, the double duty, does not set up the indenture as a valid instrument. It could only be made so by virtue of some of the provisions on this head in 20 G. 2, c. 45, which are kept in force by the subsequent stamp acts, like the clauses of 8 Anne, c. 9, to which they relate. Now of those provisions of the 20 G. 2, c. 45, the only ones applicable to the facts of this case, are sections 6 and 7, and these merely give certain remedies and advantages to the apprentice; they do not render the indenture available unless proceedings have been taken under section 8, which has not been done here.

Biggs Andrews, and Byles, contra. In *Rex v. Chipping Norton*, 5 B. & A. 412, as well as in *Rex v. Church Hulme*, Antè, 1029, note (b), a premium was paid, and, consequently, those cases came within the provisions of 8 Anne, c. 9, sects. 37, 38, 39, which require that all indentures containing the sum given as a premium, shall be endorsed and stamped within a certain time after date, &c., or else shall be void. That is the distinction. Where an instrument is to be void unless stamped within a given time, the Court will inquire into the time of stamping; otherwise not. *Here no premium was paid, and therefore the provisions of the statute of Anne, as to time, do not apply. [*1034] (They were then stopped by the Court.)

DENMAN, C. J. The main question intended to be raised does not arise. When an act of parliament requires a stamp to be affixed within a certain time, and declares that the instrument shall be void unless stamped within that time, it may be necessary to inquire into the time when the stamp was affixed; but when the question is merely, whether the instrument be admissible in evidence as bearing a stamp, it is sufficient if it has the proper stamp, and we cannot inquire into the time when it was affixed.

LITTLEDALE, J. The rule, as to receiving documents in evidence is, that the document, at the time when it is produced, should have the proper stamp affixed.

TAUNTON, J., concurred.

PATTESON, J. I am sorry that a very ingenious argument has been thrown away in this case. The courts have inquired when the penalty was paid in cases where that was material, but no case has been pointed out in which they have asked whether the right penalty has been paid. Suppose no penalty at all had been paid, would the Court inquire into that circumstance if they saw that the document had a proper stamp?

Order of sessions quashed.³

¹ It was stated that this arose from a mistaken practice of the commissioners since the passing of the 44 G. 3, c. 98, in explanation of which reference was made to the evidence of Mr. Sykes before the parliamentary commissioners of revenue inquiry. See *Coventry on Stamps*, Appendix, p. 1x.

² The duty on indentures of apprenticeship with a premium, imposed by 8 Anne, c. 9, s. 32, and at first given only for five years, is made perpetual, with the powers, provisions, &c., relating to it, by 9 Anne, c. 21, s. 7.

³ See *Rex v. Ide*, 2 B. & Ad. 866.

*REES, Gent., One, &c., v. M. MORGAN, Executrix of A. MORGAN, deceased. Jan. 23. [*1035]

After the passing of the act for the uniformity of process, 2 W. 4, c. 89, which directs, "that all personal actions, where it is not intended to hold the defendant to bail, &c.,

shall be commenced by writ of summons;" an executrix pleaded, to an action of assumpsit, plene administravit, and no assets on the day of exhibiting the bill of the plaintiff. The plaintiff in his replication tendered issue in the words of the plea: Held, that the words exhibiting the bill, upon these pleadings, meant the commencement of the suit by writ of summons, and not the filing of the declaration; and, therefore, that evidence of payments made by the executrix between the times of suing out the writ and filing the declaration, was inadmissible.

ASSUMPSIT for work and labor done by the plaintiff as attorney for the testator. Plea, that the defendant had fully administered, and that she had not then, nor on the day of exhibiting the bill of the plaintiff in this behalf, or at any time since, had, any goods or chattels which were of A. Morgan, deceased, at the time of his death, in her hands to be administered. Replication, that the defendant, on the day of exhibiting the bill of the plaintiff in this behalf, had divers goods and chattels, which were of A. Morgan, deceased, in her hands as executrix to be administered; and upon this issue was joined. At the trial before PATTESON, J., at the Carmarthen Spring assizes, 1833, the plaintiff proved his bill of costs for business done by him as attorney for the testator to the amount of 32*l*. The defendant, in support of the plea of plene administravit, tendered evidence of various payments made by her on account of the testator up to the 23d of February, 1833, when the declaration was filed. The plaintiff put in the writ of summons, which appeared to have been sued out on the 8th, and served on the 10th of December, 1832. In it the defendant was not described as executrix. The learned Judge was of opinion, that evidence of payments made by the defendant after the service of the writ on her was inadmissible; and a verdict having been found for the plaintiff for 20*l*. damages, *Chilton*, in Easter term last, obtained a rule nisi for a new trial, on the

[*1036] *ground that the learned Judge had improperly rejected the evidence of payments made by the defendant after the issuing of the writ of summons, but before the filing of the declaration. In moving for the rule he contended, that the true meaning of the issue joined between the parties was, whether the defendant had any goods of the testator to be administered on the day of filing the declaration. He cited Com. Dig. tit. Administration, C. 2 (p. 340), to show that "if a suit be commenced by one creditor, the executor may pay the other, till he (the executor) has notice of the suit" (referring to *Corbet's case*, 1 Leon. 312, and 2 Leon. 60); also 1 Rolle's Abr. 927, tit. Executors, T. pl. 2, and 1 Dyer, 32 a, note 2. In Com. Dig. tit. Administration, C. 2 (p. 340), it is stated that an arrest upon a latitat, subpœna out of the Exchequer, &c., is not notice, if it do not express the cause of action. Here it is consistent with the pleadings, that the defendant may not have had notice of any claim against her in her character of executrix until the filing of the declaration.

John Evans and *E. V. Williams* now showed cause. The plea is undoubtedly informal, and would have been bad upon demurrer. The proper form of pleading would have been to allege that at the time of the commencement of the suit the defendant had no assets to administer. But the plea is sufficient in this stage of the proceeding. Before the act for uniformity of process, 2 W. 4, c. 39, this form of pleading would have been proper, unless the action had been commenced by original, in which case it would have been necessary for the defendant to show that she had fully administered to assets before the commencement of the suit. Here, both parties have treated the exhibiting

[*1037] *of the bill as the commencement of the suit. Unless the expression was used in that sense by the defendant, her plea is bad. The plaintiff, by not replying the issuing of the writ, and the service thereof on the defendant, and that she then had assets, treats the exhibiting of the bill as the commencement of the suit. The words "at the time of exhibiting the bill," must mean either the commencement of the suit, or the filing of the declaration, or they must be wholly insensible. If they mean the commencement of the suit, then, the defendant could not, under this plea, show payments made by

her after the commencement of, but before she had notice of the suit, for that would not be the matter in issue. If she had intended to rely on such payments, she should have pleaded accordingly. In Com. Dig. tit. Administration, C. 2 (p. 340), citing Dyer 32 *a* (in margin), it is said, "if an executor has paid since the action, before notice, he ought to plead that he had not notice till such a day, and plene administravit before : semble." [LITLEDALE, J. It would seem from Com. Dig. tit. Pleader, 2 D. 9 (p. 565), that before the pleadings were in English, the words used in pleading plene administravit were *nulla habet bona nec habuit die impetrationis billæ*; and *Gewen v. Roll*, Cro. Jac. 182, is cited, where such a plea, without saying *nec unquam postea*, was held to be bad.] If the words "the exhibiting of the bill" meant the filing of the declaration, and not the commencement of the suit, the plea would have been bad; because any payment made by an executrix after action brought is a *devastavit*. The words of the plea ought now to be so construed as to make it a valid defence. Supposing the issue tendered by the replication to be insensible, the *defendant cannot have a replender, because she made the [*1038] first fault in pleading. Tidd's Pr. 9th edit. 921.

Chilton, contrâ. It is not incumbent on the defendant to show that the words in the plea necessarily mean the time of filing the declaration. It lies upon the plaintiff, who has tendered the issue in those words, and upon whom the proof of the affirmative lies, to affix some definite meaning to them. Before the act for the uniformity of process, the exhibiting of the bill was synonymous with the filing of the declaration. If the plaintiff, instead of tendering issue, had replied that the defendant had assets at the time of the commencement of the suit, the latter might have rejoined that she had then no notice of action : *Dyer*, 32, *a*, note 2. The words, if they have any meaning, must have a meaning analogous to that which they had in courts of law, before the act for uniformity of process passed, and that was the filing of the declaration. [PATTESON, J. In all personal suits where an officer or prisoner of the King's Bench was defendant, the course of proceeding was for the plaintiff to exhibit his bill against the defendant without suing out any original; but as the Court had no primary jurisdiction in actions on contracts, when such an action was contemplated against a person not privileged as an officer or prisoner, the course was for the plaintiff to cause him to be arrested on a fictitious charge of trespass, by a bill of Middlesex or *latitat*; upon such an arrest, the defendant was committed to the custody of the marshal; and the plaintiff then filed his bill against him in the particular suit, and thereby commenced that suit.] If the words, "exhibiting the bill," be construed to mean the commencement of the suit, the effect may be to make the defendant liable, although she may have exhausted *the assets in [*1039] paying debts of the testator after the commencement of the action, and before notice; but it is clear from the authorities cited in moving for the rule, that executors may pay debts pending a writ against them if they have not notice of it.

DENMAN, C. J. The evidence was rejected by the learned Judge at the trial, on the ground that the issue joined between these parties substantially was, whether the defendant had any assets before the commencement of the suit, that is, the suing out of the writ of summons. The words the exhibiting of the bill in the plea (in this sense) state a defence to the action; but they do not if they are understood in the other sense, filing the declaration. I think we must understand the defendant to have used them in that sense in which they will be effective. And considering that before the Uniformity of Process Act, 2 W. 4, c. 89, the words "the exhibiting of the bill," might be synonymous with the words "commencement of the suit," I think we do no violence to the language of the plea by putting that construction on them. The evidence tendered, therefore, was immaterial, and was properly rejected by the learned Judge.

LITLEDALE, J. Before the Uniformity of Process Act, the exhibiting of a bill was generally the commencement of the suit. That expression, when used

in pleading, was only an informal mode of saying "the commencement of the suit." It is contended now that it ought not to be understood in that sense, because the commencement of the suit, since the act for uniformity of process, is by writ of summons, and not by exhibiting a bill. But we must give some effect and meaning to these words, as used by the parties to this suit, if we can.

[*1040] *They certainly have not the technical meaning which they formerly had; but many words, which formerly had a technical meaning, are now used in a different sense; and the popular meaning of these words is, the commencement of the suit. A bill and declaration were not necessarily the same thing: the bill preceded the declaration, and the declaration pre-supposed a bill. In proceeding against a member of the House of Commons, or against a prisoner in the custody of the marshal, the bill was clearly the formal commencement of the suit. Whether a *latitat* or a bill of Middlesex was the commencement of the suit, is very doubtful. In Tidd's Practice, 9th edit. p. 146, it is said that "anciently the process in trespass was founded on a plaint or queritur entered on the records of the court; and the first process thereon was a precept in the nature of an attachment, upon which the sheriff returned, either that he had attached the defendant, or that he had nothing by which he could be attached. On the latter return, if the defendant did not appear, there issued a bill of Middlesex; and, if the defendant did not reside in the county, a *latitat*." Though the language used in the plea is not, strictly speaking, applicable to the existing state of things; yet, as the plaintiff did not demur to the plea, but tendered an issue upon it, I think that it may be taken in a general popular sense to mean the commencement of the suit; and if that be the meaning, then evidence of payments made by the defendant between the service of the writ of summons and the filing of the declaration was inadmissible.

TAUNTON, J. It has been said that an executrix may plead to an action by a creditor, payment of debts of the testator after the commencement of a suit, but before *she had notice of the action; here, however, she has not done so, but merely pleaded *plene administravit* before the exhibiting of the bill: and if the latter words mean the commencement of the suit, the only question is, whether she had then fully administered. Since the passing of the 2 W. 4, c. 39, the suing out of the writ of summons is undoubtedly, in strictness, the commencement of the suit; the words "exhibiting the bill" were first used by the defendant in her plea, and they must be understood in a sense appropriate to the purpose of making the plea an effective defence. So construing them, they must be taken to mean the commencement of the suit by writ of summons. We do no injury to the defendant by supposing that she meant to plead a good plea, and not a bad one.

PATTESON, J. It seems to me that the plaintiff has totally failed in showing that, before the late act, the exhibiting of the bill meant the filing of the declaration. The mode of pleading the Statute of Limitations is to aver, that the cause of action did not accrue within six years before the exhibiting of the bill against the defendant. There the exhibiting of the bill means the commencement of the suit, *Granger v. George*, 5 B. & C. 149. So here, the defendant, by stating that before the exhibiting of the bill she had fully administered, pleaded in effect "that she had fully administered before the commencement of the suit;" and the plaintiff, by taking issue upon that plea, treated those words in the same sense. The rule must be discharged. Rule discharged.

¹ See *Wood v. Newton*, 1 Wils. 141, where the judgment of the Court of K. B. proceeded on a similar ground.

[*1042]

*WARMAN v. FAITHFULL. Jan. 25.

An instrument in writing, whereby A. agreed to let premises to B. for seven, fourteen, or twenty-one years (commencing at Christmas day then next), at the option of B., at the yearly rent of 24*l.*, payable quarterly, the first payment to be made at the ensuing

Lady-day, free of rates and taxes; and whereby B. stipulated, if he should be desirous of putting an end to the agreement at either of the terms before specified, to give six months' notice; and that he, B., should pay all the expenses of preparing a lease for either of the terms above stated:—is a lease, and not a mere agreement for a lease.

REPLEVIN. The declaration charged a taking of the plaintiff's goods in his dwelling-house. *Avowry*, that the plaintiff, for two quarters of a year ending the 24th of June, 1832, held the dwelling-house as tenant to the defendant by virtue of a demise thereof to the plaintiff, at the rent of 24*l.*, payable quarterly, and that defendant distrained for half a year's rent. Plea, that the plaintiff did not hold and enjoy the said dwelling-house as tenant thereof to the defendant under the supposed demise. At the trial before **TINDAL, C. J.**, at the Surrey Spring assizes, 1833, it appeared that the plaintiff occupied the premises under the following instrument signed by the plaintiff and defendant, and stamped with a deed stamp. "Memorandum of an agreement, made and entered into this 28th of November, 1831, by and between John Faithfull and W. Warman, that is to say, he the said J. Faithfull, agrees to let to the said W. Warman, for a term of seven, fourteen, or twenty-one years (commencing at Christmas-day, 1831), at the option of the said W. Warman, two attached messuages or tenements, with the gardens thereto belonging, situate at Kingston Bottom, in the parish of Ham, in the county of Surrey, at the yearly rent of 24*l.*, payable quarterly; the first payment to be made at Lady-day, 1832; free and clear of all rates, taxes, or charges, whether parliamentary, parochial, or otherwise. It is also agreed that W. Warman is to paint the inside of the said messuages or tenements every seven years, and the *outside every five years, and to keep [*1043] the said messuages or tenements in good and substantial reparation; and that whatever buildings or additions may at any time be erected or built on the said premises by W. Warman, shall be left by him when he quits possession of the same, and shall not on any account be removed; and if W. Warman should be desirous of putting an end to this agreement at either of the said terms before specified, he hereby binds himself to give to the said John Faithfull six months' notice in writing of the same. Lastly, it is agreed that W. Warman is to pay all the expenses of preparing lease for either of the terms above stated." No rent has been paid. It was objected by the plaintiff that this instrument did not amount to a present demise. The learned judge thought that it was a lease, and directed a verdict to be taken for the defendant for 12*l.*, the half year's rent; but reserved liberty to the plaintiff to move to enter a verdict for 4 guineas. In last Easter term plaintiff obtained a rule nisi, on the ground that the circumstances of a future lease having been stipulated for was conclusive against the implication of any present demise. *Dunk v. Hunter*, 5 B. & A. 822, was cited.

Thesiger now showed cause. The instrument in question amounted to an actual demise, and not to a mere prospective agreement for a lease. The general rule is, that where the words of an instrument are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for a determinate time, such words, whether they run in the form of a license, covenant, or agreement, amount *to a lease for [*1044] years; *Bacon's Abr. Leases, K.* An instrument may operate as a present demise, although the parties to it appear to have contemplated a future lease. In *Poole v. Bentley*, 12 East, 168, one agreed to let, and the other to take land for sixty-one years, from Lady-day then next, at a certain rent; and the tenant agreed to lay out 2000*l.* within four years in building five or more houses; and when five or more houses were covered in, the landlord agreed to grant a lease or leases, &c.; and the agreement was to be considered binding till one fully prepared could be produced. This was held to operate as a lease. Lord **ELLENBOROUGH** there said, that the intention of the parties, as declared by the words of the instrument, must govern the construction. In *Doe dem. Walker v. Groves*, 15 East, 244, the landlord agreed to let, and also upon demand,

to execute to the tenant the lease of a farm; and the tenant agreed to take, and, upon demand, to execute a counterpart of the lease of the farm from a day specified, for fifteen years, at a certain rent, &c.; the agreement was to bind until the lease was made; and the tenant was to cultivate properly for the present season: it was held that this contract amounted to a lease, and that the provision for a future lease was for better security. In *Pinero v. Judson*, 6 Bingh. 206, there was an agreement to grant a lease (to contain certain specified covenants), and in the mean time, and until such lease should be executed, the intended lessee to pay rent and to hold the premises subject to the covenants above-mentioned, he also undertaking to do certain repairs on or before a day named; and this [*1045] was *held to amount to an actual demise. *Dunk v. Hunter*, 5 B. & A. 322, is distinguishable; because there the contract was entirely executory, and it did not appear by the instrument when the tenancy was to commence, or when the rent was to become due. Here, both those circumstances are specified.

Platt, contra. The instrument in question was a mere agreement for a lease. In *Roe dem. Jackson v. Ashburner*, 5 T. R. 163, it was held that words in an agreement, that A. shall hold and enjoy, &c., not accompanied by restraining words, would operate as words of present demise; but otherwise, if the intention of the parties to execute a future lease could be collected from the subsequent words. There, the words were, "he shall enjoy, and I engage to give a lease;" and Lord KENYON said the latter words clearly showed, "that it was the intention of the parties there should be some further assurance. It was in fieri at that time." Now it could not be the intention that the instrument in this case should operate as a present demise. It conveyed no specific term, and provided that a future lease should be prepared. In *Drake v. Munday*, Cro. Car. 207, testator covenanted that the defendant should have and enjoy a house for six years, and the defendant covenanted to pay 90% rent during the six years; and the Court held that the instrument amounted to a lease, with a reservation of rent: but there the term was specified in the instrument.

DENMAN, C. J. This rule was obtained on the authority of *Dunk v. Hunter*, [*1046] 5 B. & A. 322. The foundation of the *argument in that case was, that the stipulation by the defendant to let on a lease with a purchasing clause, showed that a future lease containing such a clause was contemplated. It is necessary here for the defendant to show that the relation of landlord and tenant existed between him and the plaintiff at the time when the distress was made. I think the plaintiff here occupied under a lease. Everything necessary to a complete and perfect lease is contained in the instrument. A specific rent is reserved; the times at which the tenancy is to commence, and the rent to become payable, are ascertained. This instrument certainly amounted to a lease, and the defendant was entitled to distrain.¹

LITLEDALE, J. The modern decisions, which are collected in Harrison's Digest, tit. Landlord and Tenant, as to what constitutes a lease, appear somewhat contradictory. Independently of those decisions, and looking to the older authorities on the subject, I am of opinion that the instrument in question amounted to a present demise. In Comyns's Dig. tit. Estates (G. 1), two old cases are cited. In one of them, *Harrington v. Wise*, S. C. Cro. Eliz. 486 (cited from 1 Rolle's Abr. 847, Estate, X. pl. 2), there were articles under seal, made between A. and B. in these words, "Imprimis: it is covenanted and agreed between the parties, that A. doth let the said lands, for and during five years, to begin at the feast of St. Michael next following, provided always that

[*1047] B. *shall pay to A. annually, during the term, at the feasts, &c., 120%." Also the said parties do covenant, that a lease shall be made and sealed according to the effect of these articles, before the feast of All Saints next ensuing." The question was, whether this was an immediate lease, or only an agree-

¹ *Platt* not being in court when cause was shown against the rule, the Judges delivered their opinions in his absence. *Platt* was heard on a subsequent day, and the Court adhered to the judgment they had already given.

ment to have a lease made. All the judges held it to be a good lease. "For the words, it is agreed that A. doth let, being in the present tense, is a good lease by the words of the agreement, and that which follows is in reference to further assurance." Maldon's case is the other case cited in Comyns's Dig., Cro. Eliz. 33. That, however, is only a nisi prius decision. There it is said, "If one saith to me, 'you shall have a lease of my lands in D., for twenty-one years, paying therefor 10s. per annum: make a lease in writing, and I will seal it:' this was agreed to be a good lease by parol, although no writing be made of it, for the intent of the lessor is sufficiently expressed, and the making of it in writing is for further assurance." On these cases, it seems to me that the instrument now in question amounts to a lease.

TAUNTON, J. On the authority of *Poole v. Bentley*, 12 East, 168 (which has been followed by other decisions), I am of opinion that the instrument in question amounts to a demise. By it Faithfull agrees to let to Warman, for seven, fourteen, or twenty-one years (commencing at Christmas-day, 1831), at the option of the latter, the premises therein described, at a specified rent; the first payment to be made at Lady-day, 1832. It seems to me that everything which could be intended to be *provided for between parties to a lease, has [*1048] been provided for by this instrument; that it operated as a demise from Christmas, 1831; and that the stipulation about granting a future lease was for the better security of the lessee, as was said in *Doe Lessee of Walker v. Groves*, 15 East, 244. In *Dunk v. Hunter*, 5 B. & A. 322, the time when the tenancy was to commence, or the rent to become due, was not fixed by the instrument.

PATTESON, J. The distinctions between the cases on this subject have been very nice. The general rule is, that the intention of the parties is to be collected from within the four corners of the instrument. Here all the terms of a tenancy are to be found in the document. The stipulation at the end of it, that Warman shall pay the expenses of the lease for either of the terms before specified, viz., seven, fourteen, or twenty-one years, did for a time create a doubt in my mind whether the term was fixed; but, looking to the clause immediately preceding, whereby Warman agrees to give six months' notice in case he should be desirous of putting an end to either of the terms, I think he acquired a right to a term of twenty-one years, determinable at his option, at the end of seven, fourteen, or twenty-one years. The case comes within the principle of the decision in *Poole v. Bentley*, 12 East, 168. The rule for entering a verdict for the plaintiff must therefore be discharged. Rule discharged.

*CHILD v. CHAMBERLAIN, BOND, JESSOPP, and Others.

Jan. 27.

[*1049]

The 1 & 2 Ph. & M. c. 12, s. 2, which enacts, "that no person shall take for keeping in pound, impounding, or poudage of any distress above 4d. for any one whole distress that shall be so impounded," does not extend to cases where the goods are impounded on the premises, by virtue of the 11 G. 2, c. 19, s. 10.

DECLARATION stated that defendants, pretending that 45*l.* 18*s.* was due from the plaintiff to Chamberlain for rent of certain premises, wrongfully seized the goods of the plaintiff as a distress, for the supposed arrears of rent; and that the defendants, not regarding the statute in that case made and provided, &c., but contriving, &c., took from the plaintiff a large sum of money, to wit, 1*l.*, for impounding the said distress, being greater than the sum of 4*d.* allowed by the statute. Plea, not guilty. At the trial before PARKE, J., at Westminster, in this term, the following appeared to be the facts of the case. The distress was made by Bond, on behalf of Chamberlain, for 45*l.* 18*s.* rent due to the latter. The goods seized were not removed from off the premises, but left there in possession of Jessopp. They were appraised at 17*l.* 12*s.* by the other defendants, and were sold for 18 guineas. The following sums were claimed: for

levy, 2*l.* 5*s.*; man in possession seven days, 1*l.* 4*s.* 6*d.*: and those sums were paid out of the proceeds of the goods. For the plaintiff it was urged that he was entitled to recover the difference between the sum of four pence and the sum actually taken by the defendant, by the 1 & 2 Ph. & M. c. 12, s. 2, which enacts, "That no person shall take for keeping in pound, impounding, or poundage of any manner of distress, above the sum of four pence for any one whole distress that shall be so impounded, upon the pain of five pounds to be paid to the party grieved, over and *beside such money as he shall [*1050] take above the sum of four pence." The learned Judge thought the sums in question were not taken for keeping in pound, impounding, or poundage of a distress, within the meaning of that statute; but told the jury to find for the plaintiff, if they thought the sums charged and taken were excessive. The jury found for the plaintiff, damages one farthing. The learned Judge reserved leave to the plaintiff to move to enter a verdict for the difference between 3*l.* 9*s.* 6*d.*, the sum taken by the defendants, and four pence, the sum allowed by the statute.

Dunbar in this term moved according to the leave reserved.¹ There was a sum exceeding four pence taken for the poundage of a distress, within the meaning of the stat. 1 Ph. & M. c. 12, s. 2; for so long as the goods distrained continue in custody of the law they are impounded. The 57 G. 3, c. 93, s. 1, enacts, "that no person making any distress for rent, where the sum demanded and due shall not exceed 20*l.* for and in respect of such rent, shall have, take, or receive out of the produce of the goods distrained upon and sold, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress than such as are fixed in the schedule thereunto annexed," viz.:—three shillings for making the distress, and two shillings and sixpence per day for the man in possession: but that statute applies only to cases where the sum is less than 20*l.* *Cur. adv. vult.*

*DENMAN, C. J., now delivered the judgment of the Court.
[*1051] We are of opinion that there should be no rule in this case. At the time of 1 & 2 Ph. & M. c. 12, goods distrained could not be impounded on the premises, but were always taken to a public pound; and that statute, by sect. 1, enacts that no distress of cattle shall be driven out of the hundred, &c., where the distress is taken, except to a pound overt within the shire, and not above three miles' distance from the place where the distress was taken, and that no cattle or other goods distrained shall be impounded in several places. Sect. 2, therefore, which provides "that no person shall take for the keeping in pound, impounding, or poundage of any manner of distress, above the sum of 4*d.*," can only apply to cases within sect. 1, where the goods distrained are taken to a public pound. Until the passing of 1 & 2 W. & M. sess. 1, c. 5, goods distrained for rent could not be sold, but only detained as pledges for enforcing the payment of the rent; that statute authorizes the sale of them; and the subsequent statute, 11 G. 2, c. 19, s. 10, recites that "great inconveniences frequently arise to landlords taking distress for rent, in removing goods distrained on the premises, in cases where by law they may not be impounded and secured thereupon;" and then authorizes any person lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made on such part of the premises chargeable with rent as shall be most fit and convenient for the impounding and securing of the same, and to appraise, sell, and dispose of the same upon the premises in like manner as any person might then do off the premises by virtue of the 2 W. & M. c. 5. Here the goods were [*1052] impounded *on the premises chargeable with the rent, by virtue of statute 11 G. 2, c. 19. That being so, we think the statute 1 & 2 Ph. & M. does not apply to this case, more especially as by the 57 G. 3, c. 93, it is provided that in case of a distress for rent under 20*l.*, no more than certain sums fixed by the schedule and much exceeding the sum of 4*d.* mentioned in the older statutes, shall be taken. Rule refused.

¹ Before DENMAN, C. J., LITLEDAL, TAUNTON, and PATTERSON, Js.

BROOKER *v.* WOOD. Jan. 27.

A brewer, who delivered beer to be used in a particular public-house, on the credit of a person not the licensed keeper of the house, may maintain an action against the latter, for goods sold and delivered.

DEBT for goods sold and delivered. At the trial before Lord LYNDEHURST, C. B., at the Sussex Spring assizes, 1833, it appeared that the action was brought by the plaintiff, a brewer, to recover 36*l.* for beer supplied to the defendant. It appeared that the defendant's daughter resided in, and carried on, an inn at Blatchington, for the use of which the beer was supplied. She conducted the business under a license to sell beer, granted by the magistrates to her. The defendant received, or shared in, the profits. It was contended, first, on the evidence, that the credit was given to the daughter, not to the defendant; and, secondly, that even if it was given to the defendant, the plaintiff could not recover, because it would be a fraud on the licensing system to allow him to do so; and for this *Meux and Others v. Humphries*, 1 M. & M. 132, was cited. The jury found that the credit was given to the defendant, and not to the daughter. The Lord Chief Baron, on the authority of the case cited, [*1053] directed a nonsuit, but reserved liberty to the plaintiff to move to enter a verdict. A rule nisi having been obtained in last Easter term,

Platt, in this term, showed cause.¹ *Meux and Others v. Humphries*, 1 M. & M. 132, is an authority to show that the plaintiff is not entitled to recover. There a brewer had delivered beer to be used at a public-house, and Lord TENTERDEN ruled at nisi prius that he could not make any person, except the licensed keeper of the house, primarily liable for it. Lord TENTERDEN there said, "I am of opinion that the plaintiffs are not entitled to recover for the beer; it would be a fraud on the licensing system to allow them to do so. The magistrates are to exercise their discretion as to the person to whom they give a license: if, however, the brewer is to sell beer for the house to another person, this is in effect to evade the license, and make that person the retailer. The brewer may, if he is not satisfied with the security of the keeper of the public house, take another person as a surety of the payment of his demand; but he must not make him the principal debtor."

W. H. Watson, contra. In *Meux v. Humphries*, 1 M. & M. 132, a mere opinion was expressed by Lord TENTERDEN, at nisi prius, that the action was not maintainable; but he reserved the point. A juror was afterwards withdrawn, so that the opinion of the Court could not be taken. The question in this case depends on the 9 G. 4, c. 61, s. 18, which enacts "that every person who shall sell, barter, exchange, *or for valuable consideration otherwise dispose of, any exciseable liquor by retail, to be drunk or consumed in his house or premises, or shall permit or suffer any exciseable liquor to be sold, bartered, exchanged or otherwise disposed of for valuable consideration, by retail, to be drunk or consumed in his house or premises, without being duly licensed so to do; and that every person, being duly licensed, who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, or shall permit or suffer to be sold, bartered, exchanged, or otherwise disposed of for valuable consideration, any exciseable liquor by retail, to be drunk or consumed in his house or premises, not being the house or premises specified in such license; shall respectively for every such offence, on conviction before one justice, forfeit and pay any sum not exceeding 20*l.* nor less than 5*l.*, together with the costs of the conviction." That act, therefore, merely imposes a penalty on a person carrying on the trade of alehouse-keeper without license, or suffering another to do so in his name. That is an excise regulation, and a contract which is merely a breach of an excoise regulation is not void: *Brown v. Duncan*, 10 B. & C. 93; *Johnson v. Hudson*, 11 East, 180. *Hodgson v. Temple*, 5 Taunt. 181, see *Foster v. Taylor*, ante, 887, and *Wetherell v. Jones*, 3 B. & Ad. 221, are

¹ Before Lord DENMAN, C. J., LITLEDAL, TAUNTON, and PATTESON, Js.

also authorities for the plaintiff. The object of the legislature was that the magistrates should have some responsible person to whom they might look in case of any irregularity in conducting the business of the house. No act of parliament prevents the licensee from carrying on the business for the benefit of another.

[*1055] If the licensee commits a breach of a mere revenue regulation, *he subjects himself to a penalty; and if he suffers any misconduct in his house, he may have his license revoked. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court. The nonsuit in this case proceeded on the authority of *Meux v. Humphries*, 1 M. & M. 132. There Lord TENTERDEN expressed an opinion that a brewer, who delivered beer to be used in a particular public-house, could not make any person except the licensed keeper of the house primarily liable, so as to maintain an action against him for goods sold and delivered, because it would be a fraud on the licensing system to allow him so to do. We have considered the matter very fully, and are of opinion that allowing the plaintiff to recover, in this case, the price of the beer sold to the defendant for the purpose of being resold in a public-house carried on for his benefit, but of which he was not the licensee, will not operate as a fraud on the licensing system. The object of that act was to enable the magistrates to know the person who conducted the business, and to have a control over that person. Here the licensee conducted the business; the magistrates, therefore, had a control over her. The circumstance of another person having a share in the profits of the trade, does not, in any degree, interfere with the control which the magistrates are authorized to exercise over the licensee. The rule, therefore, for setting aside the verdict must be made absolute.

Rule absolute.

[*1056] *HOPWOOD v. GEORGE WATTS. Jan. 27.

Issue was entered in a cause, and docketed according to the practice of the office of judgments. The plaintiff, in 1828, recovered damages and costs, and entered final judgment on the roll, but the judgment, according to a practice said to have prevailed for 100 years, was not docketed as required by 4 & 5 W. & M. c. 20, s. 2. On application to the Court in 1834, to order the judgment to be docketed *nunc pro tunc*, Held, that the Court had no power to make such order.

A RULE nisi had been obtained calling upon Edward Watts and Hannah Watts, the committees of the defendant, a lunatic, and J. Hyatt, the mortgagee of his estate, to show cause in this case why the judgment should not be docketed *nunc pro tunc*. The action was commenced on the 31st of March, 1827, and issue was joined in Easter term of the same year, and notice for trial given for the sittings after that term; the issue was entered as of Easter term, 1827, and docketed at the same time. The plaintiff obtained a verdict at the sittings after Hilary term, 1828, for 75*l.*, and his costs were taxed by the Master, and final judgment signed on the 31st of May, 1828, when the Master gave his allocatur for 158*l.* damages and costs. Final judgment was entered on the roll, and carried into the Treasury chamber on the 9th of December, 1828.

In May, 1828, George Watts was found by inquisition to have been a lunatic since the 31st of October, 1826, and on the 16th of June, 1828, Edward Watts and Hannah Watts were appointed committees of his estate. Pursuant to an order of the Court of Chancery, made in August, 1829, that estate was mortgaged, on the 1st of May, 1830, to Hyatt for 1400*l.* The interest of the mortgage was 70*l.* per annum. The plaintiff Hopwood having afterwards become bankrupt, his assignees revived the judgment by *scire facias*, and sued out an *elegit*, under which the sheriff delivered to them legal possession of a

[*1057] moiety of the defendant's lands. An action *was subsequently brought in the Court of Exchequer by the assignees of Hopwood against Edward Watts, to recover from the latter the rents of the moiety so delivered by the sheriff, and which rents were received by E. Watts. The plain-

tiffs (the assignees) were nonsuited, on the ground that the mortgagee was entitled to preference over them, because their judgment had not been docketed.¹

The affidavits in support of the present rule stated the practice to be, whenever issue is joined between parties, upon entry of the same, to deliver a docket paper thereof to the clerk of the judgments, who enters the same in a book kept by him at the judgment office for that purpose; that it has not been the practice to docket any judgment on such issue; but that on signing judgment an entry is made of such judgment in a book kept for that purpose, and that a number is fixed to the issue so docketed as above, corresponding with the number of the judgment-roll in the treasury, and that, by the entry and docketing, all persons searching have an equally good opportunity of discovering judgments as if the judgments themselves had been docketed as well as the issue; and the affidavits further stated, that for the last 100 years it had been the practice not to docket judgments after verdict, but the issues only, and that the issues so docketed were entered in a book kept for that purpose; that the numbers affixed to each issue afforded an immediate reference to the roll upon which the final judgment was entered up; that all persons searching at ^{the} office for incumbrances, so far as related to judgments after verdict, [*1058] searched for the issues so entered and docketed, and upon finding such issues so entered and docketed, searched for final judgments thereon, and could make inquiries of the plaintiff's attorney respecting the result of the suit; and that by these means a full opportunity was given to all persons to discover such judgments, if any.

The affidavits in answer to the rule stated, that final judgments were frequently docketed after trial, and taxation of costs on the *postea*, by applying to the clerk of the judgments, and informing him of the amount of damages and costs recovered in the action, and that the clerk of the judgments thereupon made the docket of the issue in such action a docket of the judgment, by adding such particulars thereto, for which he was paid a fee of 6*d.* That the clerk of the judgments never so entered the docket of the judgment, unless he was so applied to by the plaintiff's attorney, and paid such fee of 6*d.*: that the practice was, where it was intended to affect lands by judgments, to docket them in the manner above described: that when it was intended to enter up final judgment on the roll after trial and verdict, the *postea*, with the Master's allocatur thereon, was left with the clerk of the treasury at Westminster Hall, who entered up the final judgment; but these entries were totally distinct from the dockets of the judgment which are entered and kept at the King's Bench office in the Temple.

Joseph Addison now showed cause.² The 4 & 5 W. & M., c. 20, s. 2 (made perpetual by the 7 & 8 W. 3, c. 36, *s. 3),³ enacts, that the clerk of the doggets of the Court of King's Bench shall make into an alpha- [*1059]

¹ *Braithewaite and Another v. Watts*, 2 Tyrwh. 293, 2 Cro. & J. 318. The plaintiffs had a verdict, subject to the point of law, but the Court directed a nonsuit to be entered. See the evidence in that case as to the practice of docketing. Also *Davis v. The Earl of Strathmore*, 16 Ves. 419.

² Before DENMAN, C. J., LITTLEDALE, TAUNTON, and PATTESON, Js.

³ Sect. 2 enacts, as to judgments in K. B., that the clerk of the doggets shall, before the last day of every Easter term, make into an alphabetical dogget by the defendants' names, a particular of all judgments for debt by confession, non sum informatus, or nil dicit, entered of Hilary term preceding, which shall contain the names of the plaintiffs and defendants, their places of abode, and title, trade, or profession (if any such be in the record of the said judgments), and the debts, damages, and costs recovered thereby, and the venue and the number roll of the entry thereof: That the clerk of the judgments shall, within ten days before the time aforesaid, bring to the clerk of the doggets notes in writing of all the judgments by him entered of Hilary term upon verdicts, writs of inquiry, &c., to the end that the same may be by the clerk of the doggets entered in the doggets before mentioned in manner and form aforesaid; and also that the respective officers shall, before the last day of every Michaelmas term, make and cause to be made the like doggets containing all such judgments of Easter and Trinity term then last past, and the names of the plaintiffs and defendants, titles and additions, debts and

betical dogget by the defendants' names a particular of all judgments, which shall contain (inter alia) the debt, damages, and costs recovered thereby. Here there has been a docketing of the issue only, not of the judgment. The judgment, therefore, does not affect the lands as to a mortgagee, *and he

[*1060] is entitled to the rents. The object of the legislature manifestly was, that any person might, by searching the books in the office, learn from them what judgments there were affecting the lands of a given individual. Now all that could be learnt by searching the books here, would be, that there had been an issue joined in a particular cause. The party seeking to ascertain whether there was any judgment, would have to make further inquiry of the attorney in the cause. The Court of Exchequer have decided, that this judgment was not properly docketed so as to give the judgment creditor a preference over a mortgagee whose title accrued after the judgment: *Braithwaite and Another, Assignees v. Watts*, 2 Tyrwh. 293, 2 Cro. & J. 318. The object of the present application is to place the judgment creditor in the same situation he would have been in if his judgment had been duly docketed in May, 1828, and thus give his debt precedence over that of the mortgagee. The Court has no power to grant the application. The statute requires all judgments to be docketed in the term next succeeding that in which the judgments are entered. The effect of now docketing the judgment as of May, 1828, would be to make it operate as a specialty debt from that time, whereas the statute puts a judgment not docketed on a level with a simple contract debt: *Hickey v. Hayter*, 6 T. R. 384; *Steele v. Rorke*, 1 B. & P. 307; and see *Hall v. Tapper*, 3 B. & Ad. 655. The effect, therefore, of granting this application, would be to contravene the statute. The plaintiff is not without remedy; he may have an action against his own attorney if he has neglected to docket the judgment according to the

[*1061] usual practice, or he may have an *action against the chief clerk. In *Douglass v. Yallop*, 2 Burr. 722, Hilary term, 1759, a neglect of entering judgment, and a loss of the roll having been sufficiently shown to the Court, a rule was made, that the clerk of the judgments should sign a new roll, whereon was to be entered the judgment signed in that cause in Michaelmas term, 1729, and that the same should be numbered as roll 256, and filed amongst the rolls of that term; a special entry being first made, expressing the day of docketing the same: and it was further ordered, that that judgment should not be made use of against the administrator of the defendant. Lord MANSFIELD there intimated, "that it very much concerned the chief clerk to take care that the judgments be actually entered up on the roll in due time, and docketed; for that after he had received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up. And he said, that the attorney who had undertaken to do this, and neglected it, would be liable, indeed, to the chief clerk, but still the chief clerk would be liable to the purchaser who had suffered by this neglect." [DENMAN, C. J. He would never be in jeopardy, if the Court could always set the mis-

damages, in all things as aforesaid; and, before the last day of every Hilary term, cause the like dogget to be made of the judgments of Michaelmas term, with the names of the plaintiffs and defendants, titles and additions, debts and damages, in all things as aforesaid; and it is then enacted, that the doggets shall be fairly put into and kept in books in parchment in the office of the clerk of the doggets, to be searched and viewed by all persons, at all reasonable times, paying to the clerk of the doggets for every term's search for judgments against any one person, 4d.; upon pain that every clerk of the doggets shall for every term in which he shall neglect his duty in the premises forfeit 100l.

Sect. 8 enacts, that no judgment not doggeted and entered in the books as aforesaid shall affect any lands or tenements as to purchasers or mortgagees, or have any reference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates.

Sect. 4 enacts, that there shall be paid to the clerk of the judgments by the plaintiff, in every judgment upon verdicts, &c., by him respectively to be entered, the sum of 4d.

take right.] The courts, when they have amended judgments, have taken great care not to affect the rights of mortgagees. In *Baker v. Baker*, Tidd's Pr. 9th edit. 939, where leave was given to enter up judgment of a preceding term, this Court, in order that it might not affect purchasers and mortgagees, ordered it to be docketed of the term in which the application *was made. In *Sale v. Crompton*, per nomen Compton, 1 Wils. 61, this Court refused to amend the entry of a judgment by nil dicit, on a warrant of attorney (the defendant's name being entered as Compton, instead of Crompton), because Crompton might have other estates, and, for anything that appeared, there might be purchasers not before the Court, who might be affected if the alteration was made. In *Evans v. Thomas*, 2 Str. 883, the roll of the judgment had been carried in Trinity term, 1720, and docketed, but was mislaid and lost before it was filed. The Court, on motion, the defendant being dead, and the executrix consenting, ordered that a new roll should be filed, for, there being a docket, there could be no deceit on purchasers. It will be said here, that it was the duty of the officer of the Court to docket the judgment as soon as the note of it in writing was brought to him by the clerk of the judgments; and that his omission to do so was a misprision, and, therefore, that it may be amended. But it was incumbent on the plaintiff's attorney to instruct the clerk of the doggets to make the entry, and to pay him a fee of 4*d.* for so doing. There has been no misprision of the clerk; for he has docketed the issue as he was instructed, but not the judgment, because he was never required to do it.

Follett and Sewell, contra. This case is one of very great importance, because all judgments in the Court of King's Bench, for the last hundred years, stand in the same situation as the present. In *Braithwaite and Another, Assignees v. Watts*, 2 Tyrwh. 293, 2 Cro. & J. 318, the Court of Exchequer certainly held, that the docketing of the issue without *docketing the judgment, and the debt, damages, and costs thereby recovered, did not satisfy [*1063] the stat. 4 & 5 W. & M. c. 20. That statute requires the clerk of the judgments, within ten days before the end of the term next succeeding that in which the judgment shall be entered up, to bring the clerk of the doggets a note in writing of the judgments, to the end that the same may be respectively entered in the doggets. If either the clerk of the judgments neglected to bring to the clerk of the judgments a note of the judgment in this case, or the latter, when it was brought to him, neglected to enter the particulars in the dogget, the omission in either case was a misprision of the officer of the court, and therefore amendable: Com. Dig. Amendment, D., *Braswell v. Jeco*, 9 East, 316; *Perkins v. Petit*, 2 Bos. & P. 275; *Burroughs v. Stevens* (judgment of *HEATH, J.*), 5 Taunt. 557, and *Chapman v. Gale*, 2 Lev. 22, show the power of the Courts in this respect, and the principles on which it is exercised. In *Davis v. The Earl of Strathmore*, 16 Ves. 427, Lord *ELDON* said, "Suppose the officer of the court refused to docket the judgment, and the creditor, being entitled to have it docketed, applied to the Court; the Court would order the clerk to enter the docket as at the time when it ought to have been done." The practice which has prevailed for a hundred years has been followed in this instance. [TAUNTON, J. I doubt the universality of that practice; it is contrary to the statute which requires the officer of the Court to make into an alphabetical dogget the particulars, not of all issues, but of all judgments; and requires that to be done in the term after the judgment is signed. Here the judgment *was signed in May, 1828, [*1064] and final judgment entered on the roll on the 9th of December, 1828, but never docketed. What authority have we now, in 1834, to order the judgment to be docketed as of May, 1828?] The omission to docket the judgment in the proper term being a misprision of the clerk, it is in the discretion of the Court to order the entry to be now made as of the time when it was the duty of the officer to make it. The defect did not arise from the fault of the attorney: there is no book kept in the King's Bench office for docketing judgments, though there is one for docketing issues. If the attorney entered the damages

and costs in that book, it would not be docketing the judgment, and he can do no more. [TAUNTON, J. According to the note to *Douglass v. Yallop*, 2 Burr. 723, the modern practice seems to be for the plaintiff's attorney to make the entry upon the roll.] But he then acts as the clerk to the chief clerk. The making of the entry must be the act of the clerk, for the statute requires him to make it. [LITTLEDALE, J. It does not appear by the words of the statute, how the chief clerk can be answerable as there stated, when the statute throws the burden of making the entry on another officer: but the clerk of the judgments and clerk of the dockets are now the same person.] The case in Burrow is very loosely reported. It is clear, however, from *Burroughs v. Stevens*, 5 Taunt. 557, that whatever the statute requires to be done is the act of the clerk and not that of the parties, and it would be hard if the party here were to lose the benefit of his judgment by an act of an officer of the Court.

[*1065] *DENMAN, C. J. We will speak to the other Judges on this subject, before we give our judgment.

Cur. adv. vult.

DENMAN now delivered the judgment of the Court.

We have considered this case, and are of opinion that we have no power to alter the docket in the manner proposed. The rule must therefore be discharged.

Rule discharged.

DOE dem. MARRIOTT v. EDWARDS and Others.

In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage; although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee had made any claim, or otherwise enforced his rights as against either landlord or tenant.

EJECTMENT for messuages, &c. At the trial before PARKE, J., at the sittings in Middlesex in this term, it appeared that the lessor of the plaintiff proceeded for a forfeiture incurred for non-payment of rent, and other breaches of covenant in a lease. The lessor had mortgaged the premises, and afterwards (December 6th, 1831) granted the lease to one Greenacre, who became bankrupt, and whose assignees the defendants were. After granting the lease, he executed a second mortgage (February 17th, 1832), reciting the first and assigning to the second mortgagee all his right, interest, &c., in the premises, both at law and in equity. It did not appear that the defendant had paid any rent since this mortgage. The learned Judge, upon proof of these facts, was of opinion that the lessor of the plaintiff could not maintain the action, the legal estate being no longer in him; and he directed a nonsuit.

[*1066] *Gale, in this term, moved for a rule to show cause why the nonsuit should not be set aside, and a new trial had. The defendant could not set up the second mortgage against his landlord, unless there had been a default in payment of the interest, and the mortgagee had taken proceedings upon such default. "If the defendant (in ejectment) produce a mortgage deed, where the interest has not been paid, and the mortgagee never entered, it will not be sufficient to defeat the lessor, who claims under the mortgagor, because it will be presumed that the money was paid at the day, and, consequently, that it (the mortgage) is no subsisting title." Bull. N. P. 110. BULLER, J., in *Doe dem. Bristowe v. Pegge*, 1 T. R. 760, note *a*, states it as clear law, that a tenant cannot set up the title of the mortgagee against the mortgagor. It was not shown in the present case, that the tenant had been disturbed by the second mortgagee; and if that party had so conducted himself as to show that he acknowledged the tenancy, it still subsisted as against him, notwithstanding the second mortgage; *Doe dem. Whitaker v. Hales*, 7 Bing. 322 (recognised to a certain degree in *Doe dem. Rogers v. Cadwallader*, 2 B. & Ad. 473); conse-

¹ January 22d, before DENMAN, C. J., LITTLEDALE, TAUNTON, and PATTESON, Js.

quently the tenant cannot in this action allege that he had ceased to hold under the mortgagor. Nor (in the absence of any act done by the mortgagee), does it appear that the tenant, upon the change of title, renounced holding under the mortgagor, and commenced a fresh holding under the mortgagee. Not having done so, he must still pay rent to the landlord whose title he *originally [*1067] recognised. The stat. 4 Anne, c. 16, s. 9, provides that grants and conveyances shall be good without attornment of tenants; but it cannot have been meant that a tenant, in case of a mortgage, should avail himself of the statute as against his original landlord, where the mortgages had not yet interfered. Sect. 10 enacts, that no such tenant shall be prejudiced by payment of rent to the grantor of the reversion, or by breach of any condition for nonpayment of rent, before notice of such grant shall be given to him by the grantee. That shows that the legislature in allowing of a change of tenancy without attornment, did not contemplate that the relative situations of the landlord and tenant should be changed by the mere effect of the conveyance, without any other act done, or any notice given. The observations of BULLER, J., upon the statute of Anne, in *Berch v. Wright*, 1 T. R. 385, support this view of the subject.

Cur. adv. vult.

The case being mentioned again on a subsequent day, PATTERSON, J., said: My brother PARKE thinks that the tenant was entitled to make this defence, because in doing so he did not set up anything adverse to the right of his landlord to grant the lease, but merely showed that he had parted with his title subsequently, see *Pope v. Biggs*, 9 B. & C. 245.

And on a later day in the term (Jan. 24th),

DENMAN, C. J., delivered the judgment of the Court as follows:—In this case the lessor of the plaintiff had *mortgaged the premises, and then, on the 6th of December, 1831, granted the lease. He then, on the 17th of February, 1832, executed a second mortgage, reciting the first, and assigning to the second mortgagee all his right, interest, &c., in the premises, both at law and in equity. We agree with my brother PARKE, that he cannot, after this, recover for a forfeiture. Rule refused.

TAYLOR v. HELPS. Jan. 28.

In a cause decided by the judge of an inferior court on a writ of trial, this Court will hear a motion for a new trial on the ground that the verdict was against evidence, though the damages were below 20*l*.

THIS was a cause tried before the undersheriff of Middlesex, upon a writ of trial, pursuant to stat. 3 & 4 W. 4, c. 42, s. 17. The plaintiff obtained a verdict for 11*l*.

Petersdorff now moved for a rule to show cause why there should not be a new trial, on the ground that the verdict was against evidence; but the sum recovered being so small, he expressed a doubt whether the Court would listen to the application; the practice being not to receive motions for a new trial on such grounds, in causes tried before judges of the superior courts, where the damages are below 20*l*.

DENMAN, C. J. This being a cause tried before the sheriff, we are disposed to extend the rule of practice, on account of the smallness of the costs of trial in that court. The rule is not necessarily insisted upon in any case.

The motion was then gone into, but upon the merits the rule was

Refused.

*KIRBY v. BANISTER, GUNNER, HUMPHREY, BASSETT, and CHAPMAN. Jan. 28. [*1069]

Five parish officers were appointed for a certain year, viz., two churchwardens, two overseers, and one vestry clerk and assistant overseer, the terms of whose appoint-

ment did not appear. At their vestry meetings for the relief of the poor, orders were given to the paupers upon a shopkeeper for goods, and sometimes for money to pay their monthly allowances, which orders the shopkeeper complied with. Three only of the officers ever signed such orders; the assistant overseer being one, and signing, sometimes by his name only, and sometimes as clerk, or overseer. All used to attend the board, though not all at the same time, and when called upon there to pay the shopkeeper for his goods and advances, had promised to do so when they could.

Held, that the shopkeeper, after the expiration of the year, might recover against all the parties both for the goods and the advances of money, if a jury were of opinion that they had all contracted with the plaintiff. And

That it was not necessary to show by the appointment of the assistant overseer that he was authorized so to contract, the jury being satisfied that he had in fact bound himself to the plaintiff in respect of the goods and money supplied.

ASSUMPSIT for goods sold and delivered, moneys lent, moneys paid, moneys had and received, and on account stated. Plea non assumpsit. Particular of demand. "To goods supplied, and money paid by the plaintiff for and on account of the defendants as churchwardens and overseers of the poor of the parish of Hever, in the county of Kent, from Easter, 1826, to Easter, 1827, the bills containing the full particulars thereof having been delivered:—115*l.* 5*s.* 8*d.*" At the trial before TINDAL, C. J., at the Spring assizes for Kent, 1833, the facts appeared to be as follows: In 1826—1827, Banister and Gunner were churchwardens, and Humphrey and Bassett overseers for that year. Chapman was vestry-clerk and permanent assistant overseer. His appointment to the latter office was not produced. The plaintiff was a shop-keeper at Hever, who had, before the year 1826—1827, been accustomed to supply goods, on account of the parish officers, for the poor. During that year, the parish officers, when assembled in vestry for the relief of the poor, used to give to the paupers who applied orders upon the plaintiff (which he complied with), for articles of food and clothing, and also for money to pay their *monthly allowances. Some [*1070] of these orders were signed by Chapman, who occasionally added to his name the word "clerk" or "overseer;" others were signed by Banister, and by Bassett; none by the other two defendants; but they all used to attend the board. The plaintiff's son had several times gone to the vestry meetings to demand money on his father's account, and had, on different occasions, seen all the defendants there, though not all at once; and they had, at those times respectively promised the witness to pay his father as soon as they could. Upon this evidence it was objected—First, that Chapman had acted only as assistant overseer, and must therefore be considered merely as the servant of the other officers in giving the orders in question, at least in the absence of any proof that his appointment was of such a nature as to allow of his issuing such orders on his own authority; and consequently, that he ought not to have been joined with the other defendants; Secondly, that it was against the duty of parish officers to borrow money for parochial purposes, and therefore the defendants who had not given the orders were not liable for the money so obtained; and *Massey v. Knowles*, 3 Stark. N. P. C. 65, was cited. The Lord Chief Justice was of opinion as to the first point, that Chapman had contracted jointly with the other parties, and was therefore liable; and on the second, that the advances had been recognised by all the defendants, and therefore all might be sued; but he reserved leave to move to enter a nonsuit on the first point. The plaintiff had a [*1071] verdict for 115*l.* In the ensuing term a rule nisi was obtained for *entering a nonsuit, and also for reducing the damages by the amount of the money advanced.

Andrews, Serjt., now showed cause. As to the first objection; the acts proved against Chapman are sufficient to make him a joint contractor with the other defendants. He was visibly a contractor as well as the rest; he was with them when the business was transacted, and joined with them in issuing orders and obtaining credit; and the credit must be supposed to have been given to him as well as to the others. Those who did not sign the orders acted in the same

manner as the rest. By the stat. 59 G. 3, c. 12, s. 7, the inhabitants of any parish, in vestry assembled, are enabled to nominate an assistant overseer, and to determine and specify the duties to be performed by him; two justices are empowered to appoint him accordingly, by warrant, for such purposes as shall have been fixed by the vestry; and he is, by that clause, empowered "to execute all such of the duties of the office of overseer of the poor, as shall in the warrant for his appointment be expressed," in like manner as the same may be executed by any ordinary overseer. If the appointment be not produced, it must be presumed under such circumstances as were proved in this case, that the party acted under the authority given by his warrant of appointment, and in the character of assistant overseer, not of servant to the parish officers. He suffered the plaintiff to deal with him on that understanding. As far, indeed, as the evidence goes (no appointment being produced), he may not even have been assistant overseer; but whether he was so or not, the credit given him in consequence of his own conduct, *renders him liable. As to the second point, the advances of money stand on the same footing as the other [*1072] debts; there is no authority for saying that parish officers may not obtain such advances for the present exigencies of the poor, if the rates cannot be immediately got in. In *Massey v. Knowles*, 3 Stark. N. P. C. 65, the money seems to have been lent to a single overseer, as such, but on his individual credit, and the action was brought against all; here all the officers acted indiscriminately in incurring the debts, and all acknowledged them, and promised to pay as soon as they were able.

Thesiger, contra. As to the first point; the particular charges all the defendants as churchwardens, and overseers: the question then is, whether they have all acted in that character. As to two of them, who signed no order, the case must entirely rest upon the character they bore. Chapman is said to have been assistant overseer; but, to know what are the responsibilities of that office, reference must be had to the statute, and that shows that the duties and liabilities of the office are to be defined by the warrant of appointment. To fix a liability in any particular respect upon the defendant Chapman, the warrant ought to have been produced. *Bennett v. Edwards*, 7 B. & C. 586. The case here would have been strong, if that had been done, and the warrant had shown that the duty of relieving the poor was imposed on Chapman. But that is not to be inferred in the absence of the warrant; and no notice was given to produce it. [PATTESON, J. The acts of Chapman are relied upon as ground of liability.] He acted as a mere *servant, and the plaintiff must have [*1073] known it. Before the stat. 59 G. 3, c. 12, it was understood that an assistant overseer acted only as a servant, and it is so now, unless the contrary appear by his appointment. [TAUNTON, J. A person appointed assistant overseer need not have a circumscribed authority. DENMAN, C. J. He may have a greater, or at least a more immediate control, than the other officers.] It was necessary here to show that all the officers were liable; and to do so, it should have been proved that they concurred in contracting the debt. It has never yet been determined that, independently of such contract, one overseer is bound by another's act. *Malkin v. Vickerstaff*, 3 B. & A. 89, and the judgment of PARKE, J., in *Rex v. The Justices of Gloucestershire*, 1 B. & Ad. 5, rather show the contrary. Here no evidence appeared, as to two of the defendants, that they had given any orders. [PATTESON, J. Was not this part of the case matter to be determined by the Jury? In *Malkin v. Vickerstaff*, 3 B. & A. 89, one overseer (the defendant) was not proved to have had any knowledge of the relief ordered by the other, or to have assented to it afterwards, and yet it was considered to have been a question for the Jury, whether credit was given to one or both.] As to the second point; the parish officers have no power to borrow money for the relief of the poor; *Massey v. Knowles*, 3 Stark. N. P. C. 65; *Leigh v. Taylor*, 7 B. & C. 491; their duty is limited to the application of the poor-rate. [DENMAN, C. J. If an overseer asks a per-

son to pay money for him, and says, "I will repay you on Monday;" is not he liable?] Personally, but not as overseer. [LITLEDALE, J. This was not exactly a borrowing *of money.] It was the same thing. In Tawney's [*1074] case¹ it is laid down that an overseer is not bound to lay out money until he has it; it cannot, therefore, be necessary that he should borrow. [TAUNTON, J. This was not money borrowed in solido: the paupers went to the plaintiff's shop, and sometimes had their monthly payments advanced. We must be cautious how we limit the responsibility of overseers on this point. The consequence might be, that the poor would starve. LITLEDALE, J. It would throw great difficulties in the way of the management of the poor in many parishes.]

DENMAN, C. J. It was one point for consideration in this case, whether the Lord Chief Justice ought not to have expressly left it to the jury to say whether the defendants jointly contracted with the plaintiff or not; but I think that which was equivalent was done; and it appears to me that there was strong evidence of a joint contract. It is clear that all these parties were competent to render themselves jointly liable, if they acted so as to make the plaintiff look to them for payment; and I think it was proved that they did so act. The defendant Chapman signed several orders, sometimes adding the word "clerk" or "overseer;" others of the defendants signed other orders; and Chapman was present as well as the others on several occasions when money was demanded on behalf of the plaintiff, and made promises to pay. It is true that, in his particular, the plaintiff charges all the defendants as "churchwardens and overseers," but that does not import any legal definition of the character they filled; [*1075] and it is not even clear that the plaintiff knew Chapman to be *only an assistant overseer. I think, however, that as to him, nothing depends on the strict legal character in which he acted; if, indeed, he had said, "I act only as servant or assistant to the overseers," that would have been a warning to the creditor not to consider him as one of the parties contracting; but that was not done. I think the jury were right in the verdict they found. The cases which have been cited do not apply. In Leigh v. Taylor, 7 B. & C. 491, the defendant was bound as surety that an overseer should account for all sums which should come to his hands by virtue of his office; and the surety was held not to be liable for the repayment of a sum advanced to the overseer by way of loan, and applied by him to parochial purposes. That is very different from the question whether or not a creditor may look personally to an overseer who has obtained goods from him under circumstances like the present; and I think no difference ought to be made as to the advances of money in this case; a slight accommodation in money rendered as this was, may be considered in the same light as the supply of goods.

LITLEDALE, J. It is not necessary that the assistant overseer should be shown to have had a particular authority as such, if he has made himself personally liable. A tradesman is not bound to look to the legal character which the party holds, if such party has put him in a situation in which the tradesman may be authorized to consider him as his debtor: and I think that was so in the present case, though the defendant Chapman sometimes signed himself [*1076] "overseer," sometimes "clerk," *and though the orders were given sometimes by one officer and sometimes by another. It was a joint concern among the parties. As to the money advanced, it would be extraordinary if overseers, instead of suffering the paupers to come to their houses, sent them to a shop to receive their weekly or monthly payments, and it was then held that the shopkeeper could not recover against the overseers for the money paid on those occasions, as well as for goods supplied. The rule must be discharged.

TAUNTON, J., concurred.

PATTESON, J. It was necessary to the plaintiff's case that all the defendants

¹ 2 Salk. 581, 2 Ld. Raym. 1009, S. C. more fully.

should have rendered themselves liable; but upon this subject the jury were sufficiently directed, and gave their opinion. It was not requisite that all five should have been present when each order was given, or should have actually made a promise respecting such order. If it were so, there would be great inconvenience where five parish officers were concerned, and it might even be arranged so that the whole five should never interfere on any occasion. It was for the jury to say to whom credit was given. It has been made a question as to Chapman, whether his authority, as assistant overseer, was not so limited that he could not bind himself. But if he promised the plaintiff to pay, we are not to assume that he was restricted by his appointment from so engaging. He might have authority to do so, and we are not to take it for granted that he had not.

Rule discharged.

*Ex parte PITT.

[*1077]

A motion calling upon an attorney to answer matters alleged against him on affidavit, must be made by a barrister.

Mr. *Charles Pitt* in this term (January 14th) moved in person for a rule, calling upon an attorney of this Court to answer certain matters alleged against him on affidavit.

DENMAN, C. J. We think that we cannot hear an application calling upon an attorney to answer matters seriously affecting his character, unless such application be made by a gentleman of the bar. It is like a motion for a criminal information; we ought to have the opinion of a barrister that there is ground for the proceeding. There was, indeed, a rule lately granted on the motion of the present party in person, by which attorneys were called upon to answer the matters of an affidavit; but the application for that purpose was appended to another, by which the party claimed the protection of the Court in certain proceedings against him, as to which there appeared to be ground for calling upon the attorneys to make a statement, and, therefore, the rule was granted in its whole extent. The present is a different case.

LITTLEDALE, J. In the principal matter depending in that case, *Pitt v. Coomes*, much turned upon the question whether a certain document originally bore date of the 7th or 8th of June; and I granted Mr. Pitt a rule calling on *the attorneys to answer as to that, and also as to the matters alleged against them in his affidavits, both being intimately connected; but [*1078] perhaps it was wrong to do so. The present rule cannot be granted.

TAUNTON and PATTESON, Js., concurred.

Rule refused.

PITT v. COOMES. Jan. 28.

A person having made a motion in a cause to which he was a party, left the Court, and in his way home, called at an office where he kept his papers but did not reside, to refresh himself and sort his papers: he remained there between one and two hours, and then left the office, and went into a tailor's shop in the same street, intending, however, to proceed home immediately, and being on his way thither when he so deviated. As soon as he entered the shop he was arrested by a sheriff's officer, who had watched him from the Court.

Held, that the privilege of the party, redeundo from the Court, had not ceased when he was arrested, and that he was entitled to be discharged.

THE plaintiff applied (January 27th) to be discharged out of the custody of the sheriff of Middlesex, upon affidavits which stated the following circumstances:—The plaintiff lived at a place called The Polygon in the parish of St. Pancras, and had an office in Adam Street, Adelphi, where he kept his papers of business. On the 22d of January he called at his office for some papers, and proceeded thence to the Court of King's Bench, where, in the evening of the same day, he obtained a rule absolute in the cause, *Pitt v. Coomes*. He

then left the Court, with a person named King, who had accompanied him, and proceeded directly to his office, where he sorted his papers, and he and King took some refreshment, having had none during the day. It was near six in the evening when they arrived at the office, and before seven the plaintiff left it in company with King, when an officer of the sheriff of Middlesex, about seven o'clock, arrested the plaintiff on an attachment issued in a cause in chancery, *Pitt v. Tokelove*. The plaintiff was at this time going home to The Polygon, intending only to call at the Rule office, Symond's Inn (which lay in his way), for the purpose of drawing up his rule.

The Court granted a rule to show cause. The affidavits in answer to the rule (sworn by the sheriff's officer and others) stated that the officer had seen the plaintiff in court, and watched him from thence to his office; that he entered the office about twenty minutes after five, and remained there till a little after seven, when he came out and went into a tailor's shop in the same street, near the office, and the sheriff's officer also entered the shop and there arrested him.

Dampier now showed cause. The plaintiff was no longer privileged at the time of the arrest. He had gone from the Court to his office, remained there nearly two hours, and then proceeded, not to his home, but to a tradesman's shop. [DENMAN, C. J., mentioned the case of *Lightfoot v. Cameron*, 2 W. Bla. 1118. There it is merely stated that the party, after leaving the Court, went to a tavern to take refreshment, and was arrested while doing so. Here the plaintiff after refreshing himself, left his office, and instead of going directly home, deviated, and, upon that deviation, was arrested. The moment he went out of his way, the protection *redundo* ceased; it is immaterial whether the deviation lasted a minute or an hour.

DENMAN, C. J. The doctrine of deviation might become very alarming if carried to such an extent, that whenever the officer saw the party going one yard out of his way home, he might immediately arrest him. *The officer should not dodge too closely. A party on his return from a court of justice ought substantially to receive its protection, and to have the benefit of its dignity and quiet, till he reaches his home. The case just cited was stronger than this. There the party was dining with his attorney and witnesses when the officer took him; and yet he was held to be protected.

LITLEDALE, J. There is a case, *Hatch v. Blisset* (18 Ann., Gilb. Cas. K. B. 308, cited in 2 Stra. 986, and 6 Bac. Ab. 531, 538, 7th ed. See, however, the dictum of Lord ELLENBOROUGH in an Anonymous case, 1 Smith's Rep. 355, where a woman was witness on a trial at Winchester, which ended at four in the afternoon of Friday; she stayed there till Saturday, and at seven in the evening was arrested as she was going home to Portsmouth; and this Court held that she ought to be discharged. The rule must be absolute.

TAUNTON and PATTESON, Js., concurred.

Rule absolute.*

¹ See *Rishton v. Nisbett*, 1 Moody & Rob. 347.

[*1081]

*The KING v. GRANT and Others. Jan. 30.

Where an information for libel states that certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and the prosecutor, at the trial, gives general proof of such transactions, to support the introductory part of his pleading, the defendant is not thereby authorized to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel.

But if such evidence be adduced, *bonâ fide*, to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, and the Judge is informed that the evidence is offered for that purpose, it is admissible.

Affidavits are not receivable to show that a Judge is mistaken in his report of a cause tried before him.

CRIMINAL information for a libel. The information stated that, before the committing of the offences, &c., a commission had issued against the defendant, Patrick Grant, and assignees had been appointed; that before the issuing of such commission, Grant had been a co-proprietor of a newspaper with one Young, and that "certain transactions had taken place since the said bankruptcy respecting the sale by the assignees of the said Patrick Grant of his interest in the said newspaper." The information then charged, that the defendants contriving, &c., to defame the solicitor to the commission, and one of the assignees, and to cause it to be believed that they had been guilty of fraud and breach of trust in the execution of their respective duties in relation to the said commission, &c., published of and concerning the said commission of bankrupt, and of and concerning the said assignee and solicitor under the said commission, "and the said transactions as aforesaid," a certain false, &c., libel, containing the false, &c., matters of and concerning the said assignee and solicitor respectively following, that is to say. The libel was then set out. It contained several injurious statements of the conduct of the prosecutors in transactions relative to Grant's bankruptcy, and accused them of "fraud and falsehood," and of "swindling," in the discharge of *their respective functions; [*1082] stating, among other things, that, in order to defraud the creditors, they had made a false assertion respecting a purchase of the newspaper by Young: that, by such false assertion, Young had been enabled to maintain a Chancery suit against the creditors; and that, at a late meeting of the creditors, it appeared that Young withdrew the allegation of his having made such purchase. At the trial before DENMAN, C. J., at the sittings in Middlesex after last Michaelmas term, the solicitor and assignee were called as witnesses for the prosecution, and, in their examination in chief, gave general evidence of the facts stated in the inducement; and, in particular, that transactions had taken place after the bankruptcy, relating to the sale by Grant's assignees of his interest in the newspaper. *Kelly*, for the defendants, endeavored, in cross-examination, to go into the particulars of the several transactions respecting the sale of Grant's interest in the paper. The Lord Chief Justice, considering this as an attempt to bring into question the truth or falsehood of the libel, refused to allow such questions to be put. The defendants were found guilty. In this term (January 15th),

Kelly moved for a rule to show cause why a new trial should not be had, on account of the above-stated rejection of evidence. The objection to these questions was, that by asking them, the truth of the libel might incidentally be brought in question. But if certain transactions are averred in the introductory part of the information, and the averment as to them is a material one, evidence must be gone into respecting them. The Lord Chief Justice thought that evidence might be *given to show generally that such transactions had happened, but not what the nature of them was; but it was [*1083] necessary to go into the particulars, in order that the jury might judge whether a true character had been given of the supposed libel in the introductory averments. They are to decide on the whole matter, and an essential part of it is, not only whether the transactions referred to had happened, but whether they were of such a nature as the information suggests, and whether the publication complained of was a libel with relation to them. The jury could not judge of that without the evidence which it was proposed to go into. Lord MANSFIELD said in *Rex v. Horne*, Cowp. 679: "The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written." Here the gist of the charge was the transactions relating to the sale of the newspaper. In *Rex v. Horne*, Cowp. 672, where the information stated the libel to be "of and concerning his Majesty's government and the employment of his troops;" but no particular statement was made as to the occasion on which the troops had been employed, and to which the libel referred, the defendant proposed to give in evidence an affidavit,

published before the libel, relating to the employment and conduct of the king's troops in an encounter with the insurgents in America. Lord MANSFIELD said (in delivering the judgment of the Court), "I told the defendant, if he meant to prove the facts to be true as above, it could not be done by affidavit, the person himself being present, and even if he was absent, they could not be proved [*1084] by affidavit; *but if he meant to show that at the time there existed a public account in the newspapers, which might be of use to restrain or qualify the meaning of the paper in question upon the information, he might do so." Upon the same principle the evidence was admissible here, to show what transactions the writing in question referred to, and whether, taken with reference to them, it was libellous. If an indictment charged that a bankrupt had passed his examination, and that a libel had been published concerning it, stating that the bankrupt had, on such examination, sworn contradictory matters, and thereby committed perjury; it cannot be said that the particulars of the examination itself might not be gone into, it being incorporated with the libel by the introductory averment. In the present case it is stated as part of the libel, that the solicitor and assignee are alleged to have made a false allegation respecting the sale of the newspaper, to defraud the creditors; this is one of the transactions of and concerning which the libel is said to have been published: how can the jury say that the publication is a libel respecting, and applicable to, a transaction so described, unless they know particularly what the transaction was? [DENMAN, C. J. The falsehood imputed in that transaction was not in itself insisted upon: the ground of complaint was the foul and calumnious language that ran through the whole publication. In the part in question, it was not merely said that a false statement was made on a particular subject, but that it was made to defraud the creditors.] The prosecutors might have relied upon the general abuse merely; but they have, by their introductory averments, incorporated particular transactions with the subject-matter of [*1085] the charge; and if their case be such *as to require proof of matters which may bring the truth or falsehood of the libel into question, the defendant is not therefore to be precluded from examining into the matters so introduced.

DENMAN, C. J. Undoubtedly the defendants in pleading to this information, put in issue all the material allegations contained in it; I admit without reserve, that it was in issue whether or not the alleged libellous matter related to the transactions mentioned in the introductory averments of the information. And if counsel for the defendant, in a case like this, were to say, *bonâ fide*, "I propose entering upon this evidence to show that what is stated in the information is not proved, for that the libel does not apply to the transaction referred to by the pleading; and in order to show that, the evidence must be gone into;" it would then be admissible. But in this case it was taken for granted that the transactions had happened, and that the libel related to them: the object in offering this evidence was to show that it related to them justly. It came then to the question, whether or not the truth of a libel can be put in issue on an information. I have always thought it could not. The reason now given for going into the evidence in question was not suggested, and the Judge who tries a cause ought to be informed of the purpose for which evidence is offered.

LITLEDALE, J. I entirely concur. If the evidence had been offered to prove that the libel did not relate to those transactions which the information applied it to, the inquiry might have been pursued; but not with any other [*1086] view.

*TAUNTON, J., concurred.

PATTESON, J. I am of the same opinion, for the reasons given by my lord, which I need not repeat. Rule refused.

On this day, the defendants were brought up for judgment, and

Kelly renewed his former application, stating that on reference to another gentleman who was counsel in the cause, and to a short-hand writer's note, he

found that the evidence had been offered at the trial, as bearing upon the question, whether or not the transactions referred to by the libel were the same as those mentioned in the introductory part of the information, and that in particular, it had been asked, "how the jury could know that the transactions were the same, if such evidence were not gone into?" [DENMAN, C. J. My note and my recollection are distinct on the subject. It might perhaps be said by way of argument, "how can the jury know that the transactions were the same, without this evidence?" but the object always was to introduce the truth of the statements in the libel. If the evidence had been, or could have been offered, *bonâ fide*, for the purpose now suggested, it would have been different. If counsel had told me that they really put the questions for the purpose of showing that the libel did not relate to the transactions referred to in the information, I should have allowed them to be put, though I should have been surprised at the mode of proceeding. But when it was suggested that merely because certain transactions were spoken of in the introductory part of *the information, the defendant's counsel might go into the history of those transactions, I could not allow such a course to be taken.] [*1087]

Kelly offered to put in the short-hand writer's notes, and affidavits of the circumstances under which the evidence was offered.

DENMAN, C. J. I will not hear affidavits as to what passed at the trial, unless the Court tell me that I ought.

LITLEDALE, J. The affidavits cannot be received.

TAUNTON, J. The question is, whether the affidavits of bystanders are to be admitted, to prove that the Judge who presided at a trial is guilty of mistake as to what passed. If such affidavits were now received, it would be the first instance of such a practice, and would produce the greatest injury to the administration of justice; see *Everett v. Youells*, 4 B. & Ad. 683.

(PATTESON, J., was in the Bail Court.)

The defendants then received judgment.

*In the Matter of _____, Gent., One, &c., and _____, [*1088]
Gent., One Other, &c. Jan. 31.

The Court of King's Bench will not grant a rule calling on an attorney to show cause why he should not be struck off the roll, if the affidavits in support of the rule state an offence for which he would be liable to indictment.

SIR JOHN CAMPBELL, Solicitor-General, on a former day in this term, moved for a rule calling on two attorneys of this court to show cause why they should not be struck off the roll, on affidavits charging them with professional misconduct in certain pecuniary transactions. [DENMAN, C. J. The facts stated amount to an indictable offence. Is not it more satisfactory that the case should go to a trial? I have known applications of this kind after conviction, upon charges involving professional misconduct; but we should be cautious of putting parties in a situation where, by answering, they might furnish a case against themselves, on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offence is charged. PATTESON, J., referred to *Short v. Pratt*, 1 Bing. 102. See also *In re Knight and Hall*, 1 Bing. 142.]

The Court, however, desired the Solicitor-General to see if any precedent could be found of such an application as the present having been granted. He now stated that he had been unable to find any, and the rule was

Discharged.

*The KING v. KIRKE and Three Others. Jan. 31. [*1089]

Under stat. 1 W. 4, c. 21, s. 6, the costs of a mandamus, and of applying for it, may be obtained of the Court by a distinct motion, after the issuing of the writ.

And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties.

A MANDAMUS was moved for in a former term, calling on the defendants, aldermen of East Retford, to attend a corporate meeting of the bailiffs, aldermen, and burgesses of the said borough, for the purpose of electing an alderman in the room of one lately deceased. In Michaelmas term last counsel were heard on both sides, but no affidavit was put in for the defendants; the rule was made absolute, and a mandamus issued. The writ recited the duty of the aldermen under the charter, among other things, in electing new aldermen upon a vacancy, and it stated that certain meetings had been holden for that purpose, which the defendants had been required to attend, but that they had neglected and refused to do so, in consequence of which no election had taken place; and it then required them to attend a meeting, as above stated, as soon as the same could be called, and to do every act necessary in order to such election. It appeared by the affidavits in support of the present rule, that after the granting of this mandamus, and after service of it on the defendants, Thomas Appleby, the senior, and Robert Hudson, the junior bailiff, according to the custom of the corporation, issued their precept to the serjeants at mace to summon a hall of the corporation, for the purpose of choosing an alderman to fill one of the vacancies referred to by the mandamus; and that the defendants were duly served with such summons. One of them attended the meeting; the others, although

[*1090] they did not attend, acquiesced in what was there done; and no further proceedings were taken on the mandamus. In this term a rule was obtained, calling on the defendants to show cause why they should not pay the prosecutors their costs of, and occasioned by, the application lately made by them for a mandamus (as above), and also the costs of the present application. The affidavits in support of the rule stated the service of the writ of mandamus (which was set out at length), and the non-attendance of three of the defendants at the meeting holden in pursuance of the writ. The last-mentioned defendants made an affidavit in answer, setting out the grounds of their non-attendance at meetings previous to the motion for a mandamus, and stating that they had sent in their respective resignations of the office of aldermen, but the rest of the corporation had refused to accept them, after which this mandamus was moved for; they then explained their apparent disobedience to that writ, and stated that they had subsequently acquiesced in the proceedings taken at the meeting which the writ required them to attend.

Sir J. Campbell, Solicitor-General, and Hill, now showed cause. The act 1 W. 4, c. 21, s. 6,¹ under which this motion is made, will have an operation much to be regretted, if a practice is established of applying for costs of the application

[*1091] for a mandamus whenever the writ has been granted. The prosecutors ought to have their costs of the mandamus itself; but the costs of the application, if demandable, should have been moved for at the same time as the writ; the Court ought not to be called upon now to entertain a question which makes it necessary to open up the whole matter of the original motion. [LITTLEDALE, J. Where a mandamus is granted, the prosecutor may, upon the return, have judgment given against him. Till the event is ascertained, the Court may not be able to decide upon the right to costs.] In some cases that might be a question; but the difficulty which might arise in those instances is no ground for a general rule. Here all the merits were before the Court in the first instance. The motion was only for a mandamus to corporators to attend a

¹ 1 W. 4, c. 21, s. 6. "And for making some further provision for the payment of costs on applications for mandamus, be it further enacted, that in all cases of applications for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid."

corporate meeting. No new facts were stated on showing cause. The Court might safely have granted costs if they had been moved for in the rule for a mandamus. [TAUNTON, J. I think that in one of the cases of mandamus to the Hungerford Market Company, there was a distinct motion for costs, and the Court said they would wait till they saw the result of the mandamus. DENMAN, C. J. It was the case *Ex parte Davies*.] It may have been *conceived in that case, that a good return might be made: here that could [*1092] not be supposed. [TAUNTON, J. If the rule were as you would state it, a party not moving for costs of the application for a mandamus in the first instance would be precluded from ever obtaining them.] It is the same in other cases where costs of an application are moved for. [TAUNTON, J. That is where the principal matter and its incidents are one and inseparable. LITTLEDALE, J. The practice introduced by this act, of applying for costs of the mandamus after the writ is disposed of, is in itself an anomalous one.] At least where the costs of the application can be moved for at the same time with those of the mandamus, it ought to be done: there is nothing in the act to prevent it, and the delay leads to expense and waste of time. No reason is shown for it here. The affidavits which are before the Court when the mandamus is moved for, but not afterwards, may be very material to guide the discretion of the Court as to costs.

Sir *James Scarlett* and *Hildyard*, contra. We are entitled now to call in aid the affidavits on which the mandamus was obtained. And the mandamus itself, by its recital, gives sufficient information of the facts. It is true that, in moving for a mandamus, the costs of the application might be included, but then the party must run the risk of paying costs if the rule is refused. And a rule may be granted, and the party against whom the *mandamus goes may [*1093] prove, on the return, to have been right: then the costs, if already granted, will have been paid by the party not in fault. It is better that there should not be a multiplicity of motions for costs, but that the whole question of costs should be settled at once, when the result of the mandamus appears. At least no rule has yet been laid down forbidding this practice. [DENMAN, C. J. Does it appear that the parties making the present application are the same with those who complained of the default made by the defendants at the former meetings? The original affidavits must be read to show that. [The Solicitor-General. They ought not to be read; the present rule does not call upon the defendants to answer them. DENMAN, C. J. The Court think that they clearly may look at the former affidavits, and that they must do so to guide their judgment as to costs. PATTESON, J. If the present had been an entirely separate motion, the case might have been different. But this is a rule which refers to a former proceeding between the parties in the same matter, and the affidavits which it is proposed to read are those sworn on that former occasion.*]

¹ Reported, but not as to this point, 4 B. & Ad. 327. The mandamus (to summon a jury to assess compensation) was granted in Michaelmas term, 1832. The writ was obeyed, and an inquisition was held, February 20th, 1833. In Easter term, 1833, *Kelly* obtained a rule to show cause why the company should not pay Elizabeth Davies the costs of her late application for a mandamus, and also the costs of the said writ, and incidental thereto, and the costs of this application. The rule was enlarged. No return was made to the mandamus. In Michaelmas term, 1833, *Follett* showed cause against the rule, on the ground that the company might reasonably have thought themselves justified in resisting the claim to compensation, the question arising on a doubtful clause in the company's act. The Court made the rule absolute.

In *Rex v. The Hungerford Market Company* (*Ex parte Farlow*, 2 B. & Ad. 204, note (a), 348, note (a), a motion was made for costs of the mandamus and of applying for it, after the writ had been obeyed: the Court refused the costs, but the ground was, that the application for a mandamus was made before the act 1 W. 4, c. 21, came in force.

² The affidavits in support of the rule for a mandamus were sworn by *Appleby* and *Pearson*, the senior and junior bailiff above-mentioned, and by several other persons. They stated the subject-matter of the complaint as set out in the mandamus; and further, that the defendants had written letters tendering their resignations, respectively, of the office of alderman, and that two of them had stated their intention, by so doing, to break up the corporation.

DENMAN, C. J. The Court think it right that the rule should be made absolute for the costs of the writ and original application, but not of this application.¹

[*1094] *LITLEDALE, TAUNTON, and PATTESON, Js., concurred.

Rule absolute as above.*

¹ It may be presumed that the Court, in refusing the costs of the present application, did not intend to fix a precedent for all cases in which a motion for costs should be made after the time of obtaining the mandamus. Two, at least, of the learned Judges appear to have inclined to the opinion, that the motion for costs might, in some cases, be properly deferred; and if, in any instance, a distinct application ought to be made, it would seem that the costs of such application should be grantable by the Court.

² In *Rex v. The Commissioners of the Harbor of Rye*, a rule was obtained, calling on the defendants to show cause why they should not pay to Samuel Miller, Gent., his costs of several applications lately made by him for writs of mandamus directed to the defendants for enforcing the settlement and payment of charges incurred by, and which had become due to him in enforcing and protecting the rights of the harbor of Rye, and for compelling the commissioners to raise funds on the security of the rates and tolls of the said harbor, for the purpose of paying the said costs and charges, and also the costs of an application by the said S. M., for an attachment against several of the defendants for their contempt in not returning the first of the said writs; and the costs of the present application. In Easter term, 1833 (May 7th), *Follett* showed cause. It appeared that the first mandamus having been granted in 1832, and no return made, a rule nisi was obtained for an attachment; after which the defendants returned that they had paid part of the charges, but had no money applicable to the rest. A rule nisi was afterwards obtained (Mich. T. 1832) for a mandamus to the commissioners to borrow (according to a local statute under which they acted), such sum of money as should be necessary to pay the remainder of the said charges. An arrangement being then come to between the parties on the principal points, the question now was as to the costs of the above-mentioned applications.

The Court (LITLEDALE and PARKE, Js.) as to the first mandamus, refused the costs, because the commissioners had made a good return; and as to the second, they were of opinion that the costs ought not to be given, considering that the application, as framed, for a mandamus to the commissioners to borrow money, was a strong measure, and might have led to their being called to account for complying. The rule was therefore discharged, but without costs to the commissioners.

[*1095] *BODFIELD and Another v. PADMORE. Jan. 31.

The rule of Court, Hil. T. 2 & 3 G. 4, requiring that on all bailable meane process, the defendant's place of abode and addition shall be endorsed, is in effect repealed by stat. 2 W. 4, c. 39; and therefore the want of such endorsement is no objection to a *capias* issued under that statute. It is sufficient that in the body of such writ the defendant is described as "G. P. of the city of London."

An affidavit to hold to bail for a debt stated therein to be due to A. and B., is good, though the plaintiffs are partners, and are not stated to be so in the affidavit.

A RULE was obtained this term, calling on the defendant to show cause why an order of TAUNTON, J., for discharging the defendant out of custody should not be set aside, and why the plaintiffs should not be at liberty to retake the defendant on the present or any other writ. The defendant having been arrested on a *capias* of this Court, issued in November last, a summons was obtained to show cause before a judge at chambers, why the defendant should not be discharged on entering a common appearance. The parties attended before TAUNTON, J.; and it was first urged that the *capias* was irregular, because the defendant was described in the body of the writ as G. P. "of the city of London," without any further addition, or more particular description of his residence. The learned Judge, however, thought the description as full a one as is required by the act for the uniformity of process, 2 W. 4, c. 39. Secondly, it was objected that the *capias* was not endorsed with the Christian names of the plaintiffs' attorneys, but only with the surnames, "H. and B." Thirdly, it was objected that the affidavit of debt did not state that the plaintiffs were partners, but merely that the defendant was indebted to "James B. and Joseph B." The learned Judge also overruled these objections. It was lastly suggested that

there was no endorsement of the defendant's place of abode and addition, on the back of the *capias*, *as required by the rule of Court, Hil. 2 & 3, G. 4, 5 B. & A. 560; and the learned Judge, on this objection, ordered [*1096] the defendant to be discharged, observing, that the late books of practice by Mr. Tidd (see p. 1098, post), and Mr. Chapman¹ treated the rule in question as still subsisting.

Kelly now showed cause. The rule of Hil. T. 2 & 3 G. 4, is not repealed by the act 2 W. 4, c. 39. That act, by sect. 1, requires the place and county of the defendant's residence to be mentioned in every writ of summons, and refers to a form, No. 1, in the schedule. Sect. 4, which treats of bailable process, does not repeat this direction, but it refers to a form, No. 4, in the schedule, and it is evident, on a comparison of the two sections and the forms referred to, that the same direction is meant to be observed in both cases, as to the description of the defendant, but see *Bosler v. Levy*, 1 Bing. N. C. 362. No intention is shown in either clause to discontinue the former endorsement of the defendant's addition and place of abode; nor is that rendered unnecessary, for the particulars now to be mentioned in the body of the writ do not convey the same information. And the statement made as to the defendant in the present writ, is too general even to satisfy the terms of the late act. The affidavit to hold to bail was also defective, on the ground stated before the learned Judge at chambers.

R. V. Richards, contra. The act 2 W. 4, c. 39, virtually repeals the rule in question as to the endorsement on bailable process. By sect. 1, and the schedule *No. 1, there referred to, the place and county of the defendant's residence are to be inserted in the body of the writ, in the case [*1097] of non-bailable process, but even there no endorsement of these particulars is required, either by the enacting clause or by the schedule; and in sect. 4, and schedule No. 4, which relate to bailable process, no such endorsement as to the defendant is in any way directed or alluded to, although several endorsements are required, and it is particularly directed that one shall contain the name of the plaintiff's attorney (to be described as "E. F., of," &c.), or the plaintiff's name and place of residence, if he sue in person. The endorsement required by the rule of Hil. 2 & 3 G. 4, was for the benefit of the sheriff, not of the defendant, and is considered in that light by the Court, in *Clarke v. Palmer*, 9 B. & C. 153. If that rule continued in force, it would be unnecessary to require the name and residence of the plaintiff's attorney to be endorsed. But the act expressly states, by the schedule, what endorsements shall be made on bailable process, and no others can be insisted upon.

DENMAN, C. J. The affidavit stating the defendant to have been indebted to the plaintiffs is sufficient, though it does not mention them as partners. As to the other objection, the stat. 2 W. 4, c. 39, s. 21, enacts, that the writs thereinbefore authorized shall be the only writs for the commencement of personal actions in any of the superior courts at Westminster, in the cases to which such writs are applicable. We think that act repeals the rule of court, Hil. T. 2 & 3 G. 4. The rule will therefore be absolute.

*LITTLEDALE, J., concurred.

TAUNTON, J. I am of the same opinion. I should have thought [*1098] before, that the endorsement insisted upon was unnecessary, but that the late books of practice appeared to treat the rule of 2 & 3 G. 4 as still subsisting. On the motion before me, I referred to the case of *Kenrick v. Nanney*, 1 Dowl. P. C. 58, cited in Mr. Tidd's Third Supplement,* and it was not brought to my attention that that case was determined before the passing of 2 W. 4, c. 39. The rule must be made absolute.

PATTESON, J., concurred.

Rule absolute.

¹ Second Addenda to Chapman's King's Bench, 1833, p. 63.

* The Act for Uniformity of Process, by W. Tidd, Esq. (with notes, &c.), 1832. Page 15, note (c). That note, however, refers to the rule of 2 & 3 G. 4, as "a former rule," by which the plaintiff's attorney "was required," &c.

BACKHOUSE v. HARRISON.

To an action by an endorsee against the endorser of a bill of exchange, who had lost the bill by accident, it is a good defence that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the person from whom he took it, had no title; or that the plaintiff was guilty of gross negligence in taking it. But it is no defence that he took it under circumstances in which a prudent and cautious man would not have taken it.

ASSUMPSIT by the plaintiff, an officer of the York City and County Bank Company, 7 G. 4, c. 46, s. 9, upon two bills of exchange, for 26*l.* 19*s.* 9*d.*, and 20*l.*, endorsed to the Company, against the defendant as an endorser. At the trial before ALDERSON, J., at the Yorkshire Spring assizes, 1833, it appeared, that about two o'clock, P. M., on the 25th of September, 1832 (being the first [*1099] day of Howden fair), a man dressed like a sailor, accompanied *by another person dressed in the same manner, came to the Company's office at Howden, and requested one Clough, their clerk, who managed their business there, to discount the bill for 26*l.* 19*s.* 9*d.* The bill being much discolored, Clough asked how it came to be so. The man said it had fallen, with his pocket-book, into the Knottingley and Goole Canal, and that he had been searching two days and two nights for it. This statement was corroborated by his companion. Clough then looked at the bill, and seeing the names of J. & R. Harrison upon it, asked the man how he came by it. He said he had got it from those gentlemen in payment for a cargo of coals; that he had two vessels in which he traded between Hull and the West Riding, and that he had come to Howden to purchase two horses to draw his vessels up and down the canal. Clough then agreed to discount the bill, and offered it to the man to endorse, but he said he could not write, upon which Clough wrote the name given to him by the man (William Moore), to which the latter affixed his mark. Clough stated, in evidence, that it was not uncommon for persons unable to write to have such bills. Having received the money for this bill, the man produced the other bill, and said, that if the money he had received was not sufficient to pay for the horses, he would return and get the second bill discounted. In an hour and a half he returned for that purpose, and Clough discounted the bill for 20*l.* Clough asked the man if he was known in the town. He said he did not know any one there.

For the defendant it was proved, that the bills in question were lost by a sister of the defendant, she having dropped her reticule containing them into [*1100] the canal between Goole and Knottingley, on the 9th of *September, 1832, and that the reticule and its contents were found by Moore. It was proved by a clerk of the Bank of England, that it was the practice there, and at all its branch banks, not to discount bills for strangers without requiring a reference; nor to exchange Bank of England notes for strangers, and certainly not a dirty bill for a man who could not write. The same statement was made as to the practice of several other banks. The jury found, upon questions specially submitted to them by the learned Judge, that the plaintiff took the bills *bonâ fide*, but under such circumstances that a reasonable, cautious man would not have taken them. They also found, that the defendant had not used due diligence in making the loss known. The learned Judge then directed the jury to find a verdict for the defendant, but reserved liberty to the plaintiff to move to enter a verdict for the amount of the bills, if the Court should be of opinion that the defendant, having been guilty of the first negligence, was thereby estopped from setting up the negligence of the plaintiff. *F. Pollock* was to have shown cause, but in his absence (Jan. 27th) the Court first heard

Cresswell, for the plaintiff. If the defendant was guilty of the first negligence, by not advertising the loss of the bills, the plaintiff was entitled to recover. [DENMAN, C. J. Does not *Easley v. Crockford*, 10 Bing. 248, bear on that point?] That was a different case. There the plaintiff (in trover)

proved that, in September, 1830, he went to a public meeting, where he was robbed of a 200*l.* Bank of England note. He advertised his loss in the newspapers, and in June, 1832, the note was traced *to the possession of [1101] the defendant, who stated that he received it in payment of a bet on the Derby, but he could not say from whom. The jury found a verdict for the plaintiff, and that the note was received by the defendant without due circumspection. A rule was obtained for a new trial, on the ground that the plaintiff (who had lost the note), had not taken due care of his property, but was instrumental to his own loss in going to a mixed assembly with a large sum of money in his pocket. The Court thought that the plaintiff's negligence, in having attended a mixed meeting with so large a sum, did not confer a title to the note on the defendant, who had received the note without ordinary care; and that the latter had no title as against the real owner. Here the action is brought by a banker, who discounted these bills, against an endorser, who lost them. Assuming that the want of due caution in a person discounting a bill, though he does it bonâ fide, may be insisted upon in an action by the real owner in an ordinary case; still the owner is not at liberty to allege it, if he himself has been guilty of the first negligence, and thereby in some measure instrumental to the loss which he seeks to throw upon the holder. But, secondly, it is no defence that the plaintiff took the bill bonâ fide, but under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained. The defendant is bound to show that the plaintiff was guilty of gross negligence at least. [TAUNTON, J. That point was decided by us, this term, in *Crook v. Jadis*, ante, 909.] The question, whether a bill or note has been taken bonâ fide, involves in it the question, whether it has been taken with due caution, *Per HOLROYD, J., in *Gill v. Cubitt*, 3 [1102] B. & C. 477: BAYLEY, J., there said, that he considered it was parcel of the bonâ fides, whether the plaintiff had asked all those questions which, in the ordinary and proper mode in which trade is conducted, a party ought to ask; P. 474; and in a case at nisi prius, a few days ago, PARKE, J., expressed his opinion that negligence only bore upon the question of bonâ fides. The attempt to insist on want of caution, as distinguished from want of good faith, has only led to inconvenience. The plaintiff, then, is entitled to a verdict, because gross negligence was not proved: and assuming that the fact of the plaintiff having taken this bill bonâ fide, but under circumstances which ought to have excited the suspicion of a prudent man, would have been a defence in an ordinary case, still the defendant, not having given notice to the public of his loss, is estopped from making that defence. Such notice might have prevented the plaintiff from discounting the bills. [DENMAN, C. J. In *Snow v. Peacock*, 3 Bing. 410, BEST, C. J., says, that one who has lost a note payable to bearer, ought immediately to give notice of his loss to the public, in such a manner as is most likely to prevent innocent persons from taking it.]

F. Pollock and *Martin* afterwards showed cause. The defendant, by not having given notice to the public of the loss of the bills, is not estopped from saying that the plaintiff took them under circumstances which would have excited the suspicion of any prudent man; and that is a sufficient defence to this action. His misconduct, in not having advertised his loss to the public, would be no answer to an action of trover brought by him to *recover the [1103] bills. The property in the bills was at one time in the defendant. The question is, whether he has parted with them under circumstances which divested the property. If it still continued to be in him, and another party discounted the bills, under circumstances of suspicion which did not warrant his doing so, the owner may recover them in trover. In the case of a collision of two ships, if an error has been committed in the management of either, the owner of that ship will have no right of action against the owner of the other. The plaintiff acquired no property in the bills under the circumstances in which he took them. The fact of the defendant not having advertised their loss cannot estop him from saying that the plaintiff had no property in them. The

plaintiff took the bills under circumstances which gave him no right to hold them, and the defendant's omission to advertise will not confer that right. The finding of the jury is sufficient to entitle the defendant to a verdict. That the Banking Company could acquire no property in the bills, having taken them under circumstances in which a reasonable and cautious man would not have taken them, is well established : *Gill v. Cubitt*, 3 B. & C. 466 ; *Down v. Halling*, 4 B. & C. 330.

DENMAN, C. J. This case involves a mixed question of law and fact. The law upon the subject is not very well settled ; and I think the rule should be absolute, if not for entering a verdict for the plaintiff, at least for a new trial. I think, upon the whole, that the plaintiff is entitled to recover. To constitute a valid defence to the action, it was incumbent on the defendant to show that the agent of the banking company who discounted the bills had been guilty at [*1104] least of gross negligence. The finding of the jury does not go to anything like that extent ; nor was there any evidence to warrant such a finding. Then as to the other question, whether negligence in the loser of a bill or note will deprive him of a defence which he otherwise would have against the holder, that must depend on the circumstances of each particular case. But I must say that I think the omission of the defendant here, to advertise the loss of bills which had gone to the bottom of a canal, was not such negligence as to deprive him of right of defence which he otherwise might have had. As the finding of the jury with respect to the plaintiff's want of caution was no answer to this action, and the plaintiff must ultimately recover, it might perhaps be more to the defendant's advantage that the rule should be made absolute for entering a verdict for the plaintiff than for a new trial ; but at all events it must be made absolute for a new trial.

LITLEDALE, J. It was no defence to the action that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained : the defendant was bound to show that the plaintiff had been guilty of gross negligence. That was decided in *Crook v. Jadis*, ante, 909. The plaintiff is therefore entitled to recover.

TAUNTON, J. *Crook v. Jadis*, ante, 909, shows that the plaintiff is entitled to recover unless gross negligence has been made out. That was not found by the jury, and I think the negligence proved was not sufficient to have warranted such a finding. The other point, therefore, does not arise.

[*1105] PATERSON, J. The learned Judge has reserved liberty to the plaintiff to move to enter a verdict, if the Court should be of opinion that the defendant, who is found by the jury to have been guilty of the first negligence by not advertising the loss of the bills, is thereby estopped from setting up the plaintiff's want of due caution as a defence to the action. We cannot therefore order a verdict to be entered for the plaintiff without deciding the point reserved by the learned Judge, whether or not the defendant was so estopped ; but I think it unnecessary to decide that point, because I am of opinion that the first fact found by the jury did not amount to a defence to the action. I have no hesitation in saying that the doctrine first laid down in *Gill v. Cubitt*, 3 B. & C. 466, and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man, cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title ; but I never could understand that a party who takes a bill *bonâ fide*, but under the circumstances mentioned in *Gill v. Cubitt*, does not acquire a property in it. I think the fact found by the jury, here, that the plaintiff took the bills *bonâ fide*, but under such circumstances that a reasonable, cautious man would not have taken them, was no defence. The rule must be absolute for a new trial.

Rule absolute for a new trial.¹

¹ The action was afterwards compromised.

*HAYS v. TROTTER. Jan. 31.

[*1106]

Defendant in a cause being advised to pay 48*l.* into court, gave his attorney 50*l.* for the purpose of making such payment, which was done. The attorney afterwards delivered his bill to the client, not including the 48*l.*, and on taxation more than one-sixth was taken off. The attorney then claimed to add the 48*l.* (which would have made the deduction less than one-sixth), stating that the item had been inadvertently omitted.

Quære, whether such item was chargeable as a disbursement by the attorney? but Held, that, at all events, the attorney, not having treated it as a disbursement in making out his bill, could not claim to insert it as such for the purposes of the taxation.

ALEXANDER had obtained a rule to show cause why the Master should not review his taxation of the bill of the defendant's attorney as to certain items, and why the costs of such taxation should not be allowed to the defendant, more than one-sixth of the bill having been taxed off. The facts relating to the costs of taxation (which alone are material) were as follows:—The defendant, being advised to pay 48*l.* into Court in one of the causes to which the bill referred (*Backhouse v. Trotter*), paid to the above-mentioned attorney, who acted for him in that cause, 50*l.*, for the purpose of paying into Court the required sum. The attorney, in his bill of costs, neither charged the 48*l.*, nor gave credit for the 50*l.*, which omission he, in his affidavit, ascribed to inadvertence. The bill, amounting to 138*l.*, was taxed before the Master, the attorney's clerk attending on his behalf; and on that occasion no reference was made to the above sum of 48*l.*, except that the clerk offered to give the defendant credit for the balance between that and the 50*l.* The master made his allocatur, deducting 28*l.* from the bill, which, being more than one-sixth, the defendant was allowed his costs of taxation. After the parties had separated, the attorney's clerk returned to the Master, and stated that the 48*l.* ought to have been included in the bill as an item of disbursement. The Master allowed it to be inserted, and it then stood as follows:—"Yourself ats. Backhouse. Paid into Court, 48*l.*" The Master appointed *another meeting, which the parties attended. The bill was taxed anew, the 48*l.* being included, and credit given to the defendant for 50*l.*; and the same sum as before, 28*l.*, was taxed off; but the bill having now been increased to 186*l.*, the deduction did not, as before, amount to one-sixth. The Master, therefore, refused the defendant his costs of taxation. The defendant insisted that the introduction of the 48*l.* as a disbursement was a mere after-thought, and should not have been permitted after the allocatur first made.

Cresswell in this term showed cause.¹ This was a payment of money into court by the attorney in the progress of a cause, and was a proper item in his bill. The case is not distinguishable from *Hindle v. Shackleton*, 1 Taunt. 536, where a client at the assizes, after briefs had been delivered to counsel, paid his attorney 65*l.* to be disbursed in fee to them; and it was held that the attorney was, nevertheless, entitled to include those fees in his bill of costs. It is laid down in *Tidd's Practice*, p. 336, 9th ed. (citing that case), that "if a client, in the course of a cause, advances money to his attorney for specific disbursements in the cause, those disbursements must nevertheless be included in the bill of costs." The disbursement by the attorney is not a mere lending of money, but a matter done in the cause: he is bound to treat it as an item of account in his bill, though he has received from his client more than will cover the amount. The money, here, was furnished to the attorney because he had to pay a sum into court; but not as a specific sum to be so applied. [*Alexander*, contra, mentioned the case of *Woollaston v. Hudson*, 2 Dowl. P. C. 360, as *Woollison v. Hodgson*, decided a few days before in the Exchequer.] There it was held as a payment made by the attorney, for which he had received

¹ Before DENMAN, C. J., LITTLEDALE, TAUNTON, and PATTESON, Js.

26*l.* from the client, could not be included as a taxable item in his bill; but that 26*l.* was a specific sum given to pay the debt and costs, after the cause had been brought to conclusion. The present is the case of an attorney in a suit paying money into court in the progress of it.

Alexander, contra. In *Hindle v. Shackleton*, 1 Taunt. 536, the payment made was a disbursement in the due and ordinary progress of the cause. In *Woollaston v. Hudson*, 2 Dowl. P. C. 360, as *Woollison v. Hodgson*, BOLLAND, B., gave the client the costs of taxation, because the item there in question was not such a disbursement, distinguishing the case, on that ground, from *Hindle v. Shackleton*, 1 Taunt. 536: and the Court of Exchequer refused a rule for rescinding his order. It was there said that the sum paid, being for the debt and costs of suit, was one which the client could have paid over at once, if the attorney had not; this was a payment of a similar nature, and whether it be made during, or at the end of the cause, can be no real ground of distinction. The subject of taxation under the stat. 2 G. 2, c. 23, s. 3, is the bill delivered by the attorney, of his fees, charges, and disbursements. This item was not one of the fees, charges, and disbursements, in the bill so delivered, but was added subsequently, when the bill had been before the Master. [TAUNTON, J. "Disbursements in the ordinary progress of a cause," is a very vague expression.]

Cur. adv. vult.

*Lord DENMAN, C. J., now delivered the judgment of the Court as [*1109] follows:—We think, under the circumstances, that the attorney was not entitled to do what he has done. Without going into the particular facts, it is enough to say that, having delivered his bill, and at that time, not considered the payment in question as a disbursement in the cause, he could not afterwards turn it into a disbursement, to avoid the operation of the statute as to costs of taxation. The rule will therefore be absolute. Rule absolute.

JAMES v. WILLIAMS.

In an agreement in writing to pay the debt of another, the consideration must be either stated in express words or to be implied with certainty from the terms used. A letter, therefore, from the defendant to the plaintiff in the following words:—"As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day," was held not to satisfy the statute of frauds.

ASSUMPSIT on the following guarantee:—"As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks—say the 4th of January, 1833." At the trial before the under-sheriff of Middlesex, by a writ of trial under the 3 & 4 W. 4, c. 42, s. 17, the guarantee (which was in writing) was produced in evidence, and the under-sheriff nonsuited the plaintiff, on the ground that the consideration did not appear on the face of the instrument, as there was no stipulation that the creditor should wait six weeks for payment. In this term *Bardow* obtained a rule for a new trial. In moving for the rule he contended that it was not necessary that the consideration should be stated in the guarantee in express words, but it was sufficient if it could be collected from the words used, by fair and necessary implication; and for this he cited

[*1110] **Newbury v. Armstrong*, 6 Bing. 201, where a guarantee was in these words:—"I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ, to the amount of 50*l.*;" and it was held that the consideration sufficiently appeared. [PATTESON, J., observed, that in that case the words of the guarantee were prospective.] He also cited *Coe v. Duffield*, 7 B. Moore, 252, and the judgment of *RICHARDSON, J.*, in that case.

R. V. Richards in the same term, showed cause against the rule, before
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PATTESON, J., in the Bail Court, and admitted that the consideration need not be in express words on the face of the guarantee, but might be collected from it by fair and necessary implication; he contended, however, that such an implication could not be raised in this case, and he relied on *Wain v. Warlters*, 5 East, 10; *Cole v. Dyer*, 1 Crompt. & J. 461, 1 Tyrw. 304, as showing that there was no ground for inferring a consideration from the words here used.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court. This case was argued before me in the Bail Court, and the judgment which I am about to give, must be considered my own, and not that of the whole court. It was an action on the guarantee, and the under-sheriff nonsuited the plaintiff on the ground that no consideration appeared on the face of it. *Wain v. Warlters*, 6 Bing. 201, the authority of which was once doubted, but *afterwards confirmed by *Saunders v. Wakefield*, 4 B. & A. 595, was referred to. [*1111] The authority of that case was not questioned here, but it was contended that the consideration did sufficiently appear on the face of the writing. The rule of construction on the subject is clear, and indeed was not disputed. The consideration need not be stated in express words on the face of the instrument; it may be collected or implied from the instrument itself, but then it must be collected not as matter of conjecture, but with certainty. *Wain v. Warlters*, 5 East, 10, is in point. There the guarantee was, "I will engage to pay you (the plaintiff), by half past four this day, 56*l.* and expenses, on bill to that amount on Hall." Now that is precisely the same case in principle as the present, for whether the promise be to pay within six hours from the time of signing the guarantee, or within six weeks, is immaterial, if it can be collected that a forbearance by the creditor during the time was contemplated. If any agreement not to sue the principal debtor is to be implied in this case, it ought also to have been implied in *Wain v. Warlters*, but there it was conceded that the consideration did not appear on the face of the writing, and it was argued that it need not so appear. The plaintiff's counsel did not contend that it was necessarily to be implied, from the promise of the surety to pay at a future time, that the consideration for so doing was forbearance towards the principal debtor in the mean time. And I am of opinion that no inference is necessarily or fairly to be drawn from the terms of the guarantee in this case, that the consideration for the defendant's promise was forbearance for six weeks to the principal debtor. **Cole v. Dyer*, 1 Crompt. & J. 461, 1 Tyrw. 304, is not distinguishable from this case. There a guarantee for the [*1112] payment of debt and costs in an action pending against a third person, unless paid by a certain day, was given in writing. An action having been brought on the guarantee, the declaration alleged a stay of further proceedings in the first action as the consideration for the promise, and it was held that no such consideration appeared on the written instrument, or could necessarily be implied from it so as to satisfy the statute of frauds. That case shows that you must be able to fix upon the consideration on the face of the instrument, not as a matter of conjecture, but as matter of undoubted certainty. *Coe v. Duffield*, 7 B. Moore, 252, was cited in support of the rule on account of what was there said by RICHARDSON, J., and certainly whatever fell from that learned Judge would be great authority. There the guarantee was given on the 3d of April, 1820, but on the 29th of March, the defendant had written to the plaintiff that, feeling himself interested for Wilson (the principal debtor), he could not refrain from giving this security, if the plaintiff would agree to his terms, which were to allow Wilson two years to pay the whole sum by instalments, and accept the defendant's guarantee to see it paid in that time. RICHARDSON, J., said, not that the guarantee itself contained a consideration, but that the declaration might have been framed on the first letter, viz., that of the 29th of March, which was prior to the guarantee, and contained the terms on which the guarantee was to be given, and showed a sufficient consideration. The rule for setting aside the nonsuit must be discharged.

Rule discharged.

[*1113] The KING v. The Justices of MIDDLESEX, In Re BOWMAN.
Jan. 21.

A party found guilty by a jury at a session irregularly holden is entitled to have the record of the proceedings correctly made up according to the fact; and this Court will grant a mandamus to the justices to make up such record.

A RULE had been obtained by *Bodkin* in last term calling on the justices of the county of Middlesex to show cause why a writ of mandamus should not issue commanding them to make up the record of the conviction of James Bowman at the general quarter session of the peace and sessions of oyer and terminer, held in the month of July, 1833, at the sessions house for the same county, and to give a copy of such record to the said James Bowman or his attorney,

It appeared from the affidavits, that the sessions were duly held on Monday the 1st of July; that bills of indictment were then presented to the grand jury, and witnesses sworn, and that, among others, an indictment for felony was presented, and witnesses sworn, against the prisoner Bowman on that day. That on the same day the Court adjourned, and the justices did not meet again for general business until Thursday, July 4th. That the adjournment was till Tuesday the 2d; on which day, no justices being present, the court was opened by the crier; some justices attended at different times during the day, and in the evening the crier adjourned the court, no justices being present. That on Wednesday the court was again opened and adjourned as before by the crier, who stated, on inquiry subsequently made, that it had always, during his time, been usual so to open and adjourn the court while the grand jury were sitting, though business was not transacted *in court. That the grand jury continued

[*1114] sitting; and on Wednesday (the 3d), two justices attended and received bills from them, and amongst others a true bill against Bowman. That on Thursday (4th), the sessions met and heard appeals; and on Friday, Bowman was tried among others, and convicted, and was ordered to be transported, and an order for his transportation was made out by the deputy clerk of the peace. That on a subsequent day, upon a trial of a prisoner at the Old Bailey, it was objected by counsel that the bill of indictment had not been duly found at the above sessions, inasmuch as the prosecutor and witnesses had been sworn on one of the days subsequent to the adjournment on Monday, July 1st, after which, as it was contended, the court of quarter sessions had never regularly met. That afterwards a similar objection was made at the said court of quarter sessions on the trial of a party charged there with an assault. That the justices allowed the objection, thereby determining that the said quarter sessions had lapsed on the 2d of July; and the court thereupon separated. That a special commission afterwards issued, under which several prisoners who had before been acquitted and convicted at the Old Bailey sessions upon bills found under the same circumstances as those above stated, were again tried at the Old Bailey; but Bowman was not put upon his trial before the commissioners. That, by direction of the secretary of state, fresh bills of indictment were preferred, at the Middlesex session, September, 1833, against the several prisoners, including Bowman, who had been convicted at the lapsed session. That a true bill was found against Bowman, and he was thereupon arraigned at the Old Bailey sessions for the same felony as that charged in the former

[*1115] indictment. That on being called upon to plead, he pleaded his former conviction, and time was given him to apply to the clerk of the peace for a copy of the record of the former conviction, which could not be obtained, no such record having been made up. That the case was then deferred till the 9th of September, upon which day, in pursuance of a notice given to the deputy clerk of the peace, the latter attended at the Old Bailey with the documents touching the first indictment, conviction, and sentence, but without any former record whereby the prisoner could substantiate his plea. That, by two

successive orders of the Court, the prisoner was remanded from session to session, in order that he might obtain the copy of the record; and that an application was made for it on his behalf at the Middlesex sessions, but refused. It appeared also from the affidavit of the deputy clerk of the peace, that it was not usual to make up records of proceedings at the time of their taking place; that no record of the conviction of James Bowman had been made up, and that he (the clerk) believed no such record could be made up, inasmuch as according to the determination of the justices, the said court of quarter sessions of the peace, which commenced on the 1st of July, lapsed on the following day.

Sir James Scarlett and Barstow, in this term (January 21st), showed cause. The sessions not having been properly adjourned on the 2d July, it is impossible to make up a valid record of the conviction. The trial of the prisoner was without authority, and every conviction or acquittal, after such adjournment, was a nullity. The prisoner's object is to treat the record as valid for the purpose of pleading *autrefois* convict; *and then having succeeded on that plea, to treat the record as invalid, and one by which he is not subject to [*1116] punishment. If the Court were to make the rule absolute, and the justices should return a perfect record of conviction, the prisoner might bring a writ of error and assign error in fact. [PATTESON, J. That would be to contradict the record, which he cannot do. *Rex v. Carlisle*, 2 B. & Ad. 362.] If they returned a record stating the fact truly, then the record would be bad in point of law.

Bodkin, contra, was stopped by the Court.

DENMAN, C. J. The prisoner has a right to have the record of the proceedings which passed at sessions correctly made up and to make any use of it that he can. The rule must be so altered as to require the justices to make up a record not of the conviction but of the proceedings had and taken against the prisoner Bowman.

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred.

Rule absolute to make up the record as above.¹

¹ The record was made up, and, on being produced at the Old Bailey sessions, April, 1834, was held not to support the plea of *autrefois* convict. *Rex v. Bowman*, 6 Carr. & Payne, 387.

*WRIGLEY v. SMITH.

[*1117]

The son of J. S. having been arrested, and one W. becoming his bail, J. S. signed an agreement to indemnify W. from all liability which he might incur in consequence: Held, that as one of the liabilities to which J. S. thereby subjected himself to pay the debt for which the son of J. S. had been arrested, and as that must have amounted to 20*l.*, the subject-matter of the agreement must have been of that value, and the agreement, therefore, required a stamp within the 55 G. 2, c. 184, sched. part 1.

THIS was an action of assumpsit. Plea, general issue. At the trial before GURNEY, B., at the Lancashire Spring assizes, 1833, it appeared that the defendant's son, having been arrested for 35*l.*, the plaintiff, at the defendant's request, and upon his depositing 40*l.* in the hands of the sheriff, became bail for the defendant's son, and that the plaintiff having afterwards consented to allow the defendant to receive from the sheriff's officer the 40*l.* deposited, the defendant signed the following undertaking: "I, the undersigned John Smith, the elder, do hereby undertake to hold harmless and indemnified John Wrigley, of and from all costs, charges, damages, or other expenses or liability which may be incurred by him, or arise, owing to and in consideration of the said John Wrigley having become bail for my son, the defendant in this action." The plaintiff having incurred costs in surrendering the defendant's son, the present action was brought. It was objected that the undertaking ought to have been stamped. The learned Judge directed a verdict to be taken for the plaintiff, but reserved liberty to move to enter a nonsuit.

Blackburne in Easter term having moved accordingly,

Alexander, in this term (January 28th), showed cause. The agreement did not require to be stamped, *by the 55 G. 3, c. 184, sched. part 1,¹ [*1118] because the subject-matter of it does not appear to be of the value of 20*l*. In *Chadwick v. Sills, Ryan & M.* 15, a memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner was held, first by *HOLROYD, J.*, at *Nisi Prius*, and afterwards by this Court on motion for a new trial, to be admissible in evidence to show the terms on which the goods were received, without a stamp, although the value of the goods was above 20*l*., the wharfage being of a less amount. In *Latham v. Rutley*, *Ibid.* 13, a memorandum "Received of *Latham & Co.*, a paper parcel, directed to *Messrs. Hoare & Co.*, 62 Lombard Street, value 260*l*., which we agree to deliver to them to-morrow, fire and robbery excepted, carriage paid here," given by a carrier in receipt of goods at Dover, was held to be admissible in evidence without a stamp, as being an agreement the subject-matter of which did not exceed 20*l*. In *Doe v. Avis*, *M. S.* 2 *Chitty's Statutes*, 964, n. (x), it was holden that an agreement, signed by a tenant, to hold premises with scheduled fixtures at 2*s.* 6*d.* per annum, determinable at six months' notice, need not be stamped; the subject-matter of the contract, viz. the right to occupy, not being shown to be above the value of 20*l*.: Lord TENTERDEN there said, "The words of the act are so ambiguous that the party objecting ought to make out the affirmative, which is not shown." And in *Orford v. Cole*, 2 *Starkie*, N. P. C. 351, *BAXLEY, J.*, ruled that a letter produced to prove a promise of marriage need not be stamped, and on the case [*1119] being afterwards discussed on motion for a new trial, *he observed that the enactment imposing the duty did not operate at all unless the subject-matter of the agreement was of the value of 20*l*.; and that this supposed that the value of the contract was measurable in order to ascertain whether the subject-matter did or did not amount to 20*l*. In *Rex v. Enderby*, 2 B. & Ad. 205, on appeal against an order of removal, the appellants, to show that the pauper served more than forty days as an apprentice in the respondent parish, with the assent of his master, produced a written paper purporting to certify that the father of the pauper agreed to give his master 8*s.* for the term of his apprenticeship; and it was held that there being nothing to show that the subject-matter of the agreement was of the value of 20*l*., it did not require a stamp. So here, there was nothing to show that the subject-matter of the agreement was 20*l*. [*TAUNTON, J.* The party was arrested for 35*l*., and he could not have been legally arrested for less than 20*l*.] The subject-matter of the agreement was not the sum for which the defendant's son had been arrested, but the liability of his bail to pay costs. [*PATTESON, J.* Your argument goes to show that a contract of indemnity would never require a stamp. The agreement by the defendant is to hold the plaintiff harmless and indemnified from all costs, charges, damages, or other expenses or liability which he may incur in consequence of his having become bail. Now one of those liabilities was, that he might have to pay the debt for which the defendant's son had been arrested.]

Blackburne, contra, was stopped by the Court.

**DENMAN, C. J.* A liability which the defendant might have incurred by the terms of his undertaking to indemnify the plaintiff, was that he might be called upon to pay the debt for which the defendant's son had been arrested. Now, although the costs, charges, and damages were uncertain, the debt for which this party had been arrested, must certainly have amounted to 20*l*. The agreement, therefore, required a stamp. The rule for entering a nonsuit must be made absolute.

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred. Rule absolute.

¹ "Agreement—where the matter thereof shall be of the value of 20*l*. or upwards."

*REGULÆ GENERALES.

[*i]

HILARY TERM, 4 W. 4.

WHEREAS it is provided by the statute 8 & 4 W. 4, c. 42, s. 1, that the Judges of the superior courts of common law at Westminster, or any eight or more of them, of whom the chiefs of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient, which rules, orders, and regulations were to be laid before both houses of parliament, as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both houses of parliament, but after that time should be binding and obligatory on the said courts, and all other courts of common law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament:

Provided that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence in any case wherein he then was, or thereafter should be entitled so to do by virtue of any act of parliament then or thereafter to be in force:

It is therefore ordered, that from and after the first day of Easter term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force:—

I. GENERAL RULES AND REGULATIONS.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

*2. No entry of continuance by way of imparlance, curia advisare vult, vice-comes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the jurata ponitur in respectu, which is to be retained. [*ii]

Provided that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea puis darrein continuance is now by law pleadable in Banc or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a Judge shall otherwise order.

8. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Provided that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. And whereas by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the said act of the 8 & 4 W. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, are greatly enlarged:

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or

cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Ex. gr.—Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So counts for not giving, or delivering, or accepting a bill of exchange, in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

*So counts for not accepting and paying for goods sold, and for the price of the [*iii] same goods, as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange, or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro ratâ itineris* upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed.

In actions of tort for misfeasance several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged, in *indebitatus assumpsit*, to be due in respect of several matters; ex. gr., for wages, work, and labor as a hired servant, work and labor generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts, is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract, in the same count.

Ex. gr.—Pleas, *avowries*, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in *bar*, in *replevin*, are within the rule), are not to be allowed.

Pleas of *solvit ad diem*, and of *solvit post diem*, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

*Pleas of an agreement to accept the security of A. B. in discharge of the [*iv] plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct, and to be allowed.

But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there; pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct and are to be allowed.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of a right of way over the *locus in quo*, varying the termini or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances introduced in violation of the rule be struck out at the cost of the party pleading; whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shown, that some distinct subject-matter of complaint is bona fide intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall endorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed.

7. Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each plea, count, avowry, or cognizance, which he shall have so [*v] failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings; and, further, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was bona fide intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was bona fide intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance with respect to which the Judge shall so certify.

8. The name of a county shall, in all cases, be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Provided that, in cases where local description is now required, such local description shall be given.

9. In a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of "precludi non," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action. Provided that nothing herein contained shall extend to cases where an estoppel is pleaded.

10. No formal defence shall be required in a plea, and it shall commence as follows: "The said defendant, by _____, his attorney, [or, "in person," &c.] says that"

11. It shall not be necessary to state, in a second or other plea or avowry, that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

*18 All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial. [*vi]

14. The form of a demurrer shall be as follows: "The said defendant, by _____, his attorney [or, "in person," &c. or, "plaintiff,"] says, that the declaration [or, "plea," &c.] is not sufficient in law," showing the special causes of demurrer, if any.

The form of a joinder in demurrer shall be as follows: "The said plaintiff [or, "defendant,"] says, that the declaration [or, "plea," &c.] is sufficient in law."

15. The entry of proceedings on the record for trial, or on the judgment roll (accord-

ing to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceeding in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the assizes, or any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

17. When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be, in the following form, *mutatis mutandis* :—

“C. D. } The day of . The defendant, by
 ata. } his attorney [or, “in person,” &c.], says that the plaintiff ought not
 A. B. } further to maintain his action, because the defendant now brings into Court
 the sum of £ , ready to be paid to the plaintiff. And the defendant further says,
 that the plaintiff has not sustained damages [or, in actions of debt, “that he is not indebted to the plaintiff.”] to a greater amount than the said sum, &c., in respect of the
 cause of action in the declaration mentioned, and this he is ready to verify. Wherefore
 he prays judgment if the plaintiff ought further to maintain his action.”

18. No rule or Judge's order to pay money into Court shall be necessary, except under the 3 & 4 W. 4, c. 42, s. 21, but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

19. The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty, in that *case, to tax his costs of suit, and, in case of non-
 [*vii] payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply “that he has sustained damages [or, “that the defendant is indebted to him,” as the case may be], to a greater amount than the said sum,” and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment, and his costs of suit.

20. In all cases under the 3 & 4 W. 4, c. 42, s. 10, in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form :—“[Venue.] A. B., by E. F., his attorney [or, “in his own proper person,” &c.], complains of C. D. and G. H., who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H.,” &c. [the same form to be used, *mutatis mutandis*, in case of arrest or detainer].

21. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

PLEADINGS IN PARTICULAR ACTIONS.

I. ASSUMPSIT.

In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr.—In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach. In an action of indebitatus assumpsit for *goods
 [*viii] sold and delivered, the plea of non-assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of non-assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse

some matter of fact; e. g., the drawing or making, or endorsing, or accepting, or presenting, or notice of dishonor of the bill or note.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. Ex. gr.: Infancy—coverture—release—payment—performance—illegality of consideration, either by statute, or common law—drawing, endorsing, accepting, &c., bills or notes by way of accommodation—set-off—mutual credit—unseaworthiness—misrepresentation—concealment—deviation—and various other defences, must be pleaded,

4. In actions on policies of assurance the interest of the assured may be averred thus: "That A., B., C., and D., or some or one of them, were or was interested." &c.; and it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

II. IN COVENANT AND DEBT.

1. In debt on specialty or covenant, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of "nil debet" shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged;" and such plea shall have the same operation as the plea of non-assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

4. In other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

*III. DETINUE.

[*ix]

The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV. IN CASE.

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. Ex. gr.—In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not the plaintiff's right of way; and, in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff, in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

V. IN TRESPASS.

1. In actions of trespass quare clausum fregit, the close or place in which, &c., must be designated in the declaration by name or abutments, or other description; in failure whereof the defendant may demur specially.

2. In actions of trespass quare clausum fregit, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but

not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. *In actions of trespass de bonis asportatis, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass quare clausum fregit, the defendant pleads a right of common of pasture for divers kinds of cattle; ex. gr., horses, sheep, oxen, and cows,—and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Provided, nevertheless, that nothing contained in the fifth, sixth, or seventh of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of Easter term next.

Issues, judgments, and other proceedings in actions commenced by process under 2 W. 4, c. 89, shall be in the several forms in the schedule hereunto annexed, or to the like effect, *mutatis mutandis*. Provided that, in case of non-compliance, the Court or a Judge may give leave to amend.

FORM OF AN ISSUE IN THE KING'S BENCH, COMMON PLEAS, OR EXCHEQUER.

**In the King's Bench ; or,
In the Common Pleas ; or,
In the Exchequer.**

The _____ day of _____, in
the year of our Lord 18 _____.

[Venue.] A. B., by E. F., his attorney [or, in his own proper person, or by E. F., who is admitted by the Court here to prosecute for the said *A. B., who is an infant *xi within the age of twenty-one years, as the next friend of the said A. B., as the case may be], complains of C. D., who has been summoned to answer the said A. B. [or, arrested or detained in custody], by virtue [or, served with a copy, as the case may be], of a writ issued on^b the day of , in the year of our Lord 18 , out of the Court of our Lord the King before the King himself, at Westminster [or, out of the Court of our Lord the King before his Justices at Westminster, or, out of the Court of our Lord the King before the Barons of his Exchequer at Westminster, as the case may be], for that

[Copy the declaration from these words to the end, and the plea and subsequent pleadings, to the joinder of issues.]

Thereupon the sheriff is commanded that he cause to come here, on the day of _____, twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.

No. II.

FORM OF NISI PRIUS RECORD, IN THE KING'S BENCH, COMMON PLEAS, OR EXCHEQUER.

[The placita are to be omitted. Copy the issue to the end of the award of the venire, and proceed as follows:—]

Afterwards, on the _____ day of _____, in the year _____, the jury between the parties aforesaid is respited here until the _____ day of _____, unless _____ shall first come on the _____ day of _____, at _____, according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear. Therefore let the sheriff have the bodies of the said jurors accordingly.

[The postea is to be in the usual form.]

*** Date of declaration.**

b Date of first writ.

- c Tests of *distingas*, or *habeas corpora*.

^d Return day of distringas, or habeas corpora.

- First day of sittings, or commission day of assizes.

No. III.

FORM OF JUDGMENT FOR THE PLAINTIFF IN ASSUMPSIT.

[Copy the issue to the end of the award of the venire, and proceed as follows:—]
 Afterwards, the jury between the parties is respited until the^a day of
 , unless shall first come on the^b day of
 , at , according to the form of the statute in that case made and provided
 for default of the jurors, because none of them did appear.
 Afterwards, on the^c day of , came the parties aforesaid, by
 their respective attorneys aforesaid [or as the case may be], and , before
 whom the said issue was tried, hath sent hither his record had before him in these
 words:—

[Copy postea.]

Therefore it is considered, that the said A. B. do recover against the said C. D. his
 said damages, costs, and charges by the jurors aforesaid, in form ^aaforesaid,
 assessed, also £. for his costs and charges, by the Court here adjudged of [*xii]
 increase to the said A. B., with his assent; which said damages, costs, and charges in
 the whole amount to £; and the said C. D. in mercy, &c.

No. IV.

FORM OF THE ISSUE, WHEN IT IS DIRECTED TO BE TRIED BY THE SHERIFF.

After the joinder of issue, proceed as follows:—And forasmuch as the sum sought to
 be recovered in this suit, and endorsed on the said writ of summons, does not exceed
 20*l.*, hereupon, on the^d day of , in the year , pursuant to
 the statute in that case made and provided, the sheriff [or the Judge of
 , being a Court of record for the recovery of debt in the said county, as the case may be],
 is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly
 to try the issue above joined between the parties aforesaid, and that he proceed to try
 such issue accordingly, and when the same shall have been tried, that he make known
 to the Court here what shall have been done by virtue of the writ of our Lord the King
 to him in that behalf directed, with the finding of the jury thereon endorsed, on the
 day of , &c.

No. V.

FORM OF WRIT OF TRIAL.

William the Fourth, by, &c. To the sheriff of our county of
 [or, to the Judge of , being a court of record for the recovery of debt in
 our county of , [as the case may be.]

Whereas, A. B., in our Court before us at Westminster [or, in our Court before our
 Justices at Westminster; or, in our Court before the Barons of our Exchequer at
 Westminster, as the case may be], on the^e day of last, impleaded
 C. D. in an action on promises [or as the case may be], for that whereas one, &c.
 [here recite the declaration as in a writ of inquiry], and thereupon he brought suit.
 And whereas the defendant, on the day of last, by
 his attorney [or as the case may be], came into our said Court, and said [here recite the
 pleas and pleading to the joinder of issue], and the plaintiff did the like. And whereas
 the sum sought to be recovered in the said action, and endorsed on the writ of summons
 therein, does not exceed 20*l.*, and it is fitting that the issue above joined should be tried
 before you the said sheriff of [or, Judge, as the case may be]: We therefore, pursuant
 to the statute in such case made and provided, command you that you do summon
 twelve free and lawful men of your county, duly qualified according to law, who are in
 no wise akin to the plaintiff or to the defendant, who shall be sworn truly to try the
 said issue joined between the parties aforesaid, and that you proceed to try such issue
 accordingly; ^{*}and when the same shall have been tried in manner aforesaid, we [*xiii]
 command you that you make known to us at Westminster [or, to our Justices
 at Westminster; or, to the Barons of our said Exchequer, as the case may be] what
 shall have been done by virtue of this writ, with the finding of the jury hereon endorsed,
 on the day of next. Witness
 minster, the day of , in the year of our reign.

^a Return of distringas, or habeas corpora.^b Day of sittings, or nisi prius.^c Day of signing final judgment.^d Tests of writ of trial.^e Date of first writ of summons.

No. VI.

FORM OF ENDORSEMENT THEREON OF THE VERDICT.

Afterwards, on the^a day of , in the year , before me, sheriff of the county of [or, Judge of the Court of], came, as well the within named plaintiff as the within named defendant, by their respective attorneys within named [or as the case may be]; and the jurors of the jury by me duly summoned, as within commanded, also came, and, being duly sworn to try the said issue within mentioned, on their oath said, that

No. VII.

FORM OF ENDORSEMENT THEREON, IN CASE A NONSUIT TAKES PLACE.

[After the words "duly sworn to try the issue within mentioned," proceed as follows:—]
and were ready to give their verdict in that behalf; but the said A. B., being solemnly called, came not, nor did he further prosecute his said suit against the said C. D.

No. VIII.

FORM OF JUDGMENT FOR THE PLAINTIFF AFTER TRIAL BY THE SHERIFF.

[Copy the issue, and then proceed as follows:—]
Afterwards, on the^b day of , in the year , came the parties aforesaid, by their respective attorneys aforesaid [or as the case may be], and the said sheriff [or, Judge, as the case may be] before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an endorsement thereon; which said endorsement is in these words; to wit,

[Copy the endorsement.]

Therefore it is considered, &c. [in the same form as before].

[*xiv]

*REGULÆ GENERALES.

HILARY TERM, 4 W. 4.

It is ordered, that from and after the first day of Easter term next inclusive, the following rules shall be in force in the Court of King's Bench, Common Pleas, and Exchequer of Pleas, and Courts of Error in the Exchequer Chamber.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea.

Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way.

3. No rule for joinder in demurrer shall be required; but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same; otherwise judgment.

4. To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the Court.

6. No motion or rule for a concilium shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument, at the request of either party, with the Clerk of the Rules, in the King's Bench and Exchequer, and a Secondary in the Common Pleas, upon payment of a fee of 1s.; and notice thereof shall be given forthwith by such party to the opposite party.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and

^a Day of trial.

^b Day of signing judgment.

the senior Judge of the Court *in which the action is brought; and the defendant shall deliver copies to the other two Judges of the Court next in seniority; [*xv] and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk of the Rules in the King's Bench and Exchequer, or the Secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

8. Where a defendant shall plead a plea of judgment recovered in another Court, he shall, in the margin of such plea, state the date of such judgment, and, if such judgment shall be in a Court of Record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a Judge.

9. No writ of error shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued.

Provided that, if the error stated in such notice shall appear to be frivolous, the Court, or a Judge upon summons, may order execution to issue.

10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the Clerk of the Errors of the Court in which the judgment is given, and pay the transcript money to him: in default whereof, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros. The Clerk of the Errors shall, after payment of the transcript money, deliver the writ of error, when returnable, with the transcript annexed, to the Clerk of the Errors of the Court of Error.

11. No rule to allege diminution, nor rule to assign errors, nor *scire facias quare executionem non*, shall be necessary, in order to compel an assignment of errors; but, within eight days after the writ of error, with the transcript annexed, shall have been delivered to the Clerk of the Errors of the Court of Error, or to the Signer of the Writs in the King's Bench, in cases of error to that Court, or within twenty days after the allowance of the writ of error, in cases of error *coram nobis*, or *coram vobis*, the plaintiff in error shall assign errors; and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros.

*12. The assignment of errors, and subsequent pleadings thereon, shall be delivered to the attorney of the opposite party, and not filed with any officer of [*xvi] the Court.

13. No *scire facias ad audiendum errores* shall be necessary (unless in case of a change of parties); but the plaintiff in error may demand a joinder in error, or plea to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur; otherwise the judgment shall be reversed.

Provided, that if, in any case, the time allowed, as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea or demurrer, shall not have expired before the 10th day of August in any year, the party entitled to such time shall have the like time, for the same purpose, after the 24th day of October, without reckoning any of the days before the 12th of August.

Provided also, that, in all cases such time may be extended by a Judge's order.

Provided also, that in all cases of writs of error, to reverse fines and common recoveries, a *scire facias* to the terre-tenants shall issue as heretofore.

14. When issue in law is joined, either party may set down the case for argument with the Clerk of the Errors of the Court of Error, or the Clerk of the Rules in the King's Bench, as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument, in like manner as on a demurrer, without any rule or motion for a concilium.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench on writs of error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought

to have been delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk of the Errors, or the Clerk of the Rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies.

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument; but, after judgment shall have been given in the Court of Errors in the Exchequer Chamber, either *party shall be at liberty to enter the [*xvii] proceedings in error on the judgment roll remaining in the Court below, on a certificate of a Clerk of the Errors of the Exchequer Chamber of the judgment given, for which a fee of 3s. 4d., and no more, shall be charged.

17. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity Term, 1 W. 4, s. 12.

18. It shall not be necessary to repass any nisi prius record which shall have been once passed, and upon which the fees of passing shall have been paid. And if it shall be necessary to amend the day of the teste and return of the distringas or habeas corpora, or of the clause of nisi prius, the same may be done by order of a Judge, obtained on application ex parte.

19. Writs of trial shall be sealed only, and not signed.

20. Either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by endorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a Judge why he should not consent to such admission; or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge, or other presiding officer, certified by his endorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided that, if the Judge shall think the application unreasonable, he shall endorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have endorsed upon the summons, that he does not think it reasonable to require it.

*A Judge may make such order as he may think fit respecting the costs of [*xviii] the application, and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause.

FORM OF NOTICE REFERRED TO.

A.

In the K. B.,
C. P., } A. B. v. C. D.
or Exchequer. }

Take notice, that the { plaintiff
defendant } in the cause proposes to adduce in evidence the
several documents hereunder specified, and that the same may be inspected by the
{ defendant, } his attorney or agent, at
{ plaintiff, }

, on , between the hours of ; and that the { defendant
plaintiff }

will be required to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respec-

tively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H., attorney for { plaintiff.
defendant. }

To E. F., attorney or agent for { defendant.
plaintiff. }

[Here describe the documents; the manner of doing which may be as follows:]

ORIGINALS.

DESCRIPTION OF THE DOCUMENTS.	DATE.
Deed of covenant between A. B. and C. D., first part, and E. F., second part,	1st Jan., 1828.
Indenture of lease from A. B. to C. D.,	1st Feb., 1828.
Indenture of release between A. B. and C. D., first part, &c.,	2d Feb., 1828.
Letter, defendant to plaintiff,	1st March, 1828.
Policy of insurance on goods by ship <i>Isabella</i> , on voyage from Oporto to London,	8d Dec., 1827.
Memorandum of agreement between C. D., captain of said ship, and E. F.,	1st Jan., 1828.
Bill of exchange for 100 <i>l.</i> , at three months, drawn by A. B. on, and accepted by, C. D., endorsed by E. F. and G. H.,	1st May, 1829.

*COPIES.

[*xix]

DESCRIPTION OF DOCUMENTS.	DATE.	ORIGINAL OR DUPLICATE SERVED, SENT, OR DELIVERED, WHEN, HOW, AND BY WHOM.
Register of baptism of A. B. in the parish of X.,	1st Jan., 1808.	
Letter, plaintiff to defendant,	1st Feb., 1828.	Sent by General Post, 2d Feb., 1828.
Notice to produce papers,	1st March, 1828.	Served 2d March, 1828, on defendant's attorney, by E. F. of
Record of a judgment of the Court of King's Bench, in an action, <i>J. S. v. J. N.</i> ,	Trinity term, 10 G. 4.	
Letters patent of King Charles II. in the Rolls' Chapel,	1st Jan., 1680.	

HILARY VACATION.

DIRECTIONS TO TAKING OFFICERS AS TO ALL WRITS ISSUED ON OR AFTER THE 16TH MARCH, 1834.

In all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into Court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* without costs, the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed. Provided, that in case of trial before a judge of one of the superior courts, or judge of assize, if the judge shall certify on the postea that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale.

At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of 20*l.* or not, in the following form:

"Debt above 20*l.*"

"Debt 20*l.* or under."

The Officers of the Exchequer to allow no incipiturs of judgment on paper, and mark the judgment on the postea.

Three shillings and four-pence to be allowed for drawing the judgment in all cases.

Every brief sheet to contain eight folios at the least, which are to be paid for at the rate of 6*s.* 8*d.* per sheet for drawing, and 8*s.* 4*d.* copying.

For every witness the allowance for travelling to be the expense actually paid, not exceeding 1*s.* a mile, unless under special circumstances.

*No fee to counsel to be allowed on writs of trial, except in trials before the judge of the Sheriff's Court of London, or of other courts of record where attorneys are not allowed to practice, and then 1 guinea only. [*xx]

THE FEES TO BE ALLOWED TO COUNSEL'S CLERKS NOT TO EXCEED AS UNDER :

	£	s.	d.		£	s.	d.
Upon a Fee under 10 guineas,	2	6		Drawing Judgment,	3	4	
Ten guineas and under 20 guineas,	5	0		Entering on Roll at 4d. per folio,			
Twenty guineas and upwards,	10	0		Paid Roll,		0	10
Senior Counsel's Clerks on Consultation,	7	6		Paid Entries (as before),			
The other Counsel's Clerks, each,	2	6		Paid Judgment Fee and Docket (as before),			
Attending as a Witness at trials to prove Documents,	10	6		Attending thereon,	3	4	
				Term Fee,	10	0	

SCHEDULE I.

COMMENCEMENT OF SUIT.

Letter before Action (if sent),	2	0
Instructions to sue,	3	4
Writ,	10	0
Copy and Service,	5	0
Bill and Copy to endorse,	2	0
Searching for Appearance,	3	4
Instructions for Declaration,	3	4
Drawing same at 1s. per folio (folio 6),	6	0
Engrossing,	2	0
Notice thereof (when filed),	5	0
Drawing Particulars and Copy,	2	6
Rule to plead,	1	0
Demanding Plea,	3	0
Drawing Issue, of whatever length,	3	4
Engrossing Issue to deliver at 4d. per folio (10 folio),	3	4
Notice of trial,	2	0

SCHEDULE II.

WHEN THE CAUSE IS TRIED BEFORE THE SHERIFF.

Summons for Trial,	1	0
Copy and Service,	3	0
Attending for Order,	3	4
Paid Order,	1	0
Copy and Service,	3	0
Engrossing the Writ of Trial (folio 14),	4	8
Parchment,	3	0
Paid Sealing,	0	7
Attending thereon,	2	4
Copy Particulars, to annex,	2	0
Subpoena,	5	0
*Copy and Service,	3	0
*[xxi] Making Minutes of Evidence for the hearing,	18	4
Attending to enter the Cause,	3	4
Paid part of the Sheriff's Fee on leaving the same (No more to be paid if the Record be withdrawn before Trial),	4	0
Attending Court on Trial,	12	4
Paid rest of Fees of Trial,	1	4
Notice of taxing,	3	0
Affidavit of Increase,	5	0
Paid filing Affidavit (whether Town or Country),	1	0
Bill of Costs and Copies,	4	0
Attending taxing,	3	4
Paid taxing (in K. B. and Exchequer),	2	6

Where Pl. Fa. and Warrant (as before).

(Signed)

Rule Office, K. B.,
6 Symond's Inn.

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LETTERS IN COUNTRY CAUSE.

Under 50 miles,	2	0
Above 50 miles,	4	0
Above 100 miles,	6	0

WHERE PL. FA. AND WARRANT THEREON; VIZ.:

In Town,	8	0
In Country,	18	0

SCHEDULE III.

WHEN CAUSE IS TRIED AT NISI PRIUS, AND VERDICT FOR 20L. OR UNDER.

Engrossing Record (Fo. 14),	4	8
Parchment,	3	0
Paid Sealing,	0	7
Attending thereon,	3	4
Copy Particulars to annex,	2	0
Venire,	6	6
Paid return,	2	0
Attending thereon,	3	4
Distringas,	7	6
Paid return (about),	15	0
Attending thereon,	3	4
Subpoena,	5	0
Copy and Service,	3	0
*Instructions for Brief,	13	4
*[xxii] Brief and Copy (and no more),	2	0
Attending to enter Cause,	3	4
Paid entering (about),	18	0
Counsel (as usual),		
Attending Court on Trial (about),	1	1
Paid fees on Trial (about),	3	15
Postea,	5	0
Notice of taxing,	3	0
Affidavit of Increase,	5	0
Paid filing same,	1	0
Bill of Costs and Copy,	4	0
Attending taxing,	3	4
Paid taxing (in K. B. and Exchequer), as usual say,	4	0
Drawing Judgment,	3	4
Entering on Roll at 4d. about 19 Fo.		
Paid Roll,	0	10
Paid Judgment Fee and Docket,		
Attending thereon,	3	4
Term Fee,	10	0

LETTERS IN COUNTRY (AS TO DISTANCE).

Costs not to be taxed until Judgment signed, unless the parties compromise without Judgment.

T. D.	S. G.
N. C. T.	J. B. B.
L.	J. V.
J. B.	W. B.
J. A. P.	E. H. A.
J. L.	J. G.
J. P.	

AN INDEX

TO THE PRINCIPAL MATTERS.

ABUTTALS, DESCRIPTION OF, IN LEASE.

See *Lease*, 1.

ACTION.

See *Partnership*, 1, 2.

ACTION, COMMENCEMENT OF.

See *Inclosure Act*, 1.

ACTION ON THE CASE.

1. A. erected a mill in 1823 on his own land, the former owner of which had for twenty years before 1818 appropriated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818, B. had erected a mill near the same stream, and the owner and occupier of A.'s land then gave a parol license to B. to make a dam at a particular spot, and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where A.'s mill was afterwards erected. In 1818, B., without license, conveyed part of the water which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828, A. appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829, A. demolished the dam erected by B., and gave him notice not to divert the water. B. then erected a new dam lower down the stream, and by means of it diverted from A.'s mills, at some times, all the water before appropriated by A.; at others, a part of it; and the water when returned into the stream, was in a heated state: Held, on special verdict,

First, that whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, A. was entitled to the surplus water; for he was first occupant of that, and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water.

Secondly, that A. was in like manner entitled to recover in respect of the water diverted by B., at his new dam; because the license granted to B. by the former occupier was, to take the water at one particular point, and not at the place where his dam

was made; and further, because if the license had been general to take at any place, it would have been revocable, except as to such places where it had been acted on, and expense incurred; and it was revoked before the last dam was erected.

Thirdly, that A. was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1818; for the possessor of land through which a natural stream flows, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment.

Whether such possessor of land can maintain an action for the mere violation of such general right by diversion of the water, &c., without having sustained any special injury, *Quære. Mason v. Hill*, T. 3 W. 4.

2. An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue.

The owners of a ship circulated advertisements of sale, beginning with a description of the ship, which stated her to be copper-fastened; after which was a notice, that the hull, masts, yards, and rigging, were to be taken with all faults. Under this was printed the word "Inventory," which was followed by a list of the ship's stores and tackle; and there was then a further announcement, that the vessel and her stores were to be taken with all faults, and without allowance for weight, length, quality, quantity, or any defect whatever. The owners afterwards executed a written contract of sale, not stating the vessel to be copper-fastened, but containing this clause: "On payment of the purchase-money, the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited; but the said inventory shall be made good as to quantity only; and the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever."

Held (assuming that the advertisement could, by words of reference, be incorporated with the contract of sale), that the word "inventory" in the contract, referred only to the list of stores, &c., and not to the prior part of the advertisement: and, therefore, that on the two documents taken together, no

warranty appeared that the ship was copper-fastened. *Freeman v. Baker* and another, M. 4 W. 4. 797

ADMINISTRATION.

See *Settlement by renting a Tenement*, 1.

ADMITTANCE.

See *Copyhold*, 2, 3.

ADOPTION OF ROAD BY PARISH.

See *Highway*.

AFFIDAVIT TO HOLD TO BAIL.

See *Practice*, 12.

AGREEMENT.

See *Pleading*, 5, 7. *Practice*, 7.

ALDERMAN.

See *Mandamus*, 1.

AMENDMENT.

See *Pleading*, 1.

ANNUITY.

See *Devise*, 2. *Judgment*.

APPEAL.

See *Mandamus*, 3, 4, 7. *Sessions*.

The Parish of Bishop Wearmouth has no overseers of the poor; but contains several townships, separately maintaining their own poor, and having distinct overseers. Two of these townships are called Bishop Wearmouth and Bishop Wearmouth Pannu. Paupers, whose settlement was in Bishop Wearmouth Pannu, were, by an order of justices, directed to be removed to the parish of Bishop Wearmouth. The order was served on the overseer of Bishop Wearmouth Pannu, who refused to receive the paupers (on the ground that that township was not named in the order) unless certain expenses were waived. This being refused, the paupers were taken away. The removing parish afterwards served the churchwarden of the whole parish of Bishop Wearmouth with the order, and delivered the paupers to him. The latter took the paupers to the workhouse of Bishop Wearmouth township, where they were maintained:

Held by DENMAN, C. J., and LITLEDAL, J., TAUNTON, and PATTISON, Jr., dubitanti-bus, that the inhabitants of the township of Bishop Wearmouth, although they were not bound to maintain the pauper under the order, had reasonable ground for thinking that they might be aggrieved by it, and therefore were entitled to appeal. *The King v. The Inhabitants of Bishop Wearmouth*, H. 4 W. 4. 942

APPORTIONMENT OF RENT.

See *Lease*, 2.

APPURTENANCES.

See *Way*.

ARBITRAMENT.

See *Stoppage in transitu*, 2.

1. A replevin suit, and all matters in difference touching the distress, were referred to arbitration; the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14l., and that 6l. were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6l., and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed:

Held, that the award did not show who ought to pay the costs, which were to abide the event of the suit; and consequently, that it was not final. *In the matter of Arbitration between Leeming and Fearnley*. T. 3 W. 4. 403

2. A party to an arbitration cannot object to the award, that the arbitrators chose an umpire by lot, if he expressly agreed to, or acquiesced in, that mode of choice.

Where a submission to arbitration under seal, has been varied by endorsing on it a new agreement (as, for changing one of the arbitrators), to which both the principal parties have expressly assented, one of those parties cannot afterwards move to have the award set aside on the ground that the endorsement was not under seal.

An umpire, being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was in question, made his award without calling for further evidence, or giving any notice on that subject to the parties: Held, that the award could not be objected to on that ground by a party who knew that the case had gone before the umpire, and made no application to him to hear further evidence. *In the matter of Arbitration between Tunno and Bird*. M. 4 W. 4. 488

3. On a reference of a cause and all matters in difference by a Judge's order, one of the parties moved, after the proper time, to set the award aside: Held, no excuse for the delay, that the arbitrator made an exorbitant charge for the award, in consequence of which the party now applying did not take it up.

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges; whether they be reasonable or not. *Macarthur v. Campbell*, M. 4 W. 4. 518

4. No precise form of words is necessary to constitute an award; it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. But where an arbitrator, to whom a dispute between an architect and his clerk, respecting a claim by the latter to wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not show experience or ability to the extent to justify a demand for remuneration under the circumstances; but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10l.:

Held that the latter part of the letter was a mere suggestion of the arbitrator and not a decided opinion that the clerk was or was not

entitled to recover 10*l.*, and therefore not a good award. *Lock v. Vulliamy*, M. 4 W. 4. 600

ARREST.

1. By the 32 G. 2, c. 28, s. 1, it is enacted that no sheriff's officer shall carry any person arrested by him to gaol within twenty-four hours from the time of such arrest, unless such person shall refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment; and by s. 12, a penalty is imposed on any officer offending against the act:

Held, in an action brought for the penalty for taking a party to gaol within twenty-four hours, contrary to the statute, that the officer who made the arrest ought to have required the party arrested to nominate some convenient dwelling-house to be taken to; for the latter could not be said to have refused till the proposal had been made, and a mere omission by him to nominate a place did not justify carrying him immediately to gaol. *Simpson v. Benton*, T. 3 W. 4. 35

2. Plaintiffs having obtained a verdict against defendant under an award, in a cause in K. B., the Court of Chancery, upon bill filed, and matter appearing on the award itself, granted an injunction to stay further proceedings. Plaintiffs nevertheless signed judgment, and took defendant in execution. On application to this court for a rule nisi to discharge the defendant out of custody (it being stated amongst other things, that the plaintiffs could not be met with for the purpose of attaching them by process out of Chancery), this court refused to interfere. *Foreman & Lloyd v. Jeyes*, M. 4 W. 4. 835
3. A person having made a motion in a cause to which he was a party, left the court, and in his way home called at an office where he kept his papers, but did not reside, to refresh himself and sort his papers: he remained there between one and two hours, and then left the office, and went into a tailor's shop in the same street, intending, however, to proceed home immediately, and being on his way thither when he so deviated. As soon as he entered the shop, he was arrested by a sheriff's officer, who had watched him from the court:

Held that the privilege of the party, *re-deundo* from the court, had not ceased when he was arrested, and that he was entitled to be discharged. *Pitt v. Coomes*, H. 4 W. 4. 1079

ASSUMPSIT.

See *Lien*.

1. Defendant was office-keeper of an Exeter and London coach, and servant to C., a proprietor at Exeter, where the office kept by the defendant was. Defendant from time to time made up accounts of the shares of profits due to the several proprietors, and sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion defendant sent to plaintiff, a proprietor, a packet purporting to contain 23*l.*, which was due to him, but in reality containing 20*l.* only. Plaintiff sued defendant for 3*l.* had and received to his use:

Held that defendant was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from this defence by having told the plaintiff (after action brought) that he, defendant, had had the 23*l.* of C. and sent it to the plaintiff, and debited C. with it. *Howell v. Batt*, M. 4 W. 4. 504

2. A brewer, who delivered beer to be used in a particular public house on the credit of a person not the licensed keeper of the house, may maintain an action against the latter for goods sold and delivered. *Brooker v. Wood*, H. 4 W. 4. 1052

ATTAINDER OF FELONY.

See *Ejectment*, 1. *Lease*, 6.

ATTORNEY.

See *Evidence*, 3. *Lien. Practice*, 11.

1. Where an attorney, defendant in *assumpsit*, sets off the amount of his bill, the plaintiff cannot deduct from that set-off costs of taxation allowed against the attorney, pursuant to 3 G. 4, c. 23, s. 23. *Field v. Bezanet, Gt. one, &c.*, T. 3 W. 4. 357
2. The Court of King's Bench does not exercise any common law jurisdiction in taxing attorneys' bills.

The court, in the exercise of its statutory jurisdiction, refused to order an attorney's bill to be taxed at the instance of a third person, where the client had before admitted the amount to be due and declined taxing the bill; such client having since become bankrupt, and the application being made for the purpose of reducing his claim so as to prevent his being a good petitioning creditor. *Clutterbuck v. Combes*, T. 3 W. 4. 400

3. The Court of King's Bench will not grant a rule calling on an attorney to show cause why he should not be struck off the roll, if the affidavits in support of the rule state an offence for which he would be liable to indictment. *Anonymous*, H. 4 W. 4. 1069

AWARD.

See *Arbitrament*, 1, 2, 3, 4.

BAIL.

See *Practice*, 2.

BANKER.

1. V. and Co., bankers, were assignees of a judgment obtained in Scotland against M. H. for 4100*l.* In 1829 M. H. deposited with V. and Co. 4100*l.*, and by a memorandum in writing it was agreed that that sum should be deposited in their hands for safe custody, on account of M. H., and that from the time such deposit should be made and during its continuance V. and Co. were not to pay any interest thereon, and all interest should cease in respect of the amount due upon the judgment. M. H. afterwards became bankrupt, and his assignees on the 12th of Nov., 1831, demanded from V. and Co. the 4100*l.*, which they refused to pay: Held, that they were not liable to pay interest on that sum from the time when payment of the principal was demanded. *Edwards v. Vere*, T. 3 W. 4. 282

2. Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money unless he prove distinctly that the loan was in reality intended to be his and was received as such. And therefore where A. as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the East India Company, to pay to the said owners or bearer the sum of money therein mentioned, for freight; and A. deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it on account: it was held on assumpsit brought after A.'s death by the surviving part-owners against the bankers, that on proof of the above facts, they could not recover the money because it was not shown that the loan was upon their account, for the fact of the warrants being the property of all the part-owners, when placed in the bankers' hands was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan. *Sims v. Bond and another*, T. 3 W. 4. 389

BANKRUPT.

See *Stoppage in Transitu*, 2.

1. A steam engine erected for the purpose of working a colliery to be used by the lessee of such colliery during his term, but to be held as the property of the landlord subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels," in the 6 G. 4, c. 16, s. 72, nor had the bankrupt the actual or apparent ownership. *Coombs and another v. Beaumont*, T. 3 W. 4. 72
2. A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must show, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. *Morgan v. Brundrett, &c. one*, &c. T. 3 W. 4. 289
3. R. C. borrowed a sum of money and gave the lenders a bond, by which he and four others bound themselves jointly and severally in a penalty, for the regular payment of interest, and for the discharge of the principal, and all the interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of R. C. became bankrupt, and obtained his certificate. At the time of the bankruptcy, a forfeiture had accrued by non-payment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate R. C. was called upon for the principal but did not pay, and payment was enforced from the four co-obligors who had continued solvent. In an action by one of them against the party who had been bankrupt for contribution: held that they could not have proved under the commission by s. 52 of the bankrupt act, and, therefore, that the certificate was no answer to the action. *Clements v. Langley*, T. 3 W. 4. 372

4. The bankrupt act 6 G. 4, c. 16, s. 72, vests in the assignees such goods whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of A. until the day before he became bankrupt, and then demanded the possession of them, which A. refused to deliver: Held, that they did not pass to A.'s assignees. *Smith v. Topping*, M. 4 W. 4. 674

BARON AND FEME.

See *Feme Covert*.

BEER, SALE OF, BY RETAIL.

See *Custom*, 1.

BILL OF EXCHANGE.

See *Stamp*, 1.

1. In an action by drawer against acceptor of a bill of exchange for 101l. defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in the defendant's handwriting, purporting by its date to have been written after he became of age, addressed to a third person in these words: "I request you pay to H." (plaintiff) "101l. at your earliest convenience, after the date of this letter, from the money left me by my grandfather, for which I have given my bill." This letter was proved to have been delivered to the plaintiff's clerk, but it did not appear when. Held, that the letter must, *prima facie*, be taken to have been written and issued at the time when it bore date; and that having been written after defendant came of age, and before the bill became due, it would support a count on a promise to pay according to the tenor and effect of the bill. *Hunt v. Massey*, H. 4 W. 4. 902
2. In an action by the endorsee against the drawer of an accommodation bill, which had been fraudulently disposed of by the first endorsee, and afterwards discounted by the plaintiff, it is no defence that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained: the defendant must show that the plaintiff was guilty of gross negligence. *Crook v. Jadis*, H. 4 W. 4. 909
3. To an action by an endorsee against the endorser of a bill of exchange, who had lost the bill by accident, it is a good defence that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the party from whom he took it had no title, or that he was guilty of gross negligence in taking it; but it is no defence that he took it under such circumstances that a prudent cautious man would not have taken it. *Backhouse v. Harrison*, H. 4 W. 4. 1099

BILL OF LADING.

See *Freight. Stoppage in transitu*, 2.

BILL OF MIDDLESEX.

See *Practice*, 6.

BOND.

1. On a bond with a penalty, conditioned for the payment of money at a given day, and interest in the mean time, with a stipulation that on any default in paying the interest, the whole sum should be demandable; the obligee, on the interest falling into arrear, brought an action to recover the whole principal and interest: Held, that the case was not within 8 & 9 W. 3, c. 11, s. 8, and therefore that the plaintiff was entitled after verdict to have judgment and execution for the whole principal sum, and not merely for the arrears of interest. *James v. Thomas*, T. 3 W. 4. 40
2. An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made. *Gibbs v. Southam*, H. 4 W. 4. 911
3. Debt on bond. The condition, after reciting that the obligor was about to marry with A. a widow, and thereby to become possessed of a stock in trade, and that it was agreed that he should execute a bond to pay the children of A. by her late husband 300*l.* within twelve months after her death in the event thereafter specified, was that, "if the obligor should within twelve months after the decease of A. pay to her children 300*l.*, if, upon an account taken, the stock in trade and effects in the business (if then carried on by the obligor) should amount to 400*l.*; but in case upon such account to be taken, the stock in trade should amount to less than 400*l.*, then if the obligor should pay to the children of A. 120*l.*, the bond should be void." Plea, that long before the death of A., the obligor retired from and ceased to carry on the trade, and that at the death of A. he had not any stock in trade, and that no account of the said stock in trade in the condition mentioned was or could be taken at the time of the death of A., or from thence hitherto: Held, on demurrer that the true construction of the condition of the bond was, that the obligor had an option to continue or discontinue the trade during the life of A., and that he having discontinued it, the event on which the money was to come to the children of A. had never happened; and that the plea therefore was good. *Beswick v. Swindells*, H. 4 W. 4. 914

BREWER.

See *Assumpsit*, 2.

BRIDGE.

Before the statute of 43 G. 3, c. 59, there had been a public county bridge, which was of wood, resting on stone abutments. After that statute passed, the wooden part of the bridge was, during a flood, carried some distance down the river, but the stone abutments remained. Part of the wooden materials being afterwards collected together, were, with new materials formed into the upper part of a bridge, which was wider than it had been before the flood, and placed upon the old abutments. This was done at the expense of the parish, and not under the direction of the county surveyor: Held, that this was not a bridge erected or built after the passing of 43 G. 3, c. 59, s. 5; and that the inhabi-

tants of the county were bound to repair it. *The King v. The Inhabitants of the County of Devon*, T. 3 W. 4. 383

BROKER.

See *Insurance Broker*.

BUILDING.

See *Indictment*, 3.

BURGESS.

See *Custom*, 1, 2.

BUTTER, SALE OF.

See *Vendor and Vendee*, 1.

CANAL ACT.

1. By acts of parliament enabling a company to make and maintain a canal navigation, and to take lands for that purpose making satisfaction, it was provided that the company should not take any garden ground without consent of the respective owners and occupiers, and that any action to be brought for anything done in pursuance of those acts, should be commenced within six calendar months next after the act should have been committed; or, if there should be a continuance of damages, then within six calendar months next after the committing of such damage should have ceased.

The company wishing to take garden ground for the purpose of sloping the banks of the canal, told the occupier, or tenant, that they had obtained the consent of the owner's agent, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land in consequence was from thenceforth overflowed by the Thames at every high tide. For this damage the landlord sued the company more than six calendar months after the ground was taken, and the tide was let in:

Held, that the injury was one for which an action should have been brought within six months from the taking away of the land; and that the defendants were within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statutes, though in the prosecution of that purpose the defendants had been guilty of a misrepresentation and of bad faith toward the occupier. *Lord Oakley v. The Kensington Canal Company*, T. 3 W. 4. 138

2. A river navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person seized in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls to a trustee, to secure the annuities, and to permit her to hold the conveyed premises and the profits thereof to her own use, till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to Y., together with other property, in trust to sell as in the deed was directed, and to receive the pro-

ceeds of such sale, and the tolls and profits of the navigation; and out of the several receipts and profits to defray the costs and expenses necessary for carrying the trusts into effect, to pay up, and, if possible, discharge the annuities, to pay off certain creditors, and to hold the surplus, if any, for her benefit.

The trustee under the last mentioned deed entered into receipt of the tolls, appointed a collector, and represented himself to the commissioners as a mortgagee of the tolls, and as having a control over them and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary:

Held, that it lay upon the trustee having conducted himself as above stated, to show that he was not a proprietor within the meaning of the act: Held further, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee, to secure the annuities.

The act, passed in 1794, required that certain notices should be given to the Northampton and Cambridge newspapers. There was at that time one newspaper published at each place. A newspaper was subsequently established, called *The Huntington, Bedford, and Peterborough Gazette*, and Cambridge and Hertford Independent Press; and it was published (among other places) at Cambridge: Held, that publication of the notices in the former papers was sufficient. *Tibbitts, Gent. One, &c. v. Yorke*, M. 4 W. 4. 605

CAPIAS.

See *Practice*, 12.

CERTIFICATE.

See *Bankrupt*, 3.

CERTIORARI.

See *Indictment*, 1. *Sessions*.

CHELSEA WATERWORKS COMPANY.

See *Poor Rate*.

CLERK TO COMMISSIONERS OF NAVIGABLE CANAL.

See *Canal Act*, 2.

CLERK TO TRUSTEES UNDER A TURNPIKE ACT.

See *Mandamus*, 2.

CLOSES IN WHICH, &c.

See *Pleading*, 3.

COAL MINES, RATEABILITY OF.

See *Inclosure Act*, 2.

COMMENCEMENT OF RISK.

See *Insurance*, 2.

CONDITION.

See *Bond*, 1, 2, 3.

CONDITION PRECEDENT

See *Lease*, 3.

CONVICTION.

See *Justices*, 1.

COPARCENER.

See *Livery of Seisin*.

COPYHOLD.

1. Copyholds are within the statute 27 Eliz. c. 4, which avoids all conveyances of any lands, tenements, or hereditaments, made for the intent and of purpose to defraud and deceive persons that shall afterwards purchase the same. *Dee d. Tunstall v. Bottrill*, T. 3 W. 4. 131

2. A copyholder in fee surrendered to the use of another person, and afterwards and before the admittance of the surrenderee, committed, and was convicted of simple felony: there being a custom in the manor that any tenant of customary tenements who should commit and be convicted of felony, should forfeit his said tenements to the lord: Held, that the surrender or before admittance was still tenant for the purpose of forfeiture, and that his estate was forfeited to the lord, and the surrenderee not entitled to be admitted. *The King v. Lady Jane St. John Mildmay*, T. 3 W. 4. 254

3. At a court baron, held in 1812, before the steward of a manor, two copyhold tenements were granted to W. R. and J. H., habendum for their lives and the life of the longest liver of them successively at the will of the lord according to the custom of the manor, at the yearly rents of 26s. 4d. and 7s. all services therefore due, and a heriot when it should happen, and the said W. R. was admitted tenant; but the admission and fealty of J. H. were respited until, &c.

In 1823, the lessees of the manor by deed appointed C. L. steward of the manor, with full power to hold courts baron and customary courts, and to do all acts usual to be done by stewards in relation thereunto; and they more especially authorized him to make any voluntary grants of customary or copyhold lands within or parcel of the manor, and to give licenses to demise, or otherwise, as he the said C. L. should think fit, and either in or out of court as fully as the lessees might or could do.

At a court baron held out of the manor in 1825, J. H. (who survived W. R.) surrendered to the lords-lessees the above-mentioned copyhold messuages, and the lessees by C. L. their steward granted them again to W. H. L. and J. W. W. habendum for their lives, and the life of the longest liver of them successively, according to the custom of the manor, at the yearly rent of 26s. 4d. and 7s. and all services therefore due, and a heriot for each of the said tenements when it should happen, according to the custom of the manor; and J. H. L. and J. W. W. were admitted tenants:

Held, that it was no objection to this grant

that J. H., the surviving life under the grant of 1812, was never admitted tenant: nor that two rents were reserved, without distinguishing how much was payable for each tenement, the same rents having been reserved by a former grant in 1771: nor that a heriot was reserved for each tenement when it should happen, according to the custom of the manor; for if a heriot was not demandable for each tenement, the claim could not be enforced; but that would not avoid the grant:

Held, secondly, that a customary court cannot be held out of the manor, unless there be a custom to warrant it; and if one be held out of it without such custom, it is void, and such things there done, as are required to be done at a court, such as presentments by the homage, imposing fines, levying fines, and suffering recoveries, are void:

But, thirdly, that as the lord may grant to or admit a copyhold tenant, not only out of court, but also out of the manor, the grant of 1823, if it had been made by the lord, would have been good, though it purported to have been made at a void court:

Held, fourthly, that a steward cannot in his mere character of steward, admit a copyhold tenant out of the manor.

Fifthly, that as C. L., by the deed of 1823, had a special authority to make any voluntary grants, either in or out of court, as fully as the lessees of the manor could do, he might take the surrender, and make the grant in question out of the manor; and that although he professed in making the grant, to act only as steward, and not as the special agent of the lord, the grant so made might operate as a grant made by the lord's attorney, and was therefore valid.

Sixthly, that although, in general, to make a party tenant by copy of court roll, his admission ought to be notified, for the information of the tenants, at the next or some other court, and a regular entry of it made by certificate, presentment, &c.; yet, as the proceedings at this void court were entered by the steward on the court rolls, as if done at a valid court, the tenants must, at a following court, after the admittance, have had information of what had been done, and that was sufficient. *Doe dem. Leach and Another v. Whitaker*, T. 3 W. 4. 409

4. If a copyholder pull down a barn, without any intention of rebuilding, the lord cannot recover the place from him, on the ground of a forfeiture, if the jury find that the premises are not damaged. *Doe dem. Grubb v. The Earl of Burlington*, M. 4 W. 4. 507

A. and B. by a settlement made on occasion of their intended marriage (which afterwards took place) conveyed certain freehold estates to trustees, for the benefit of themselves and the survivor of them for life, then for the benefit of the issue of the marriage, if any, and if none, then to the use of such person as the wife by deed or last will, notwithstanding her coverture, and as if she was sole and unmarried, should appoint, and in default of appointment to the use of herself in fee. The wife at the time of the marriage was seised in tail of certain copyhold lands.

The husband and wife afterwards executed a power of attorney to C., authorizing him to surrender the copyhold lands of which the

wife was seised in tail to a third person, in order to make him tenant to the præcipe or plaint in a recovery intended to be suffered in the manor court. The wife, previous to her executing the power of attorney, was examined apart from her husband, by the deputy steward of the manor. The recovery was suffered, and immediately afterwards the premises were surrendered to the same uses as those mentioned in the marriage settlement: Held, that the power of attorney was valid as the act of the husband; he having sufficient interest in his wife's copyhold lands to pass them by surrender during the joint lives of himself and his wife; and that the recovery (which had stood unreversed for twenty years) was therefore well suffered.

After the above surrender, the wife was admitted to other copyhold lands, which were not surrendered to the use of her will. By her will made in 1802, she devised her real and leasehold estates to certain persons therein named. At the date of her will and of her death she was seised of freehold estates: Held, that the will was a valid disposition of the copyhold which had been surrendered to the use of her will, though it did not refer to the surrender in which the right of disposition was reserved, and though it was made after she ceased to be a feme covert:

Held further, that the copyholds which had not been surrendered to the use of the will, did not pass by the general devise of the real estate, the will having been made before the 55 G. 3, c. 192. *Doe dem. Smith v. Bird and Another*, M. 4 W. 4. 695

CORONERS.

The court on the application of the crown, set aside a coroner's inquisition, for defects apparent on the face of it. Rule absolute in the first instance. *In the Matter of Culley*, T. 3 W. 4. 230

CORPORATE OFFICER.

See *Mandamus*.

CORPORATION.

See *Quo Warranto*.

In an action against a corporation on a bond, the condition of which recited, that the company were, by act of parliament, authorized to raise money by bond, and that at a general assembly of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded non est factum: Held, that although the company could not, under that plea, show that the bond executed by them was invalidated by collateral matters, they might show that it was void, because it was executed contrary to the provisions of the act of parliament:

Held, secondly, that a clause in the act of parliament, whereby the company were authorized, at any general or special general assembly, to order and dispose of the custody of their common seal, and the use and application thereof, empowered them to make rules and regulations for its custody, but did not require their concurrence in each particu-

lar act of sealing, and that a bond to which the seal had been affixed by the company's clerk, under a general authority from the directors, was valid.

By another clause it was enacted, that the clerk should, in a book provided by the company, keep an account of all acts, proceedings, and transactions of the company proprietors, and that every proprietor should have liberty to inspect the same, and take copies of the entries: Held, that entries of the proceedings in the book so kept by the clerk were not admissible in evidence, against one of their own members suing them. *Hill v. The Manchester and Salford Waterworks Company*, M. 4 W. 4. 866

COSTS.

See *Attorney*, 1, 2. *Ejectment*, 2, 3. *Indictment*, 2. *Mandamus*, 8. *Practice*, 5, 7, 8, 12. *Prohibition*, 1. *Slander*, 2.

CO-SURETY.

See *Bankrupt*, 3.

COURT.

See *Copyhold*, 3.

COURT MARTIAL.

See *Prohibition*, 2.

COVENANT.

See *Lease*, 3, 5. *Pleading*, 5.

Declaration stated that by indenture between defendant and J. W., reciting that defendant for certain considerations had agreed to pay off certain mortgages and debts of J. W., defendant covenanted to and with J. W. to save, protect, defend, keep harmless, and indemnify J. W., his heirs, executors, administrators, &c., from the payment of the said debts, and from all actions, &c., in respect of them. Breach, that 500*l.* of an annuity for payment of which J. W. had bound himself, his heirs, executors, and administrators, became in arrear, and remained so after J. W.'s death, and that defendant did not pay the same, nor protect or indemnify J. W., his executors, administrators, &c., by reason whereof the annuity bond became forfeited, and the grantee recovered against the plaintiff, administratrix of J. W., and had judgment for 20*l.*, the amount of assets admitted to be in hand, and for the residue, judgment of assets quando: Held, that looking to the whole of the deed declared upon, there appeared a covenant by the defendant, not only to indemnify, but to pay the debt.

Semble, per PARKE, J., and held by PATTERSON, J., that if the express covenant to protect and indemnify had stood alone, a sufficient breach of that covenant appeared (LITLEDALE, J., dubitante): Held, that the plaintiff might recover the whole arrears, for which she was liable, as administratrix, to the grantee of the annuity, though she had only paid a part. *Carr v. Roberts*, T. 3 W. 4. 78

COVENANT TO STAND SEISED TO USES.

See *Marriage Settlement*.

CRIMINAL INFORMATION.

See *Justices*, 2.

CURATE.

See *Settlement by Renting a Tenement*, 4.

CUSTOM.

1. The statute 11 G. 4 and 1 W. 4, c. 64, for permitting the general sale of beer by retail in England, does not supersede the custom of a borough, that no person shall carry on the trade of an ale-house keeper therein who is not a Burgess. *Mayor, &c., of Leicester v. Burgess*, T. 3 W. 4. 246
2. A custom for the jurors of a court leet holden for a borough and manor, to present persons to be admitted burgesses of the borough, and for the persons so presented to be admitted and sworn in burgesses, was held, on motion in arrest of judgment, to be valid in law. *The King v. The Duke of Beaufort*, T. 3 W. 4. 442

CUSTOMARY COURT.

See *Copyhold*, 3.

DEATH, PRESUMPTION OF.

See *Evidence*, 1.

DECEIT.

See *Action on the Case*, 2.

DEED.

See *Canal Act*, 2. *Marriage Settlement*.
Way.

Mortgagor granted, bargained, sold, released, and confirmed to mortgagees (in his possession then being by a previous bargain and sale) an iron-foundry and two dwelling-houses, &c., and the appurtenances; together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses; and all trees, houses, cottages, commons, &c., easements, profits, &c., to the said foundry, messuages, and lands appertaining. There were cranes, presses, a steam engine, and other fixtures in the foundry, used for the purposes of the business carried on there, and valued at 600*l.*: Held, that the specification of the grates and other fixtures in and about the dwelling-houses, showed that those in the foundry were not intended to pass, though they would have passed if the others had not been mentioned.

Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage: Held, that the possession of it by the plaintiff was *prima facie* evidence that it had been delivered to him as a deed. *Hare v. Horton*, M. 4 W. 4. 715

DEPOSIT.

See *Banker*, 1, 2.

DEVISE.

See *Copyhold*, 5.

1. Testator devises as follows: "As touching my worldly estate, I give, devise, and dispose of the same in the following manner: first, I give to my wife, Ann, the whole of my estates, goods and chattels, living stock, and debts, during her widowhood, and no longer, but demately to go to my dear children, as I have appointed and disposed to them in lots and money." He then, after giving to his eldest son a sum of money, left to his second son a lot of land (therein described) to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever. Then followed four other devises in similar terms to four other sons, and then he gave to his son John a dwelling-house, and piece of ground, &c.; also his goods and living stock. He then devised to his daughter a house and gardens, and to her son and his lawful heirs for ever: Held that John took a life estate only in the house and ground devised to him. *Doe d. Gwillim v. Gwillim*, T. 3 W. 4. 122

2. Lands were devised, to the use, among others, that M. A. F. should take from and out of the same premises an annuity or yearly rent charge of 500*l.* a year, to be paid clear of all taxes and deductions, remainder to S. for life, subject to the annuity: Held that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently that S. who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity pursuant to the 45 G. 3, c. 28, s. 5, could not recover it again from the annuitant. *Stow v. Davenport*, T. 3 W. 4. 359

3. Testator being seized in fee of lands, devised to trustees in fee, upon trust, as to part, to permit his eldest son to receive the profits for life; and as to other parts to permit his two daughters to receive the profits for life; and also upon trust, during the lives of his said children, to preserve contingent remainders.

And after the decease of any or either of his said children, he devised the estate to him or them limited for life as aforesaid, unto all and every his, her, or their child or children living at the time of his, her, or their parents' decease, or born in due time afterwards, for their lives as tenants in common; but, nevertheless with an equal benefit of survivorship among the rest of the said children, if more than one, and any of them should die without leaving issue, the child or children of each of his said sons and daughters taking the rents and profits of his, her, or their parent's estate only.

And from and after the decease of all the children of each of his said sons and daughters without issue, he devised the estates to them respectively limited as aforesaid, unto and among all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining:

And for default or in failure of issue of any of his said sons and daughters, he devised the estates so limited to him, her, or them dying without issue, unto the survivors of his said

sons and daughters, during their respective lives, in equal shares as tenants in common; and after their respective deaths, he devised the same to the children of the survivor of his said sons and daughters, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters.

And for default or in failure of issue of all his said sons and daughters except one, he devised all his said estates unto his only surviving son or daughter in fee:

Held, that under this will, the eldest son of the testator did not take an estate tail (unless in remainder) but an estate for life; that his children took estates tail in undivided shares as tenants in common.

The doctrine that, in construing a devise, the general intent is to be preferred to the particular intent, is incorrect and vague; the true rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator use inconsistent words; unless the inconsistent words are of such a nature as to make it clear that the technical words are not used in their proper sense. *Doe dem. J. A. Gallini v. F. A. Gallini*, M. 4 W. 4. 621

4. A. devised copyhold lands to his son D. S. and his wife, and J. H. and his wife, or the survivor of them, for their lives; and after the decease of all of them, to the male heir-at-law of him the testator, his heirs and assigns for ever; he then bequeathed legacies to three other sons, and afterwards died leaving five sons and one daughter, three by his first wife, and three by the second: Held, that the fee vested at the testator's death, in the person who was then his male heir-at-law, and did not remain contingent until the determination of the life-estates. *Doe dem. Pilkington v. Spratt*, M. 4 W. 4. 73

DISTRESS.

The 1 & 2 Phil. and M. c. 12, s. 2, which enacts, "that no person shall take for keeping in pound, impounding, or poundage of any distress, above 4*d.* for any one whole distress that shall be so impounded," does not extend to cases where the goods are impounded on the premises, by virtue of the 11 G. 2, c. 19, s. 10. *Child v. Chamberlain*, Bond, Jessopp & Others, H. 4 W. 4. 1049

DIVISIBLE ALLEGATION.

See *Pleading*, 3.

EASEMENT.

See *Way*.

ECCLESIASTICAL COURT.

See *Prohibition*, 1.

EJECTMENT.

1. Ejectment may be maintained for freehold lands on the demise of a person attainted of felony, when there has been no office found on behalf of the king. *Doe dem. Griffith v. Pritchard*, M. 4 W. 4. 765

2. In a second action of ejectment brought for the same premises, the Court will stay proceedings till the costs of the former are paid, although the former action was discontinued before consent rule, or plea. *Doe dem. Langden v. Langden*, M. 4 W. 4. 864
3. A. having brought an ejectment had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtor's Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the Court stayed the proceedings in it until the costs of the first were paid. *Doe dem. Standish v. Roe*, M. 4 W. 4. 878
4. In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage; although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant. *Doe dem. Marriott v. Edwards*, H. 4 W. 4. 1065

ELECTION OF CORPORATE OFFICER.

See *Quo Warranto*.

EMBLEMES.

Tenant for a term determinable upon a life, sowed the land in spring, first with barley and soon after with clover. The life expired in the following summer. In the autumn, the tenant mowed the barley, together with a little of the clover-plant which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing: Held, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley. *Graves v. Weld*, T. 3 W. 4. 105

ENTRIES IN CORPORATION BOOKS.

See *Corporation*.

ENTRY.

See *Fine. Lease*, 6.

ESCROW.

See *Evidence*, 5. *Deed*.

ESTATE TAIL.

See *Devise*, 3.

EVIDENCE.

See *Arbitrament*, 2. *Bill of Exchange*, 1, 2. *Corporation. Frauds, Statute of*, 1. *Lease*, 5. *Pleading*, 3, 4, 6, 8. *Settlement by Birth. Stamp*, 1, 3.

1. A person who has not been heard of for seven years, is presumed to be dead; but there is no legal presumption as to the time of his death. The fact of his having been alive or dead at any particular period during the seven years must be proved by the party relying on it. *Doe dem. Knight v. Nepean, Bart.* T. 3 W. 4. 86
2. In an action against executors for a debt of the testator, a person entitled to an annuity under the will is not disqualified by interest from giving evidence for the defendants. *Nowell v. Davies*, T. 3 W. 4. 368
3. A witness may be called upon by the plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. *Griffith, Gent., One, &c. v. Davies*, M. 4 W. 4. 502
4. An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal that, when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish; and therefore upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may show by parol evidence, that the first order of removal was quashed, on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement, and that he afterwards sold the tenement, and thereby became removable. *The King v. the Inhabitants of Wick, St. Lawrence*, M. 4 W. 4. 526
5. Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved, that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage: Held, that the possession of it by plaintiff was *prima facie* evidence that it had been delivered to him as a deed. *Hare v. Horton*, M. 4 W. 4. 715
6. A merchant at Sidney shipped goods for England on board the ship C., and by another ship that sailed after her, wrote to an agent in England, and desired him, if he received that letter before the C. arrived, to wait thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days, effected an insurance through the intervention of a broker, who told the underwriters when the C. sailed, and when the letter ordering the insurance was written, but did not state when it was received, nor the order to wait thirty days after the receipt of it, before effecting the insurance. The C. never arrived. The assured brought an action on the policy against the insurers, but failed, on account of the suppression of facts by the broker. In an action by the assured against the

broker, for negligence in effecting the policy : Held, that the evidence of underwriters and brokers was not admissible to show, that in their opinion the matters not communicated were material. *Campbell v. Richards*, M. 4 W. 4. 840

7. Five parish officers were appointed for a certain year, viz., two churchwardens, two overseers, and one vestry clerk and assistant overseer the term of whose appointment did not appear. At their vestry meetings for the relief of the poor, orders were given to the paupers upon a shopkeeper for goods, and sometimes for money to pay their monthly allowances; which orders the shopkeeper complied with. Three only of the officers ever signed such orders; the assistant overseer being one, signing sometimes by his name only, and sometimes as clerk, or overseer. All used to attend the board, and when called upon there to pay the shopkeeper for his goods and advances, had severally promised to do so when they could :

Held, that the shopkeeper, after the expiration of the year, might recover against all the parties both for the goods and the advances of money, if a jury were of opinion that they had all contracted with the plaintiff.

And, that it was not necessary to show by the appointment of the assistant overseer that he was authorized so to contract, the jury being satisfied that he had in fact bound himself to the plaintiff in respect of the goods and money supplied. *Kirby v. Banister*, H. 4 W. 4. 1070

8. Where an information for libel states certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and the prosecutor at the trial, gives general proof of such transactions to support the introductory part of his pleading, the defendant is not thereby authorized to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel.

But if such evidence be adduced bona fide to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, and that the Judge is informed that the evidence is offered for that purpose, it is admissible.

Affidavits are not receivable to show that a Judge is mistaken in his report of a cause tried before him. *The King v. Grant*, H. 4 W. 4. 1082

FALSE REPRESENTATION.

See *Action on the Case*, 2.

FELONY.

See *Copyhold*, 2. *Lease*, 6.

FEME COVERT.

See *Order of Removal*.

To a declaration against husband and wife for a debt due from the wife before coverture, the husband's discharge under the insolvent act is a good plea.

Quære, whether it can be replied that the wife had separate property. *Lockwood v. Salter*, T. 3 W. 4. 303

FEOFFMENT.

See *Livery of Seisin*.

FINE.

It is a sufficient entry to avoid a fine, if the party enters expressly to claim the premises as his own : it is not necessary for him to say that he enters to avoid all fines, or to specify what particular act, adverse to his own interest, he means to defeat. *Doe dem. Jones v. Williams*, M. 4 W. 4. 783

FIXTURES.

See *Bankrupt*, 1. *Deed*, 1. *Pleading*, 4.

FORFEITURE.

See *Copyhold*, 4. *Lease*, 6.

FRAUDS, STATUTE OF.

1. By agreement in writing, A. contracted to sell B. several lots of land and to make a good title to them : and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then verbally agreed between the parties, that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted. In an action brought by the vendor to recover the remainder of the purchase-money, the declaration stated that the defendant agreed to deduce a good title to all the lots except one, and that the vendee discharged and exonerated him from making out a good title to that lot and waived his right to require the same :

Held, that oral testimony was not admissible to show the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing; and by the statute of frauds, in every action brought to charge a person on a contract for the sale of lands, the agreement must be in writing. *Goss v. Lord Nugent*, T. 3 W. 4. 58

2. In an agreement in writing to pay the debt of another, the consideration must either be stated in express words or must be necessarily implied from the terms used. A letter, therefore, from the defendant to the plaintiff in the following words : "As you have a claim on my brother for *5l. 17s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day, 14th January, 1833," was held not to satisfy the statute of frauds. *James v. Williams*, H. 4 W. 4. 1109

FREIGHT.

In *indebitatus assumpsit* for freight, it appeared that goods were laden in Jamaica on board the plaintiff's ship, according to a bill of lading, which stated them to have been shipped by W. J. on a vessel bound for London on account of the defendant, and that they were to be delivered in London to the consignees, paying freight for the same at the rate therein mentioned; the goods so shipped were the property of the defendant. The captain having delivered the goods to the

consignees without receiving the freight, it was held that the defendant was liable by law to pay the freight to the shipowners; and that independently of any express contract by charter-party. *Domett v. Beckford*, M. 4 W. 4. 521

GENERAL AND PARTICULAR INTENT.

See *Devise*, 3.

GOODS SOLD AND DELIVERED.

See *Assumpsit*, 2.

GRANT.

See *Copyhold*, 3.

HERIOT.

See *Copyhold*, 3.

HIGHWAY.

1. The inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.

Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them.

By an act for draining fen lands, commissioners were authorized to make drains and other works therein prescribed, and also to make a new cut or main drain as therein mentioned, and to dispose of all earth and soil arising from the drains directed to be made, in forming banks at certain distances on each side thereof, and the banks, drains, &c., were to remain under their control for the purposes of the act. The commissioners, under the powers of the act, made a drain according to the act, and with the earth taken from it made a bank on one side of it, of the average breadth of forty feet: this drain and bank were never part of the fen, but were old enclosed land, and bounded by old enclosures on both sides; and the land upon which they were respectively made, was purchased by the commissioners for the purposes of the act. The bank had been used for about twenty-five years as a public highway, and was a convenient and useful road for the public.

Upon special case, stating these facts, it was held by DENMAN, C. J. and PARKER, J., (LITTLEDALE, J. dissentiente) that the dedication of this part of the bank as a road to the use of the public was not inconsistent with the purposes to which the commissioners were bound by the act to apply it, it not appearing by the case (which, however, ought to have been more express on these points, per PARKER, J.) that the cleansing of the drains or any other purpose of the act had been or was likely to be interfered with by such user of the soil. *The King v. The Inhabitants of Leake*, M. 4 W. 4. 469

2. The general turnpike act 4 G. 4, c. 95, s. 87, gives an appeal to the sessions to any person who shall think himself aggrieved by anything done by any two justices in pursuance of that act, or any local turnpike act; and

declares that the determination of the sessions shall be final and conclusive, and that no proceeding to be had in pursuance of that act shall be removed by certiorari. The sessions on appeal against a certificate of two justices, that a turnpike road made under a local act had been completed and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, this Court refused to grant a mandamus to them to hear the appeal, on the ground that their decision was contrary to the local act.

A local turnpike act recited that the making and maintaining a new turnpike road from Leeds to join the Wakefield and Halifax turnpike road at a certain point, and several branch roads (therein also described) from and out of the said main turnpike road, would be an advantage to the inhabitants of Leeds and Halifax, and to the public in general; and it authorized the making of the said several roads, and enacted "that the said new roads should not be respectively opened to the public, or become public roads, until two justices should have certified that the said roads respectively, and the works thereon, respectively, were completely made and fit to be travelled upon throughout the whole length of such roads respectively."

Semble, per LITTLEDALE, and TAUNTON, J., that the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed and fit to be travelled on, but that the main road, when so completed and certified to be so by two justices, became a public road, although the branch roads were still unfinished. *The King v. The Justices of the West Riding of Yorkshire*, H. 4 W. 4. 1003

HIRING FOR A YEAR.

See *Master and Servant*, 1, 2.

INCLOSURE ACT.

1. By an act for inclosing common lands in G. after reciting that the corporation of G. claimed the right of soil as lords of the manor, and that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted that the commissioners might set out and allot plots of ground out of the East and West Commons in G. as a compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said commons as on certain other lands named, such plots of ground to be used and enjoyed as the commissioners should by their award direct. Parties dissatisfied with the award might bring an action against the persons in whose favor the determination should be, within three months, or might appeal within six months to the justices in quarter sessions, who were to determine the matter and award costs and damages. In default of such action or appeal, the determination of the commissioners was to be final.

The commissioners by their award, allotted a plot of land on the West Common as common pasture, to the owners and proprietors

of commonable messuages or cottages, and their respective tenants or occupiers of the said messuages and cottages only having a right of common on the said West Common; and they limited the use of the pastures as the act empowered them.

Before the passing of the act, the rights attached to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of G. Subsequently to the act one of the messuages on West Common being in the hands of a person not a freeman, the corporation brought trespass against him for turning his cattle on the above-mentioned allotment:

Held, that the act, though general in its words, did not authorize the commissioners to extend the benefit of their allotments in lieu of common, to occupiers who were not freemen; and that the award itself did not purport to do so; nor could it have done so unless the act had given power to the commissioners to ascertain who should be entitled to the newly granted rights: and consequently that the present action was maintainable, though brought more than six months after the award. *The Bailiffs of Godmanchester v. Philips*, T. 3 W. 4. 198

2. By an inclosure act it was declared that all the allotments to be set out to the several persons having right of common upon a moor should be deemed to be situate within the same townships and places respectively, wherein the lands lay in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of W. P. to certain coal mines under the said moor: Held, that the first clause affected only those portions of the soil which were allotted to the commoners, and not the coal mines under those allotments; and therefore that such coal mines were rateable to the relief of the poor in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere. *The King v. Pitt*, M. 4 W. 4. 565

INDICTMENT.

See *New Trial*.

1. An indictment found at the Suffolk Lent assizes, 1833, on a charge of felony preferred in September, 1832, was removed into K. B. by certiorari, and a motion made to award a venire into another county, on a suggestion that a fair trial could not be had in Suffolk; in support of which applications many affidavits were put in, sworn in the autumn of 1832, showing that a strong prejudice existed in Suffolk against the defendants on the subject of this charge.

The Court held that there were not sufficient grounds laid for removing an indictment from the body of a large county, and discharged the rule. *The King v. Holden and Another*, T. 3 W. 4. 347

2. An indictment for a libel on the governor of a parish workhouse was preferred by the direction of the select vestry of the parish; and the defendant having removed it by certiorari into K. B., was convicted: Held, that the libelled party was not the party grieved, within the statute 5 & 6 W. and M. c. 11, s. 3, and therefore was not entitled to costs.

The King on the prosecution of Brindley v. Dewhurst, T. 3 W. 4. 405

3. An act of parliament prohibited the erection or continuance of any building within ten feet of the road, and declared that the foot-paths should be subject to the act, and be part of the road. It further enacted that if any such building should be erected or continued contrary to the act, it should be deemed a common nuisance. By another clause, two magistrates were empowered to convict the proprietor and occupier of such building, and to make an order for the removal thereof:

Held, that notwithstanding the latter clause the party who erected or continued a building, contrary to the act, might be indicted for a nuisance:

Held also, that an open shop, having its front built on the foundation of an old wall immediately adjoining the foot-path, and connected by a roof with the front of a house which was more than ten feet from the road, was a building within the meaning of the act. *The King v. Gregory*, M. 4 W. 4. 555

INFANCY.

See *Bill of Exchange*, 1.

INHABITATION.

See *Settlement by Apprenticeship*, 2.

INJUNCTION.

See *Arrest*, 2.

INNS OF COURT AND CHANCERY.

See *Mandamus*, 6.

INQUISITION.

See *Coroner*.

INSOLVENT ACT.

See *Ejectment*, 3. *Feme Covert*.

INSURANCE.

1. Valued policy of insurance on ship and goods at and from the coast of Africa to the ship's port of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and wheresoever, to trade backwards and forwards in any order, and to call at, or proceed to the Azores, Madeira, &c., and all African islands: beginning the adventure on the goods from the loading thereof aboard the said ship, twenty-four hours after her arrival on the coast of Africa, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter, or exchange with any ships or factories wheresoever she might call.

First, The policy does not protect an outward cargo shipped before the vessel's arrival on the coast of Africa.

Secondly, A considerable proportion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy: Held, that the valuation was opened; and that although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on

board, made up the amount named in such valuation. the assurer could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss. *Rickman and another v. Carstairs*, M. 4 W. 4. 651

2. A ship was insured from April 1st, 1831, to January 1st, 1832, warranted not to sail foreign after the times limited in certain club rules. The rules of warranties of the club limited the times of sailing to different parts of the world; and by a distinct warranty (the ninth), it was declared that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship was then ready for sea. The vessel insured was bound for the Bay of Fundy from Dublin, and the last day for sailing by the rules, was the 1st of September. She cleared out on the 31st of August, and dropped down the Liffey on the 1st of September, with an incomplete crew (though a full complement was engaged before the ship cleared out), to a place within the port of Dublin, where she lay at anchor the rest of the day. During that day the whole crew came on board, and on the 2d she proceeded on her voyage, having been prevented doing so on the 1st by an unfavorable wind. She was afterwards lost:

Held per LITLEDALE, J., and *semble* per TAUNTON, J., that the policy must be construed as incorporating the ninth article of warranty, and not merely the several directions as to the times of sailing. (DENMAN, C. J., and PATTON, J. *dubitantes*);

Held by all the Court, that the ship did not actually sail till after the 1st of September, and that she was not ready for sea at the time of clearing out, the whole crew not being then on board. (LITLEDALE, J., *dubitante*), that the words in the ninth article of warranty, "provided the ship is then ready for sea," if incorporated with the policy, must be limited to the point of time at which the clearances were obtained, and that as the vessel was not then ready for want of a full crew, there had not been a constructive sailing on or before the 1st of September, according to the ninth warranty. By one of the rules it was provided, that vessels might sail after the limited time, on payment of an additional premium, as per scale: and by another rule, every member of the club, before the commencement of each voyage, was to give his acceptance for the premium; and parties neglecting to give notice were subject to a penalty: Held (assuming that these rules could be incorporated with the present policy), that a party whose ship had sailed too late and been lost, could not afterwards obtain the benefit of the extended time, by submitting to the penalty and paying the extra premium. *Graham v. Barras*, H. 4 W. 4. 1011

INSURANCE BROKER.

See *Evidence*, 6.

A trustee suing as a plaintiff in a court of law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the *cestui que trust* who uses his name. And, therefore, where a broker, in whose name a policy of

insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff, according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker, by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and the assurers, it was a good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action. *Gibson v. Winter and another*, T. 3 W. 4. 96

INTEREST.

See *Banker*, 1.

INTERPLEADER ACT.

See *Practice*, 8.

JUDGMENT.

See *Pleading*, 1. *Practice*, 9.

- A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of Yorkshire, to secure payment of an annuity, need not be registered under 8 G. 2, c. 6; for though it may be enforced by sequestration, the benefice is not affected by the judgment.

The judgment was for 1800*l*. The warrant of attorney provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a *sequestrari facias* thereupon, it appeared that at that time the former creditor had by sequestrations levied more than 1800*l*. for arrears of his annuity, and there were arrears still due. The Court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l*. levied before the signing of his judgment. *Cottle v. Warrington, Clerk*, T. 3 W. 4. 447

JUSTICES.

1. An adjudication of justices under 11 G. 2, c. 19, s. 4, (inflicting penalties for fraudulently removing goods to avoid a distress), is an order, and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form. *The King v. The Justices of Cheshire*, T. 3 W. 4. 439
2. A party who applies to the Court for a criminal information against a defendant, for breach of duty as a magistrate as well as an individual, must, before motion, give notice to the defendant of his intended application. *The King v. Heming*, M. 4 W. 4. 666
3. A party gave information on oath before a magistrate, that from certain language used towards him he was in bodily fear from another; and the magistrate upon hearing the complaint required the latter to enter into recognisances to keep the peace. On motion to discharge the recognisances, on the ground that the language was used in a metaphorical

sense only, the Court refused to interfere, because it was for the magistrate to judge in what sense the language was used. *The King v. Tregarthen*, M. 4 W. 4. 678

JUSTICES, ORDER OF.

An order of justices under the 11 G. 2, c. 19, s. 4, adjudging a party to pay double the value of goods fraudulently and clandestinely removed to prevent a distress, must show on the face of it that the party removing the goods was tenant; and that is not sufficiently shown by stating that, on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent A. B. from distraining them for arrears of rent due to him for the said premises; and that it appearing that he did so remove, &c., he is convicted thereof.

Semble, also that the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord. *The King v. Davis and Another*, M. 4 W. 4. 551

LANDLORD AND TENANT.

See *Ejectment*, 4. *Emblements*. *Justices*, *Order of*. *Lease*, 3.

LEASE.

1. Under a lease of all that part of the park called B., situate and being in the county of O., and now in the occupation of S., lying within certain specified abutments, with all houses, &c., belonging thereto, and which now are in the occupation of S., a house on a part which is within the abutments, but not in the occupation of S. will pass. *Doe dem. Smith and Others v. Galloway*, T. 3 W. 4. 43

2. Lands were devised to R. N. for life, with power to lease for lives all but a certain excepted portion, reserving the like rents as were then reserved, or more. The rent of the lands to be demised was then 29*l.* a year. In 1800, R. N. made a lease of the last-mentioned lands to G. M. for three lives, at the yearly rent of 35*l.* In 1813, he made another lease to G. M. of the same premises and part of the excepted lands, for different lives, at the rent of 40*l.* for the whole: Held, that the rent could not be apportioned, and that the last lease, being void for the excepted lands, was void as to all. *Doe dem. Williams and Others v. Matthews*, T. 3 W. 4. 298

3. Premises were demised for a term at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days: the lessee covenanted to pay the rent, and the landlord covenanted that he, paying the rent at the appointed times should quietly enjoy, &c.:

Held, that the lessee having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued, the rent had been in arrear more than twenty-one days; for the payment of rent was not a condition precedent to the performance of the covenant for quiet enjoyment. *Dawson v. Dyer*, Bart. M. 4 W. 4. 584

4. Where A. demises to B. for the term of his natural life, the demise is, *prima facie*, for the

life of B. But where A. demised to B. his executors and administrators, for the term of his natural life, and the lease contained a covenant by A. for quiet enjoyment of the premises by B., his executors, &c., during the natural life of A.:

Held, that the word "his" in the demising clause must be referred to A. the grantor, and not to B., though his name was the last antecedent. *Doe on the demises of Prichard and Others against Dodd*, M. 4 W. 4. 689

5. A power was reserved to grant leases for a term not exceeding seven years, so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof. The donee of the power granted a lease for seven years, at a specified rent, which lease contained a covenant by the lessee, to find board, lodging, and wearing apparel during the term, for three children of the donee (if they wished it), at 7*l.* a year each, and for the donee's son gratis: Held, by PARKES and PATTERSON, JEs. (TAUNTON, J. dissentiente) that assuming the power to require two conditions, first, that the rent reserved should be the best rent; and, secondly, that there should be no fine or premium: it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, parol evidence was admissible to show that the rent reserved was the best that could be obtained. *Doe dem. Rogers v. Rogers*, M. 4 W. 4. 755

6. A lease for three lives contained a proviso, that if the lessee, his heirs, &c., should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void. Tenant (being the second *cestui que vie*) under such lease, was attainted of felony, and transported. His mother and sister occupied the farm from that time, till the expiration of the third life named in the lease, and during that period the reserved rent was regularly paid to R. W. P., to whom the reversion had come by devise, and who knew all the facts. The time of his becoming entitled did not appear. The reversioner, on the expiration of the third life, supposing that the term was at an end in point of law, let the land to a new tenant, whom he afterwards ejected, the attainted party being still alive.

Quære, whether the attainer of the tenant was a forfeiture of the lease; but, held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction:

Quære also, if a forfeiture was committed, whether it was one of which an assignee of the reversion might take advantage by stat. 32 H. 8, c. 34.

Held, that if such a forfeiture was committed, the reversioner had waived it by accepting the reserved rent under the lease, from the parties occupying the premises:

Semble, that if the forfeiture had not been waived, a sufficient entry had been made to avoid the lease. *Doe dem. Griffith v. Prichard*, M. 4 W. 4. 765

7. An instrument in writing, whereby A.

agreed to let premises to B. for seven, fourteen, or twenty-one years (commencing at Christmas Day then next), at the option of B. at the yearly rent of 24*l.* payable quarterly, the first payment to be made at the ensuing Lady Day free of all rates and taxes, and whereby B. stipulated if he should be desirous of putting an end to the agreement at either of the terms before specified, to give six months' notice, and that he, B., should pay all the expenses of preparing a lease for either of the terms above stated, is a lease, and not a mere agreement for a lease. *Warman v. Faithful*, H. 4 W. 4. 1042

LEASEHOLD.

See *Vendor and Vendee*.

LEET.

See *Custom*, 2.

LEGACY DUTY.

See *Devise*, 2.

LICENSE.

See *Action on the Case*, 1.

LIEN.

See *Stoppage in Transitu*, 1, 2.

A. wishing to borrow money on a mortgage of land, delivered the title-deeds to B., the intended mortgagee, for examination, and said that he would pay all expenses. B. handed the deeds to his own attorneys to be investigated. The negotiation went off, and the attorneys being requested by A. to return his deeds, refused to do so till he paid their bill of costs. On assumpsit brought by A. against the attorneys, to recover back the money so paid:

Held, that the defendants could not be considered as having acted for both parties in the negotiation, and therefore had not a lien against A. as his attorneys: that, supposing A. liable to B. for the costs incurred, B. could not communicate to his own attorneys a lien upon A.'s deeds, by handing them to the attorneys for investigation: that the undertaking of A. to B., if it amounted to a promise to pay these costs, did not entitle B.'s attorneys to detain the deeds, as it established no privity between them and A.: And that A. might have brought trover for the deeds, and was entitled to recover in this action. *Pratt v. Vizard, Gent., One, &c., and Blower, Gent., One, &c.* M. 4 W. 4. 808.

LIFE ESTATE.

See *Devise*, 1.

LIMITATION OF ACTION.

See *Canal Act*, 1.

LIVERY OF SEISIN.

Livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having title,

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unless the child was placed there for the purpose of representing that party.

If there be several coparceners, and one only be in actual possession, a feoffment executed by her to a stranger, of the whole premises, will oust the other coparceners.

In the absence of evidence to the contrary, the entry of such coparcener will be presumed to have been a general entry, and not for herself alone or for herself and the other coparceners. *Doe dem. Reed v. Taylor*, M. 4 W. 4. 575

LOAN.

See *Banker*, 2.

MALICIOUS ARREST, ACTION FOR.

In an action for a malicious arrest, malice is a question of fact for the jury, who are at liberty, but not bound, to infer it from the want of probable cause: and where a creditor had caused his debtor to be arrested for 45*l.*, knowing that there was a set-off to the amount of 16*l.* 5*s.*, but instructed the bailiff who made the arrest, to allow the set-off in case the debtor would settle the debt; and the Judge, upon the proof of these facts, was of opinion that there was no probable cause for the arrest, and that there was malice in law, inasmuch as the act of causing the party to be arrested for a larger sum than he owed was wrongful, and therefore told the jury that the only question for them was the amount of damages; the Court granted a new trial, on the ground that it ought to have been left to the jury to find whether there was malice or not. *Mitchell v. Jenkins, Clerk*, M. 4 W. 4. 588

MANDAMUS.

1. By custom the court of mayor and aldermen of London have always had authority to examine and determine whether or not any person returned to them by the court of wardmote as an alderman is, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned has been brought into question. In February, 1831, M. S. was elected alderman by the citizens, and returned as elected to the court of mayor and aldermen. That court, on the petition of persons interested in the election, adjudged and determined that M. S. was not a person fit and proper to discharge the duties of alderman. In January, 1832, M. S. was a second time elected alderman by a majority of votes, and returned so elected to the court of mayor and aldermen, but they again refused to admit him to the office.

A rule nisi having been obtained for a mandamus to admit M. S. to the office:

Held, that an affidavit stating that the court of mayor and aldermen had again determined that he was not a fit and proper person to be admitted, is no ground for refusing the mandamus, because the prosecutor has a right to have the facts stated in the return, in order that he may have an opportunity of controverting the truth of them:

Held, at all events, that the affidavits in answer to the rule ought to show that the court of mayor and aldermen had, on the second occasion, come to the conclusion that M. S. was not a fit and proper person to be admitted to the office, on a fresh investigation.

A mandamus having issued, the return stated that M. S. was elected by a majority of votes, and returned as so elected to the court of mayor and aldermen; that a petition was presented to that court against M. S.'s admission to the office, whereupon they examined the merits of the petition according to custom, and determined that he was not a fit and proper person to be admitted to the office, nor duly elected; and further, that he was not in fact duly elected: Held, that this return was not inconsistent. *The King v. the Mayor and Aldermen of London*, T. 3 W. 4. 233

2. Mandamus lies to admit a clerk of trustees under the general turnpike acts. *The King v. The Trustees of the Cheshunt Turnpike Roads*, T. 3 W. 4. 438
3. Where the quarter sessions have improperly decided against an appeal on a preliminary objection, the Court of King's Bench will grant a mandamus to them to enter continuances and hear the appeal; but where an objection has been made during the trial of an appeal to the reception of a particular piece of evidence, and the sessions have held such objection valid, in consequence of which the appeal has been dismissed, this Court will not interfere, unless the sessions send up a case. *The King v. The Inhabitants of Friston*, M. 4 W. 4. 597
4. By statute, parties were enabled, in certain cases, to appeal to the quarter sessions for a particular district, giving ten days' notice. The act said nothing as to further notice in the event of such appeal being respited, nor did it appear that there was any rule of practice on the subject at those sessions. An appeal under the statute, of which due notice had been given, was respited, and came on at a subsequent sessions, pursuant to the respite. The appellant was called upon to prove that he had given notice of trial of the respited appeal, and on his failing to do so, the appeal was dismissed:

Held, that the sessions were wrong in requiring such notice, and that the case was one in which this Court might overrule their decision. Mandamus granted to hear the appeal. *The King v. The Justices of the West Riding of Yorkshire*, M. 4 W. 4. 667

5. To ground an application for a mandamus to inspect books, quære, whether it is sufficient to show that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favor, and that he refused to accept it otherwise than as a right. Per DENMAN, C. J. *The King v. The Trustees of the North Leach and Winney Roads*, H. 4 W. 4. 978
6. A rule nisi was granted for a mandamus to the Principal of Clifford's Inn, to attend the benchers of the Inner Temple, and produce the rules and regulations of the society of Clifford's Inn, to enable the benchers to decide on the validity of his election to that office. But on cause shown, the rule was discharged, no sufficient proof appearing, that

the benchers of the Inner Temple had a compulsory authority over Clifford's Inn for this purpose. *The King v. Allen*, Gent., H. 4 W. 4. 984

7. A resolution of a court of quarter sessions, that whenever an appeal against an order of removal shall be entered and respited, notice thereof shall, within one month after such entry and respite, be given to the officers of the removing parish, is void; and where the court of quarter sessions had dismissed an appeal for want of such notice, this Court granted a mandamus to them to hear it. *The King v. The Justices of Norfolk*, H. 4 W. 4. 990
8. Under stat. 1 W. 4, c. 21, s. 6, the costs of a mandamus, and of applying for it, may be obtained of the Court by a distinct motion after issuing of the writ.
And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties. *The King v. Kirke*, H. 4 W. 4. 1089
9. A party found guilty by a jury at a session irregularly holden is entitled to have the record of the proceedings correctly made up according to the fact, and this Court will grant a mandamus to the justices to make up such record. *Re v. The Justices of Middlesex, in re Bowman*. 1113

MARRIAGE SETTLEMENT.

A father, seised in fee, executed a deed of settlement on the marriage of his son, containing the following clause:—"Whereas, it is agreed upon by and between the parties to these presents, that the said A. J. (the father) giveth and settlenth upon his said son Griffith J. all and singular the premises, &c., from Michaelmas next for the term of his natural life; and from and immediately after his decease, to the use of the first son of the body of the said Griffith J. on the body of J. J. (his intended wife) to be lawfully begotten, and so on successively for all and every other son," &c.; and in default of such issue male, the like limitation to the daughters; and for want of such issue, to the use of the settlor's right heirs: Held, that this clause was not a mere executory agreement, but operated, in law, as a covenant by the settlor to stand seised to the uses declared by the settlement. Namely, to the uses of the first and other sons of Griffith J. successively for their respective lives. *Doe dem. Jones v. Williams*, M. 4 W. 4. 783

MASTER AND SERVANT.

1. In an action for wages by a servant, who was dismissed, the proof was, that he was to have wages at the rate of 80*l.* per annum: Held, that the *prima facie* presumption was, that the hiring was for a year; and that having been rightfully dismissed for misconduct before the year expired, he could not recover wages *pro rata*. And this, although the master had brought an action against him for the misconduct, and recovered damages. *Turner v. Robinson*, M. 4 W. 4. 789
2. On the 5th of March, 1832, A. entered as warehouseman into the service of B., the

latter engaging to pay A. at the rate of 12l. 10s. per month for the first year, and to advance 10l. per annum until the salary was 180l.: Held, that this was a contract by B. to employ A. for one whole year. *Fawcett v. Cash*, H. 4 W. 4. 904

MILITIA MAN.

See *Settlement by Hiring and Service*, 3.

MONEY HAD AND RECEIVED.

See *Assumpsit*, 1.

MORTGAGE.

See *Decd. Ejectment*, 4.

MORTGAGOR AND MORTGAGEE.

See *Lien*.

MOTION TO SET ASIDE AWARD.

See *Arbitrament*, 2, 3.

NEGLIGENCE.

See *Bill of Exchange*, 2, 3.

NEW TRIAL.

See *Practice*, 5, 10.

On indictment for non-repair of a highway which defendant was stated to be liable to repair *ratione tenuræ*, and verdict found for the defendant, a new trial was moved for, on the ground of misdirection, and the improper rejection of evidence. The Court refused a new trial, but suspended the judgment in order that a new indictment might be preferred.

Quere, whether a new trial is grantable after acquittal in any criminal case, except a penal action. *The King v. Sutton*, T. 3 W. 4. 52

NON EST FACTUM, PLEA OF.

See *Corporation*.

NOTICE OF APPEAL.

See *Mandamus*, 4, 7.

NUISANCE.

See *Indictment*, 3.

OCCUPIER.

See *Poor Rate. Settlement by Renting a Tenement*, 3.

ORDER OF JUSTICES.

See *Justices, Order of*.

ORDER OF REMOVAL.

See *Settlement by Estate*.

Two justices ordered F. C. the wife of R. C. a Scotchman, having no settlement in England, and a lunatic, to be removed from parish A. where she had become chargeable, to parish B., which was adjudged to be her

lawful settlement. The order did not state where the husband was when it was made: Held, that the order was not void on the ground that it would effect the separation of husband and wife; because it was not to be presumed that when it was made, the husband was residing in parish A., or was not residing in parish B. *The King v. The Inhabitants of Stockton*, M. 4 W. 4. 546

ORGANIST.

See *Settlement by Serving an Office*.

PARTNERSHIP.

1. A. and B. dissolved partnership, and agreed that the business should be carried on by B. alone; and that he should receive and pay all debts. Sufficient partnership funds were left in his possession. C., a creditor of the firm, afterwards applied for the payment of his debt to B., who informed him that A. knew nothing of his debt, and that he, C., must look to B. alone. C. then drew a bill on B., which he accepted, but which was afterwards dishonored: Held, in an action brought by C. against A. and B. (the latter having become bankrupt), that it was a question for the jury whether it had been agreed between C., the creditor, and B., that the former should accept B. as his sole debtor, and take his acceptance in satisfaction of the debt due from both: Held further, that such an agreement and receipt of the bill would be a good answer to a suit by way of accord and satisfaction; and that the fact of B. having had the partnership effects left in his hands, and having agreed with A. to pay all the partnership debts, was evidence of an authority from A. to make such agreement on his behalf.

After a rule for a new trial had been granted on the above grounds, A. also became bankrupt, but C. did not prove his debt under the commission. A.'s attorney having carried down the record by proviso, C. applied for a *stet processus*, alleging that he could derive no benefit from proceeding. The Court refused to interfere. *Thompson v. Percival*, Hilary T. 4 W. 4. 925

2. One of several partners in trade who pays money on account of his co-partners, cannot maintain an action against them for contribution, on the ground that he made such payment not voluntarily, but by compulsion of law. *Sadler v. Nixon*, 4 W. 4. 936

PART OWNER.

See *Banker*, 2.

PAYMENT.

See *Insurance Broker*.

PAYMENT OF MONEY INTO COURT.

See *Practice*, 4, 12.

PENAL STATUTE.

See *Distress*.

PENALTY.

See *Vendor and Vendee*, 1.

PLEADING.

See *Bill of Exchange*, 1. *Bond*, 3. *Corporation. Covenant*.

1. In declaring on a judgment signed in vacation, on certificate by the judge at Nisi Prius for immediate execution (under 1 W. 4, c. 7, s. 2), the day of signing judgment should be stated according to the fact, and not laid as of the preceding term.

But it is enough to set out the judgment as it appears on the record; the certificate need not be stated.

The postea, however, in such case, should be so framed that the judgment may appear to be warranted by the previous finding of a jury.

But when on nul tiel record pleaded to debt on recognisance of bail, the postea shown to the Court proved erroneous in this respect, leave was given to amend it; the defendants also having leave to plead de novo.

Semble, that the Court would have allowed the error in the declaration to be amended without permitting the defendants to plead again. *Engleheart v. Eyre and Another*, T. 3 W. 4. 68

2. Declaration of Easter Term, 1831, on a replevin bond, by the assignees of the sheriff against W., the plaintiff, in replevin and his sureties, after stating the condition, assigned as a breach, "that although the suit was removed into K. B. by re. fa. lo. returnable in Michaelmas Term, 1829, at the instance of W., the plaintiff in replevin, yet he did not prosecute his suit with effect and without delay."

Plea, first, that by the re. fa. lo. the sheriff was commanded to record the plaint, to have the record on the return day in K. B., and to prefix the same day to the parties, that they might be ready to proceed in the said plaint; that W., the plaintiff in replevin, appeared in court at the return, and was ready to proceed in the suit and prosecute the same with effect and without delay, but that the now plaintiffs did not appear, and the sheriff returned to the re. fa. lo. amongst other things, that he had prefixed the same day to the parties that they might be ready there to proceed in the said plaint. It then averred that W. was always ready to prosecute his plaint with effect, and without delay, and would have done so if the defendants in replevin (the now plaintiffs) had appeared. To this plea there was a general demurrer.

The second plea stated that the sheriff, in pursuance of the re. fa. lo., recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the now plaintiffs to appear in K. B. to proceed in the plaint; and that W., the plaintiff in replevin, was ready to proceed, but the now plaintiffs did not appear. Replication, that the sheriff did not summon the now plaintiffs to appear. Rejoinder, by way of estoppel, that the sheriff, before the assignment, returned to the re. fa. lo. that he had prefixed a day to the parties that they might be ready to proceed in the plaint. General demurrer.

Held first, that a plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even

though it may not appear that the suit is determined.

Secondly, admitting that upon the replication to the second plea it was to be assumed that the now plaintiffs were not summoned (and semble, that in the present action they were not estopped from alleging this), still as it appeared by the pleas that the re. fa. lo. contained a direction in effect to summon the now plaintiffs, W., the plaintiff in replevin, was not responsible for the default of the sheriff, or guilty of delay in that suit by reason of the sheriff having neglected to serve a summons. *Harrison and Another, assignees v. Wardle and Others*, T. 3 W. 4. 147

3. Trespass for breaking and entering two closes of the plaintiff. Plea, that the said closes in which, &c., were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times, when, &c., to use his right of common thereon; and, because the closes in which, &c., were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that the said closes in which, &c., at the said times, were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time, when, &c., had been and were separated, and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severally. Rejoinder traversed this averment, and issue was joined thereon:

Held, that the allegation in the replication "that the said closes in which, &c., for twenty years and more, had been inclosed from the residue of the waste, and enjoyed in severally," was divisible, and satisfied by proof, that any part of the closes in which the trespasses were committed had been so inclosed for that period. *Tapley v. Wainwright*, T. 3 W. 4. 395

4. Declaration stated, that an iron-foundry, messuages, and cranes, boilers, and other machinery, &c., which were described, were in the possession of plaintiff's tenant, the reversion belonging to the plaintiff; and that defendant, contriving to injure plaintiff in his reversionary interest, while he was such reversioner, broke and entered the said foundries, machinery, &c., and messuages, with the appurtenances, cranes, boilers, &c., tore up, broke down, and prostrated the same; seized, carried away, and converted the machinery, &c., and the cranes, boilers, &c., affixed to plaintiff's reversionary interest, and scattered and spread the same with rubbish, and greatly injured the said reversionary estate. Plea, not guilty. At the trial it appeared that the plaintiff had no right to the fixtures: Held, nevertheless, that enough appeared on this declaration to support a verdict for the plaintiff for unnecessary damage done in removing the fixtures, of which proof had been given. *Hare v. Horton*, M. 4 W. 4. 715

5. Vendor covenanted under seal to vendee that he would, on or before the 30th of November then next, deduce a good title to the premises sold; and would, on or before the 8th of January, execute a proper conveyance for conveying the fee simple; and it was stipulated that the conveyance should be pre-

pared by and at the expense of the vendee; and further, that if the vendor should not verify the title to the vendee or his agent, by production of deeds, &c., at Norwich, Lynn, or London, before the 30th of November, the agreement should be void.

In an action of covenant by the vendee, two breaches were assigned: first, that the vendor did not, on or before the 30th of November, deduce a good title; secondly, that the defendant did not, on or before the 8th of January, execute a proper conveyance.

Plea, first, that the vendor did, before the 30th of November, produce and show divers deeds, in part deducing a good title, and that until, and upon that day, he was ready and willing to produce and show to the vendee other deeds, completing such title, and would, on or before that day, have produced such deeds to the vendee or his agent attending, whereof the vendee had notice, but that he would not by himself or agent attend: Held, on special demurrer, that the plea was bad, inasmuch as the vendor's covenant was general, and therefore the facts stated were no excuse; and, that if the covenant could be read as qualified by the subsequent stipulation as to place, the plea ought to have averred notice to the vendee, at which of the three places, the vendor would be ready to produce his deeds.

Plea, secondly, to the first breach, that by a subsequent agreement made before any breach committed, the time for deducing title had been enlarged; and that the vendor was ready to deduce title within such enlarged time. Thirdly, the defendant, pleaded a similar agreement after breach, and that the plaintiff accepted such agreement as a substitution for the former, and as a satisfaction of the damages resulting from the breach; and that defendant was ready to fulfil such agreement, but plaintiff refused, &c.:

Held, on special demurrer, that the second plea was bad, in not stating the new agreement to have been under seal. Leave given to amend the third plea by stating the new agreement to have been in writing; but quere, if it were so, whether the facts amounted to a good accord and satisfaction.

Plea to the second breach of covenants that the vendor until and on the 8th of January, was ready and willing to execute proper conveyances, and would have executed the same, if the plaintiff would have prepared and tendered them, but that he did not do so.

Replication, that the vendor did not deduce a good title, wherefore the vendee did not prepare the conveyances.

Rejoinder, that although the vendor within a reasonable time before the 8th of January, was ready and willing, and offered to deduce a good title, so that the vendee might before the 8th of January have prepared and tendered conveyances whereof the vendee had notice, yet the vendee refused to have such title deduced, and discharged the defendant from deducing such title.

Surrejoinder, that the vendor was not ready and willing to deduce, &c.

On general demurrer, Held, that upon this breach, the matter pleaded by the vendee was no answer to the pleas of the vendor,

and that the latter was entitled to judgment. *Rippingall v. Lloyd*, M. 4 W. 4. 742

6. A. being arrested and in custody of the sheriff at the suit of B., upon a writ endorsed "oath for 76l.;" C., in consideration of B. discharging A., undertook to give his promissory note at six months, "for 10s. in the pound for the debt," on the arrival of the discharge:

Held, that this sufficiently appeared to be a promise to pay 10s. in the pound upon the debt for which A. was arrested and then in custody, and was properly declared on as such:

Held also, that the sum endorsed on the writ was sufficient evidence of the amount for which A. had been arrested. And that no demand of the note was necessary to enable plaintiff to commence this action. *Brown v. Dean*, M. 4 W. 4. 848

7. By a contract in writing between plaintiffs (three executors) and defendant (testator's heir-at-law), after reciting an agreement of all the parties, that certain goods of the testator should be sold, and that S., one of the executors and plaintiffs, should receive the proceeds for and towards payment of the testator's debts; defendant agreed, that if he took possession of the said goods, he should pay to S. the value thereof, or give security for such payment, on or before, &c. One of the plaintiffs and the defendant also undertook, if the proceeds of the testator's personal property should not be sufficient for payment of the debts, to raise and pay to S. a sufficient sum to enable him to discharge them. Defendant took the goods first mentioned, but did not pay for them or give security, and afterwards, finding that they were more than he wanted, he made a verbal agreement with the plaintiffs, that he should select so much of the goods as he wished for, and take the same at the prices they had been appraised at, and that the residue should be taken and sold by the plaintiffs. He accordingly selected and took such goods (being of a smaller value than those first bargained for), but did not pay for them. Plaintiffs as executors took the residue:

Held, that supposing the action to be grounded on the written contract, S. was named therein merely as the agent of the plaintiffs, and therefore that they need not declare specially upon the contract to pay the money to him.

Semble, per DENMAN, C. J., and PARKE, J., that the second contract might be considered as substituted for the first, and forming a new and distinct ground of action. *Pearson v. Pearson*, M. 4 W. 4. 859

8. After the passing of the act for the uniformity of process, 2 W. 4, c. 39, which directs, "That all personal actions, where it is not intended to hold the defendant to bail, &c., shall be commenced by writ of summons;" an executrix pleaded, to an action of assumption, plene administravit, and no assets on the day of exhibiting the bill of the plaintiff. The plaintiff in his replication tendered issue in the words of the plea:

Held, that the words exhibiting the bill upon these pleadings meant the commencement of the suit, by writ of summons and not the filing of the declaration; and therefore that evidence of payments made by the

executrix between the time of suing out the writ and the filing of the declaration, was inadmissible. *Rees v. Morgan*, H. 4 W. 4. 1035

POOR CHILD.

See *Settlement by Apprenticeship*.

POOR RATE.

See *Inclosure Act*, 2.

By a grant of G. 1, reciting that the Chelsea Waterworks' Company had undertaken works for supplying Westminster, &c., with water, and had petitioned the crown for liberty to use a certain canal or basin and old pond in St. James's Park, and to lay mains through the park to and from the same for the purpose aforesaid; and that the surveyor-general had reported that the said undertaking might be convenient to his Majesty, and to many of his subjects, and ornamental to the park; the king gave, granted and assigned to the company and their successors the said canal, &c., to be converted into reservoirs and to be used and enjoyed by them as such, for the purposes aforesaid, during the royal pleasure. Liberty was also granted them to break up the ground at all times through the said park, for laying therein pipes or mains to and from the old pond and canal for the purposes aforesaid, making good the ground so broken as soon as possible. Certain conditions were added, prescribing the direction in which the pipes should be carried, the breadth of ground to be broken, &c. The company were to supply St. James's Palace at reasonable rates; and the ranger was empowered to supervise all the company's works in the park, and order them to rectify and reform the same if not done according to the conditions.

The company took the basin and pond in pursuance of the warrant, and made a reservoir, into which they conveyed water, and laid pipes communicating with it for the purposes aforesaid. They subsequently made expensive improvements in and about the reservoir, on the requisition of the Crown; and they were never allowed to alter or repair it, but by leave, and under the inspection of the crown surveyor. They pay no rent and are paid for supplying the palace, as well as other residences. The ranger is rated to the poor for the herbage growing on the surface of the soil in the park, including that under which the pipes pass:

Held, first, that the company were rateable as occupiers of the reservoir; secondly, that they were rateable for the occupation of land below the surface of the soil by their pipes, though another person was rated for the herbage. *The King v. The Governor and Company of the Chelsea Waterworks*, T. 3 W. 4. 156

POSTEA.

See *Pleading*, 1.

POWER.

See *Lease*, 2, 5.

POWER OF ATTORNEY.

See *Copyhold*, 5.

PRACTICE.

See *Indictment*, 1. *New Trial*.

1. Sections 87, 88, of the first General Rule of Hilary Term, 2 W. 4, relating to the discharge of prisoners in the custody of the marshal of the King's Bench, and warden of the Fleet, who are supersedeable, apply only to persons within the walls of the respective prisons. *Siggers v. Brett*, Clerk, T. 3 W. 4. 455

2. The Uniformity of Process Act, 2 W. 4, c. 39, Sched. No. 4, repeals sect. 24 of the first General Rule of Hilary term, 2 W. 4; and therefore, if a party held to bail on a capias do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail bond in suit. *Hilary v. Rowles and Two Others*, T. 3 W. 4. 460

3. The 7 & 8 G. 4, c. 30, s. 41, which directs that actions brought for anything done in pursuance of that statute, shall be tried in the county where the fact was committed, applies only to the case of parties exercising particular powers conferred by the statute.

In an action against justices for falsely imprisoning the plaintiff on a charge of feloniously beginning to demolish a house, contrary to the act, the Court granted a rule to change the venue, on a suggestion that a fair trial could not be had in the county. *Thomas, Gent., v. Saunders and Another*, T. 3 W. 4. 462

4. Payment of money into court on a count on a promissory note payable by instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note; it does not bar the Statute of Limitations as to a further sum claimed to be due on the same note. *Reid and Another, Executors, v. Dickens*, M. 4 W. 4. 499

5. Where a new trial is granted on payment of costs, in a town cause, the costs occasioned by the cause being made a remanet are included. *Robinson v. Day*, M. 4 W. 4. 814

6. After the Uniformity of Process Act, 2 W. 4, c. 39, the Court directed the signet of K. B. writs to sign a pluries bill of Middlesex, in a suit commenced before the act, and which, if recommenced, would have been barred by the Statute of Limitations. *Finnie v. Montague*, M. 4 W. 4. 877

7. Defendant in an action for words, after notice of trial, signed a paper, in which, after reciting that plaintiff had consented on defendant's paying the costs and making an apology, to stay proceedings, he made such apology: Held, that this was a positive undertaking by defendant to pay the costs.

Plaintiff in such a case having stayed proceedings, but defendant not paying the costs, the Court will enforce performance of the agreement on his part by rule. *Tardrew v. Brooke*, M. 4 W. 4. 880

8. On application to the Court by a sheriff under sect. 6 of the Interpleader Act, a third party served with the rule, and not appearing, is barred by sect. 3 from further prosecuting any claim brought in question by the

rule, as well as where such application is made by a defendant under sect. 1.

The Court, on such application, will, on proper grounds shown, order the sheriff, or the execution creditor, to pay to a third party, appearing and successfully prosecuting his claim, his costs of such appearance. *Ford v. Dille*, M. 4 W. 4. 885

9. Issue was entered in a cause in Easter term, 1827, and docketed according to the practice of the office of judgments. The plaintiff in 1828 recovered damages and costs, and entered final judgment on the roll, but the judgment, according to a practice said to have prevailed for 100 years, was not docketed as required by 4 & 5 W. & M. c. 20, s. 2. On application to the Court in Hilary term, 1834, to order the judgment to be docketed *nunc pro tunc*: Held, that the Court had no power to make such order. *Hopwood v. Watts*, H. 4 W. 4. 1056

10. In a cause decided by the judge of an inferior court on a writ of trial, this Court will hear a motion for a new trial on the ground that the verdict was against evidence, though the damages were below 20*l*. *Taylor v. Helps*, H. 4 W. 4. 1069

11. A motion calling upon an attorney to answer matters alleged against him on affidavit affecting his character, must be made by a barrister. *Pitt Ex parte*, H. 4 W. 4. 1078

12. The rule of court Hil. T. 2 & 3 G. 4, requiring that on all bailable *meane process*, the defendant's place of abode and addition shall be endorsed, is in effect repealed by stat. 2 W. 4, c. 39, and therefore the want of such endorsement is no objection to a *capias* issued under that statute, and in the body of which the defendant is described as "G. P. of the city of London."

An affidavit to hold to bail for a debt stated therein to be due to A. and B. is good, though the plaintiffs are partners, and are not stated to be so in the affidavit. *Bodfield v. Padmore*, H. 4 W. 4. 1095

13. Defendant in a cause, being advised to pay 48*l*. into court, gave his attorney 50*l*. for the purpose of making such payment, which was done. The attorney afterwards delivered his bill to the client, not including the 48*l*., and on taxation more than one-sixth was taken off. The attorney then claimed to add the 48*l*. (which would have made the deduction less than one-sixth), stating that the item had been inadvertently omitted.

Quere, whether such item was chargeable as a disbursement by the attorney, but

Held, that, at all events, the attorney, not having treated it as a disbursement in making out his bill, could not claim to insert it as such, for the purposes of the taxation. *Hayes v. Trotter*, H. 4 W. 4. 1106

PREMIUM.

See *Lease*, 5.

PRINCIPAL AND AGENT.

See *Banker*, 2.

PRISONER.

See *Arrest*, 2.

PRIVILEGED COMMUNICATION.

See *Evidence*, 3.

PROHIBITION.

1. The act 1 W. 4, c. 21, "to improve the proceedings in prohibition," does not enable this Court, where a party has declared in prohibition and succeeded, to grant him his costs incurred in the Ecclesiastical Court. *Tessimond v. Yardley*, T. 3 W. 4. 458
2. A prohibition cannot issue to a court martial, after its sentence has been ratified by the King and carried into execution. In the matter of *John Waller Poe*, M. 4 W. 4. 681

PROMISSORY NOTE.

See *Pleading*, 6. *Practice*, 4. *Stamp*, 2.

PROMOTION,

468

QUO WARRANTO.

A quo warranto information was moved for against an officer elected by ballot, on the ground that a large proportion of the persons who voted were not qualified; but it was not shown for whom the votes of those persons were given:

Held, that on this application the officer could not be required to prove his election valid, but it lay on the opposing parties to show (if that were practicable) that his majority was obtained by bad votes. *The King v. Jefferson*, M. 4 W. 4. 855

RATE.

See *Inclosure Act*, 2.

RECOGNISANCE.

See *Justices*, 3.

REGULÆ GENERALES. I.

467, 468, 816, i—xxii.

REMAINDER.

See *Devise*, 4.

REMANET.

See *Practice*, 5.

RENT, APPORTIONMENT OF.

See *Lease*, 2.

REPLEVIN BOND.

See *Pleading*, 2.

ROAD.

See *Highway*, 1, 2. *Toll*.

SESSIONS.

See *Mandamus*, 3, 4, 7, 9.

Where it has been referred to the chairman at sessions, on an appeal, to state a case, and a case has afterwards, on certiorari, been returned to this Court by the clerk of the peace, purporting to be signed by the chair-

man, this Court will not send it back to be restated, or quash the certiorari, on the ground of the chairman having said that he did not recollect signing the case, and upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, and that deponent believes the chairman did not settle the case. *Retz v. The Inhabitants of Matlock*, M. 4 W. 4. 883

SET-OFF.

See *Attorney*, 1.

SETTLEMENT—BY APPRENTICE-SHIP.

See *Stamp*, 3, 4.

1. A person of the age of twenty-one years, is not a poor child whom the parish officers are to bind out apprentice with the assent of two justices within the meaning of the 56 G. 3, c. 139. Section 11 of that statute extends only to indentures of apprenticeship of poor children; and, therefore, an indenture whereby a person of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two justices. *The King v. The Inhabitants of St. John Bedwardine*, T. 3 W. 4. 169
2. Pauper was bound apprentice for seven years to a breeches-maker, and served his master half a year: the latter then failed in business, and told the pauper he might go and work for one B., who lived in another parish, and if pauper did not become troublesome to him, the first master, or to his parish, till the end of his time, he would give pauper his watch. The pauper agreed with B., and worked for him at breeches-making, by the piece, at the usual rate. B. frequently carried messages between the first master and the pauper. The latter having worked for B. a year in B.'s parish, agreed (with the consent of his first master) to work by the piece for C., another breeches-maker, living in a third parish, who gave better terms. While he so worked with C., his first master came to see him, and again promised him his watch at the end of his time. The pauper worked two years for C., living in C.'s parish; he afterwards left, and his first master then sent him his watch. The pauper kept his earnings, and maintained himself: Held by DENMAN, C. J., LITTLEDALE, J., and PATTESON, J. (PARKE, J., dissentiente), that the inhabitation of the pauper in the parishes of the second and third master was connected with the apprenticeship, and that he thereby gained settlements in those parishes. *The King v. The Inhabitants of Banbury*, T. 3 W. 4. 176
3. On special case, the sessions found that J. E. by indenture in 1774, was put apprentice to P. for and in respect of W.'s estate; and there was a covenant by P. to teach J. E. the business of husbandry. The indenture was executed by the parish officers and W. P. was a farmer, and tenant to W., who was a stocking-weaver. J. E. never served P., but lived with W. long enough to gain a settlement by apprenticeship, if he could acquire one by such service. The sessions not having found that P. ever executed the in-

denture, or assigned the apprentice to, or assented to his service with W., it was held that a settlement by apprenticeship was not proved. *The King v. The Inhabitants of St. Cuthbert Wells*, 4 W. 4. 939

SETTLEMENT—BY BIRTH.

Appellants against an order of removal, to establish a birth settlement proved, first, the marriage of the father and mother at K., in April, 1749; and, secondly, the baptism at K. of their four children, viz. a daughter M., in May, 1751; a son J., in May, 1753; a daughter E., in January, 1755; and another daughter S., in December, 1756:

Held, that the sessions were not bound to infer from this evidence that E. was born at K. *The King v. The Inhabitants of Lubbenham*, H. 4 W. 4. 968

SETTLEMENT—BY ESTATE.

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish; and, therefore, upon the trial of an appeal, between the same parishes against a second of removal of the same party, the removing parish may show by parol order evidence that the first order of removal was quashed on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement, and that he afterwards sold the tenement, and thereby became removable. *The King v. The Inhabitants of Wick St. Lawrence*, M. 4 W. 4. 526

SETTLEMENT—BY HIRING AND SERVICE.

1. Pauper was hired for a year as a footman and groom, by a West India planter residing at M. in England at 7l. wages. He went in to the master's service in February, 1828, and in May following engaged to bind himself to serve the same master at Berbice as clerk and overseer, for three years from the first day of his arrival there, at a certain salary. Soon after their arrival at Berbice, the pauper entered on the office of overseer and clerk, but he also continued to act as servant, and lived in his master's house, and did so until the following February, when they returned to England, the pauper acting in the capacity of servant on the homeward voyage, and after his arrival in England. No further contract had ever been entered into for the pauper's service as overseer. The master paid him his footman's wages till the time of their going abroad, and on their return home paid him 20l. as salary for the service in Berbice, after which he gave him weekly wages under a new agreement: Held, that there was no dissolution of the first contract, and that the pauper having served forty days under the first hiring, gained a settlement in M. *The King v. The Inhabitants of Buckingham*, H. 4 W. 4. 953
2. A female of full age, who lived with her father and was the main support of his family, hired herself with his consent, and at his de-

aire, to a farmer in an adjoining parish to work at weekly wages during his harvest; she worked for him under this hiring for three weeks, when she received her wages and returned home. In the following autumn she again hired herself to the same farmer, and served him for a fortnight and two days; and on her return home she gave her wages to her father, who expended them for the use of his family. On both these occasions she intended, and was expected by her father, to return home as soon as the harvest work was done. The court of quarter sessions having upon these facts found that the pauper was emancipated, held by DENMAN, C. J., TAUNTON and PATTERSON, JS. (LITTLEDALE, J. dissentiente), that their decision was right. *The King v. The Inhabitants of Oulton*, H. 4 W. 4. 958

3. Pauper on the 16th of May, 1811, being in the local militia, hired himself to the colonel of his regiment to serve for a year, and served under that contract. On the 4th of May, 1812, the regiment was assembled for training, and continued in training till the 19th of May. During that time the pauper was under military control, though he also served the colonel as an in-door servant. While the regiment was assembled he received pay from the crown, and also his wages from his master:

Held, that the pauper gained a settlement by hiring and service; the fact of his being a militia man having been known to the master at the time of the hiring. *The King v. The Inhabitants of St. Mary at the Walls, Colchester*, H. 4 W. 4. 1023

SETTLEMENT—BY RENTING A TENEMENT.

1. A. rented a house in the appellat parish of L. as tenant from year to year and died. His widow, a fortnight after his death, told the landlord that she wished to pay the rent weekly; he assented, and she paid it weekly for the following nine months, when she quitted on a week's notice. Two months after her husband's death the attorney for the respondent parish (which had relieved the widow) told her she had a right to take out administration if she chose, and if she would leave it to him, he would do whatever was necessary. She assented, the letters of administration were obtained, and the pauper resided forty days afterwards in the appellat parish. The sessions found that the administration was fraudulently taken out by the direction and at the expense of the respondent parish, for the purpose of settling the pauper in the appellat parish:

Held, that as the widow was not only entitled, but bound by law, to take out administration, there was no fraud in the transaction which could prevent her from taking, as administratrix, her husband's interest as yearly tenant, and thereby acquiring a settlement. But the court referred it back to the sessions as a question of fact, whether the widow after administration granted, continued a weekly tenant, or became a tenant from year to year, in her husband's right. *The King v. The Inhabitants of Great Glenn*, T. 3 W. 4. 188

2. The first section of the statute 1 W. 4, c. 18, which enacts, "that from and after the

passing of that act, no person shall acquire a settlement by reason of the yearly hiring of a dwelling-house, building, &c., unless the rent for the same to the amount of 10l. at the least shall be paid by the person hiring the same," is prospective only. *The King v. The Inhabitants of Ruthin*, T. 3 W. 4. 215

3. To give a settlement by renting a tenement, since the stat. 1 W. 4, c. 18, there must be an occupation in fact of the whole dwelling-house or building of which the tenement consists, by the party hiring the same; and, therefore, where A. took a lease for a year of a house consisting of three floors, at the rent of 40l. per annum, and after he had been in possession three months underlet two floors by the quarter, at the rate of 22l. per annum, to another person who occupied them for two quarters, the ground floor only during that time being occupied by A. and in all other respects the provisions of the 6 G. 4, c. 57, and 1 W. 4, c. 18, were complied with, it was Held, that A. did not gain a settlement. *The King v. The Inhabitants of St. Nicholas, Rochester*, T. 3 W. 4. 219
4. A curate licensed by the bishop at a yearly salary according to the 57 G. 3, c. 29, resided in the rectory-house which was assigned to him pursuant to the same statute, and was above the value of 10l. a year, for more than forty days before the passing of the 59 G. 3, c. 50: Held that this was a coming to settle within the statute 13 & 14 Car. 2, c. 12, and that a settlement was gained thereby. *The King v. The Inhabitants of St. Mary, Newington*, M. 4 W. 4. 540
5. A. by lease demised a house and land to B. and C. for a term of years at 16l. per annum. There was a covenant by them jointly and severally to pay taxes, and rates, &c., but none to pay rent. B. occupied the whole premises, and paid the rent for five years: Held, that, the demise being joint, the rent was payable by the two jointly, and that each could only be considered as having rented a tenement at 8l. a year, and consequently that B. did not gain a settlement, either by renting the tenement, or by being rated and paying rates in respect of it. *The King v. The Inhabitants of Great Wakering*, H. 4 W. 4. 971

SETTLEMENT—BY SERVING AN OFFICE.

In a parish governed by a select vestry, public notice was given that the vestry would meet to elect an organist for a newly-erected chapel. At the meeting C. S. was elected, and it was entered in the minutes of vestry, that she was appointed organist at 60l. per annum. She performed the office for several years, receiving the salary half-yearly, and residing in the parish, till, on complaint made against her by the congregation, she was dismissed by order of vestry:

Held, that the office of organist so held by C. S., was not a public annual office, by which a settlement could be gained under 3 W. & M. c. 11, s. 6. *The King v. The Inhabitants of St. George, Hanover Square*, M. 4 W. 4. 571

SHERIFF'S OFFICER.

See Arrest, 1.

SLANDER.

1. Declaration stated that defendant intending to cause it to be believed that plaintiff had been guilty of wilfully setting his house and premises on fire, said of the plaintiff that he had set fire to his own premises, meaning that he had been guilty of wilfully setting fire to the premises, which, while in his occupation, had been destroyed by fire. After verdict for the plaintiff, the judgment was arrested on the ground that wilfully setting his own premises on fire was not, except under special circumstances, a crime punishable by law; and the court would presume only such circumstances as it was essentially necessary for the plaintiff to have proved in support of his declaration. *Sweetapple v. Jesse*, T. 3 W. 4. 27
2. Declaration in slander. The second count stated that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her, as such, the following words: "She (meaning the plaintiff) secreted 1s. 6d. under the till; stating, these are not times to be robbed." The declaration alleged as special damage, that one S., by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held, that the words in the second count, if actionable at all, were so only by reason of the special damage, and therefore that the plaintiff, if entitled to recover, ought to have full costs: Held, secondly, on motion in arrest of judgment, that the words in that count were not defamatory in their nature, and therefore not actionable, even though followed by special damage. *Kelly v. Partington*, M. 4 W. 4. 645

SPECIAL CASE.

See *Sessions*.

SPECIAL DAMAGE.

See *Slander*, 2.

STAMP.

1. In the Stamp Act 55 G. 3, c. 184, Schedule part i. (title Bill of Exchange), which imposes a certain duty on bills "exceeding two months after date;" the date means the time expressed on the face of the bill, not the time when it actually issued. And although by sect. 12, if a bill purporting to be payable at two months from a certain time, be issued before the commencement of that period, without payment of a proportionate duty, the maker is liable to a penalty; yet a bill so post-dated, and bearing the inferior stamp, corresponding with the purport of the bill, is admissible in evidence, being on the face of it conformable to the schedule. *Williams v. Jarrett*, T. 3 W. 4. 32
2. A promissory note payable to A. B. generally, is not one payable to bearer on demand, and re-issuable, within the first class of notes described in 55 G. 3, c. 184, Sched. part 1, but, a note payable otherwise than to bearer on demand (not re-issuable), within class 2, and therefore such a note for 100l. requires a stamp of 3s. 6d. only. *Cheetham and Wife v. Butler*, M. 4 W. 4. 837
3. Where an instrument is not required by

law to be stamped within a particular time after its execution, the Court on its being offered in evidence will not inquire when the stamp was affixed, nor if a penalty was incurred, whether the proper penalty was paid on the stamping. An indenture of apprenticeship, without premium, was executed April 27th, 1825, but not stamped till July, 1832, when a 1l. stamp was put on it, and a 5l. penalty paid. Afterwards a double duty (2l.) was paid. The indenture was offered in evidence to prove the settlement of a paper by service under it. Held, that as it was not within the stat. 8 Anne, c. 9, which limits the time for stamping indentures, the Court was not called upon to notice the circumstances under which the stamps were affixed. *The King v. The Inhabitants of Preston*, H. 4 W. 4. 1023

4. The 55 G. 3, c. 148, does not repeal the provisions of the 8 Anne, c. 9, as to the time for stamping indentures of apprenticeship, and therefore an indenture of apprenticeship (a premium having been paid with the apprentice), must be stamped with the ad valorem duty, within the time prescribed by the stat. 8 Anne, c. 9, ss. 36, 37, 38, and if not so stamped is wholly void. *Rex v. The Inhabitants of Church Hulme*, E. 1831. 1029
5. The son of J. S. having been arrested, one W. becoming his bail, J. S. signed an agreement to indemnify W. from all liability which he might incur in consequence of having so become bail: Held, that one of the liabilities to which J. S. thereby subjected himself, was to pay the debt for which the son of J. S. had been arrested, and as that must have amounted to 20l., the subject-matter of the agreement must have been of that value, and therefore required a stamp within the 55 G. 3, c. 184, sched. part I. *Wrigley v. Smith the elder*, H. 4 W. 4. 1117

STATUTE OF LIMITATIONS.

See *Practice*, 4.

STEAM ENGINE.

See *Bankrupt*, 1.

STET PROCESSUS.

See *Partnership*, 1.

STEWARD, POWER OF, TO ADMIT TENANT.

See *Copyhold*, 3.

STOPPAGE IN TRANSITU.

1. D. bought of Y. 46 puncheons of rum lying in the warehouse of Y. at Liverpool, and sold them to C. who was a clerk of Y., but carried on business for himself. D. gave C. an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum and the samples which had been taken remained in Y.'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at Liverpool, is by the vendor's giving a delivery order to the vendee. D. was asked by C. for delivery orders, but declined giving any, except for two or three puncheons which C. received. C. marked, coopered and gauged the casks. While the bills were

running, C. sold twenty-six of the puncheons to K., who paid him for them, and who by C.'s permission without the knowledge of D., gauged and coopered the casks in the warehouse of Y., and marked them with his initials. C. gave an invoice to K., stating the marks and numbers of the casks, and by whom the rum was bonded. C. also while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices and samples, and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by D. They paid C. for the whole. The bills given by C. for the price of the forty-four puncheons were dishonored: Held upon special case (whereby it was agreed that the Court should be at liberty to draw from the facts any inference that the jury might have drawn) that C. never had acquired the actual possession of the rum, and on his dishonoring his acceptances, D. had a lien on it for the price; and that C.'s sub-vendee could not claim against D. the rum which remained undelivered to them. *Dixon and Another v. Yates and others*, T. 3 W. 4. 313

2. W. shipped at Leghorn twenty-three casks of oil, on account and by the order of L., at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, L. endorsed the bill of lading, and deposited it with H., who advanced money on it, having previously advanced money on other goods (the property of L.) deposited with him. On the arrival of the oil, L. having previously become bankrupt, and W. not having been paid for it, W.'s agents claimed it of the master of the ship; but the latter delivered it to H., who afterwards sold the goods of L. as well as the oil of W. The net proceeds of the goods belonging to L. were sufficient to satisfy the debt due from L. to H. H. paid himself his debt, and deposited the net proceeds of W.'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between W. and the assignees of L. were referred. The arbitrator having stated the above facts on his award for the opinion of this Court: Held, that W., the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of L., because the property in and the right to the possession, was then vested in H., the endorsee of the bill of lading for value; and further, that W. had not, by reason of such claim, any legal right to the possession of the goods after H.'s lien was satisfied: but that in a court of equity, such transfer to H. would be treated as a pledge or mortgage only, and therefore W., by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to H.'s lien against the assignees of L.

Held, secondly, that W., by means of his goods, had become surety to H. for L.'s debt, and had a clear equity to oblige H. to pay his debt out of L.'s own goods deposited with him in case of such surety; and all the goods both of W. and L. having been sold, W. might insist on the proceeds of L.'s goods being appropriated to the payment of the debt; and, therefore, that W. was entitled to have all the proceeds of the oil paid

over to him. *In the matter of Westzinthus and Others*, M. 4 W. 4. 817

SURRENDER.

See *Copyhold*, 3, 5.

TAXATION OF ATTORNEY'S BILL.

See *Attorney*, 1, 2.

TOLL.

Where certain roads were, by local acts, placed under the direction of trustees for amending, improving, and repairing the same, and the trustees were empowered to erect turnpike gates on the said roads, and receive tolls there; but there was a certain portion of one of the said roads, which they were prohibited from repairing or improving, and on which they were not to erect toll-gates:

Held, that a person travelling along the last-mentioned road for more than a hundred yards including the excepted part, but less if that part were excluded, was not exempted from toll by 3 G. 4, c. 126, s. 32. *Pope v. Langworthy*, T. 3 W. 4. 464

TRESPASS.

See *Pleading*, 3, 4.

TROVER.

See *Lien*.

TRUSTEES.

See *Canal Act*, 2. *Highway*, 1. *Insurance Broker*.

TURNPIKE ACT.

See *Highway*, 2. *Mandamus*, 2. *Toll*.

A local turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings; and that all persons should have access to such entries. By a subsequent local act it was directed, that the trustees should keep a book, in which they should enter their accounts, which book should be open to the inspection of the trustees, or of any creditor on the tolls. The general turnpike act, 3 G. 4, c. 126, s. 73, re-enacted the latter provision as to all turnpike road accounts, and s. 72, directed that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where, by that act, it is otherwise ordered:

Held, that these clauses of the general and of the second local act, superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors in their respective cases of orders and accounts. *The King v. The Trustees of the North Leach and Witney Roads*, H. 4 W. 4. 978

UMPIRE.

See *Arbitration*, 2.

UNIFORMITY OF PROCESS ACT.

See *Pleading*, 8. *Practice*, 2, 6.

VALUED POLICY.

See *Insurance*, 1.

VARIANCE.

See *Bill of Exchange*, 1. *Pleading*, 6, 7.

VENDOR AND VENDEE.

See *Action on the Case*, 2. *Frauds, Statute of*. *Pleading*, 5. *Stoppage in Transitu*, 1, 2.

1. By the 36 G. 3, c. 88, entitled "An Act to prevent Abuses and Frauds in the Packing, Weight, and Sale of Butter" (s. 2), every cooper, or other person making a vessel for packing butter, is required to brand his Christian and surname on such vessel, together with the exact weight or tare thereof, or in default thereof he is to forfeit for every such vessel not so marked 10s. By section 3, every dairyman, farmer, &c., who shall pack any butter for sale shall pack the same in vessels so made and marked as aforesaid, and shall brand his Christian and surname on different parts of the vessel therein described and on the butter contained in such vessel, upon penalty of forfeiting for every default 5l.

In an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to the defendant, it appeared that the firkins were not marked according to the act :

Held, that the provisions which required the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked ; that the subject-matter of this contract was in such a state from the vessels not being properly marked, that the sale of it was forbidden by act of parliament ; and consequently that the contract of sale was void, and the plaintiff could not recover :

Held further, that although there was a penalty imposed in the same clause of the act, which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty ; but that the clause might be used against him as a defence to an action. *Foster v. Taylor*, M. 4 W. 4. 887

2. In every contract for the sale of an existing lease, there is an implied undertaking by the seller (if the contrary be not expressed), to make out the lessor's title to demise, and without showing such title, the seller cannot maintain an action at law against the buyer, for refusing to complete the purchase.

Where a lessee in possession contracted to sell the residue of his term, being three years and a quarter, at the rent of 42l. per annum the vendee paying 30l. for the fixtures as per list : Held, that it was not to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease, that the vendee intended to waive his right to call for the production of the lessor's title. *Souter v. Drake*, H. 4 W. 4. 992

VENUE.

See *Indictment*, 1. *Practice*, 3.

VOLUNTARY PAYMENT.

See *Bankrupt*, 2.

WAGES, ACTION FOR.

See *Master and Servant*, 1, 2.

WAIVER.

See *Lease*, 6.

WARRANT OF ATTORNEY.

See *Judgment*.

WASTE.

See *Copyhold*, 4.

WATER FLOWING, RIGHT TO.

See *Action on the Case*, 1.

WAY.

Two coheiresses being seized each of an undivided moiety of two estates conveyed to H. in fee, for the purpose of making partition, one of the estates called Parkhall to which they were entitled by descent as coparceners, and another called Woodseaves of which they were tenants in tail, together with all houses, outhouses, edifices, orchards, ways, paths, passages, rights, members and appurtenances whatsoever to the said several messuages, tenements, lands, and hereditaments belonging or therewith usually held or occupied, to hold Parkhall to H. in fee to certain uses, and Woodseaves to H. in fee to the use of H. and his heirs, to make him a tenant to the præcipe, in order to suffer a common recovery. The deed contained a covenant to levy a fine of the moiety of one of the coheiresses in Parkhall, and a declaration that a recovery should be suffered of Woodseaves, and then declared the uses of the fine, recovery and conveyance as to the whole of the said messuage or tenement called Parkhall, with the buildings, lands, hereditaments, and appurtenances thereto respectively belonging, to be to such uses as the husband of the said coheiress should appoint ; and as to Woodseaves with the buildings, lands, hereditaments, and appurtenances thereunto belonging, to the use of the other coheiress in fee. The fine was levied and the recovery suffered :

Held, that a way from the king's highway over the Woodseaves estate to the Parkhall estate, which before the conveyance, fine, and recovery, had always been used by the occupiers of Parkhall, did not pass by this deed of partition, fine, and recovery, to the owner of Parkhall. *Plant v. James and Another*, M. 4 W. 4. 791

WITNESS.

See *Evidence*, 2, 3.

WORDS, CONSTRUCTION OF, AFTER VERDICT.

See *Slander*, 1, 2.

YEARLY HIRING.

See *Master and Servant*, 1, 2.

NEW CASES

IN

The Court of Common Pleas,

AND

OTHER COURTS

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

PEREGRINE BINGHAM,

OF THE MIDDLE TEMPLE,

ESQ., BARRISTER AT LAW.

VOL. I.

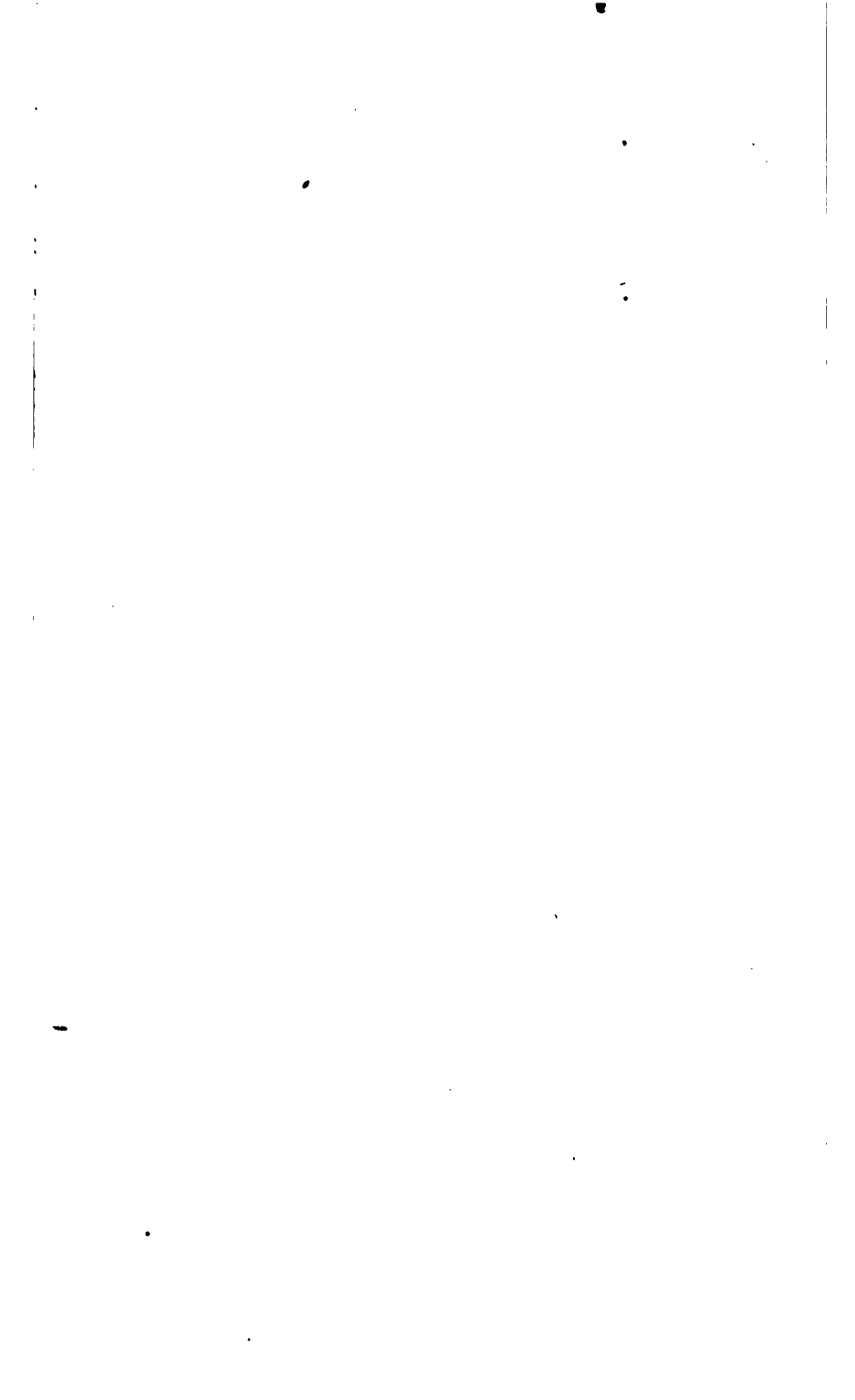
CONTAINING THE CASES FROM TRINITY TERM, 4 WILLIAM IV., 1834,
TO EASTER TERM, 5 WILLIAM IV., 1835, BOTH INCLUSIVE.

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1854.



J U D G E S
OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt.
Ld. C. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

Hon. Sir EDWARD HALL ALDERSON, Knt.

A T A B L E

OF

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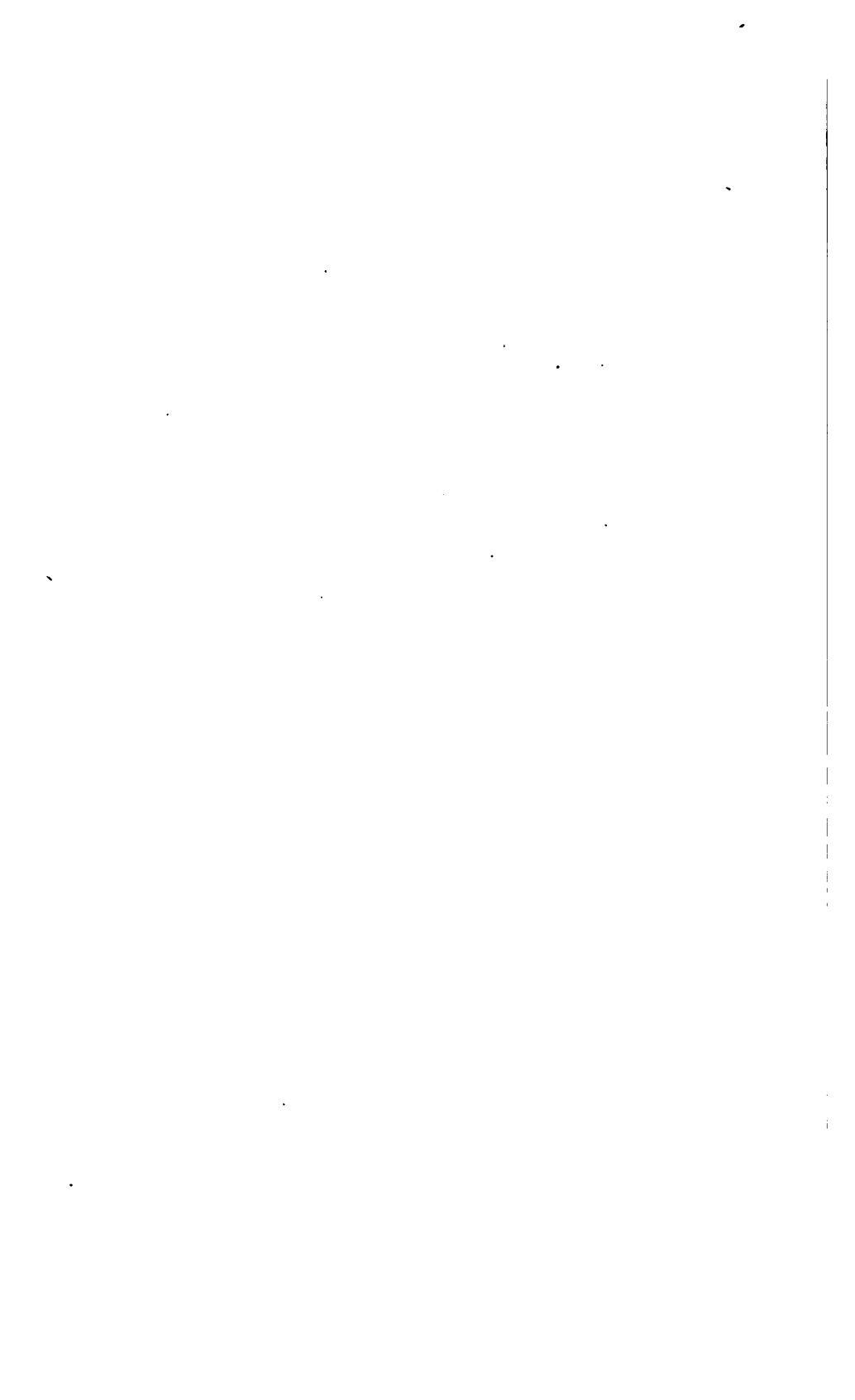
My Reports of Cases argued and determined in the Court of Common Pleas and other Courts, having now reached a tenth volume, it has been thought expedient that another series should be commenced, under the name of New Cases in the Court of Common Pleas and other Courts.

The recent change effected in the Court of Common Pleas, by the abolition of the exclusive privilege of practising in that Court, hitherto attached to the rank of Serjeant, and the promulgation of the New Rules of Pleading and Practice, concur in rendering the present term a convenient time for commencing a New Series.

The New Rules will, probably, give rise to numerous decisions on points of Practice, and novel questions and forms in Pleading. Points of this description will receive particular attention; and new forms of the several pleadings will be given at length.

P. BINGHAM.

Trinity Term, 1834.



NEW CASES
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,

Trinity Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were,

TINDAL, C. J.
PARK, J.

GASELEE, J.
BOSANQUET, J.

COCKMAN v. HELLYER. *May 22.*

The affidavit in support of a motion to enter up judgment on a warrant of attorney, need not now state, as formerly, that the defendant was alive on a day in term.

Butt moved to enter up judgment on a warrant of attorney. His affidavit stated, that the defendant was alive the day *before* this term.

The old rule, which requires an affidavit that the defendant is alive on a day in term, being grounded on the relation which judgments formerly had to the first day of term, and the judgment, according to the new rules, relating to the day on which it is signed,

The Court acceded to the application supported by the affidavit as above.

Rule as prayed.

[*4] *OBERTS v. WEDDERBURNE. *May 23.*

The writ of *capias*, and writs which purport to be a continuance of it, must state the place where the defendant resides, and, if that be unknown, the place where he is supposed to reside.

In this case, after *capias* and *alias* had been issued, describing the defendant as of Chesterfield Street, May Fair, in the county of Middlesex, he was detained upon a *plures capias*, in which a blank was left for his place of residence.

The service of this *urries capias* was set aside by an order of BOSANQUET, J., because the writ did not disclose the actual or supposed residence of the defendant, as required by the schedule (Form No. 4) of the uniformity of process act.

Wilde, Serjt., upon affidavit that, between the issuing of the *capias* and *pluries*, the defendant had quitted his residence in Chesterfield Street, and, as

it was believed, had gone abroad, and that the plaintiff was unable to discover his residence,—obtained a rule nisi to discharge the order made by BOSANQUET, J.

Mereuether, Serjt., who showed cause, contended, that the act was imperative, and that there could be no sufficient reason for omitting to insert a supposed residence where the actual abode of the party is unknown.

Wilde. The act is remedial; and was passed to facilitate the access to justice by the removal of technical obstructions. It ought, therefore, to receive a liberal construction; and, in matters which are not of importance to the parties, must be considered as directory only, not imperative. It must be altogether immaterial to the defendant whether his residence is stated in the writ or not. But, if it were material, *lex neminem cogit ad impossibilia*. [5] Assuming that the plaintiff ought to state the defendant's residence where he knows or can guess at it, still he would be misleading all whom it might concern, if, when he neither knows nor can suppose where the defendant's residence is, he were to name a place at random. In such a case he best conforms to the statute by leaving a blank, as here. *Cur. adv. nult.*

TINDAL, C. J. In this case, the defendant has been arrested upon a *pluries* writ of *capias*, wherein there is a blank left for his place of residence, after a *capias* and *alias* had been issued, describing the defendant as of Chesterfield Street, May Fair, in the county of Middlesex.

The question which has been argued before us has been, whether service of the present writ is irregular and ought to be set aside; and it is the opinion of a majority of the Judges, that such is the case. The act for uniformity of process enacts, by section 4, that where it is intended to arrest the defendant, the process shall be by writ of *capias*, according to the Form No. 1, contained in the schedule; and, upon reference to that form, it is clearly intended that the residence of the party shall be described, both in the writ of *capias* and in those writs which purport to be a continuance of it. In what manner and to what degree of strictness this description is necessary, will appear by section 1; for although the enactment in that section relates to writs of *subpoena* only, it shows by analogy what was the intention of the legislature in the respect, viz., the place or county of the residence, or supposed residence, of the defendant, wherein the defendant shall be or shall be supposed to be; so that it is difficult to conceive any case in which the plaintiff can be at a loss to comply with one of these requisites: at all events, that difficulty does not apply to the present case, where the two preceding writs, of which this is the continuance, [6] had given him a description.

Upon the ground that it is much better for the public to adhere, in all practicable cases, to the strict, close, literal compliance with the form prescribed by the act, rather than to yield to particular cases of supposed hardship on individuals, when those requisites have not been formally complied with we think the rule for setting aside Mr. Justice BOSANQUET's order must be discharged, and that this writ and subsequent proceedings must be set aside for irregularity.

Rule discharged.

LINDREDGE v. RICHARD ROE. *Jus* 5.

The actual or supposed place of the defendant's residence must be stated in that part of the body of the writ prescribed by Schedule No. 4, 2 W. 4, c. 8. It is not sufficient to endorse it on the writ.

In this case *Archbold* obtained a rule nisi to cancel the beyond, the defendant's residence being endorsed on the copy of the writ served, instead of being inserted in the body of the instrument, according to the form given in the Schedule No. 4, to 2 W. 4, c. 89.

Austin, who showed cause, contended that the specification of the defendant's residence on any part of the writ was a substantial compliance with the act;

and, in this respect, distinguished the present from the preceding case of *Roberts v. Wedderburne*, where the defendant's residence was nowhere stated.

The irregularity here, if any, was one from which no detriment could arise to the defendant; and the statute would be a trap for suitors instead of a remedial enactment, if it were construed with such literal rigor. The *statute [*7] prescribes the insertion of the defendant's residence in the writ. The schedule indicates, for the place of insertion, the first place where the defendant's name occurs,—“We command you that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of —.” Suppose the plaintiff were to omit the defendant's residence there, and to insert it at the next mention of the defendant's name,—“and him safely keep,” “until the said C. D., of Parliament Street, in the county of Middlesex, shall, by lawful means, be discharged,” &c. The defendant's residence would be thus pointed out in the writ, and it could scarcely be contended the statute had not been obeyed. If so, an endorsement which gives the same information, on the same instrument, ought to be held sufficient.

Sed per Curiam. That would not be a compliance with the form prescribed by the schedule, and the statute requires that such shall be the form employed. Where a form is given, there can be no difficulty in pursuing it; and it is best, in such a case, to enforce a literal compliance with the directions of the legislature. Rule absolute.¹

¹ See *Price v. Huxley*, 2 Crompt. & Mee. 211.

[*8] **ALLEN and Wife v. WOOD*, Administrator of *GRIMMETT*. May 23.

Rents devised to a female *durante viduitate*, do not pass over to the remainder-man upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband. And the party who thus holds himself out, is not, by so doing, estopped to show the invalidity of the marriage.

THE plaintiff and his wife, who was the daughter of one Fuller, sought, by this action of money had and received, to recover the amount of certain rents and profits received by Grimmett, the intestate.

At the trial the plaintiffs put in the will of Fuller, by which he left these rents to his widow for life, provided she should continue unmarried, and, in case of her marrying again, they were to belong to his daughter, the plaintiff's wife.

The plaintiffs then proved that, about ten years ago, Mrs. Fuller had been ostensibly married to Grimmett, after banns of marriage published in her maiden name; that she had lived with Grimmett till her death, about two years ago, when he attended her funeral in the character of husband, and erected a monument to her memory, with an epitaph, in which he styled her his wife. The lady, however, had concealed the marriage, and as long as she lived, continued to receive the rents as the widow of Fuller.

TINDAL, C. J., before whom the cause was tried, considering, on the authority of *Rex v. Tibshelf*, 1 B. & Adol. 190, that Mrs. Fuller and Grimmett had never been married, the plaintiff was nonsuited, with leave to move to set the nonsuit aside: accordingly,

Spankie, Serjt., obtained a rule nisi to that effect, on the ground that Grimmett, having held out Mrs. Fuller to the world as his wife, his representative [*9] was now estopped to say there had been no legal marriage. *The intestate could not take advantage of his own wrong.

Wilde and Andrews, Serjts., showed cause. It was for the plaintiffs to establish their title to the rents by showing that Mrs. Fuller had married again. That they failed to establish; and as the rents were received, not on the representation of a marriage between the parties, but by the suppression of any such fact, the intestate could not be said to take advantage of his own wrong. It was

no more competent to the plaintiffs to rely on what they called a marriage in substance and effect, than it was for a defendant, in an action for a libel, to rely on showing that, in substance and effect, the libel was true. In *Weaver v. Lloyd*, 2 B. & C. 678, where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect, the jury having found that it was true in all particulars, except that the eye was knocked out, it was held that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea.

Spankie. The plaintiffs showed a sufficient marriage within the meaning of the condition in Fuller's will, by showing that the intestate held out Mrs. Fuller as his wife; and he having lived as in a state of marriage, his representative cannot now set up and take advantage of his turpitude and concubinage. A party who has conveyed property to give a colorable qualification, is not permitted to say he has not conveyed: *Doe v. Roberts*, 2 B. & Ald. 367. So, in *Crocker v. Fothergill*, *Ibid.* 652, there was a demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under *the surface of other lands not demised; the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all; but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig: it was held, that although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent, under the statute of 11 G. 2, c. 19, the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig. And iniquity can no more be set up as a defence, than as a cause of action: *Montefiori v. Montefiori*, 1 W. Bl. 363. [*10]

At all events, the condition in Fuller's will applies as much to an intercourse like this as to a state of marriage; if he objected to marriage, he must have objected still more to concubinage as a status for his widow. In effect she was to enjoy the property only *dum sola et casta maneret*.

TINDAL, C. J. We may determine this question without infringing the general rule that a party shall not set up his own fraud or wrongful act as a ground of claim or defence. The plaintiffs here seek to recover certain rents and profits under a clause in the will of Fuller, by which he provides that property bequeathed to his widow shall go over to his daughter in case his widow shall take another husband. It is a part of the plaintiffs' case, therefore not of the defendant's, to show that Mrs. Fuller's right to the rents had determined. *But the plaintiffs' witnesses, after showing that Grimmett and Mrs. Fuller had, indeed, lived together as man and wife, disclosed also, that [*11] that which was a marriage in form was no marriage in fact. It has been contended that *prima facie*, it was sufficient for the plaintiffs to show that Grimmett and Mrs. Fuller were living together as man and wife: but, conceding that, it would have been open to the defendant to explain the real circumstances of the case; and if so, we could only have held, as was held in *Rex v. Tibshelf*, that this was no marriage. To invalidate a marriage under a false name, it is not necessary there should have been actual fraud. In all the cases cited in the note to *Rex v. Billingham*, 3 M. & S. 250, the Judge took a wider view, and thought that where a false name has been inserted in the banns, though no fraud were intended, the marriage is without banns, and consequently illegal. As in *Wakefield v. Wakefield*, 1 Phill. 139, 140, in note, where Sir William Scott stated and approved of that opinion; and in another case, of *Frankland v. Nicholson*, 3 M. & S. 259, he said, "I do not hold it to be necessary that there should be actual fraud on the individual party; it is enough if the thing leads to

a probability of fraud; and this mode of conducting the matter would lead to such consequences and mischief as it is the intention of the legislature to prevent. It seems to me that courts of justice are only following up that intention in preventing such modes as are so obnoxious, and lead to fraud: certainly if this mode was permitted, a man might be married to the wife of another person, without the slightest knowledge of the fact; and many instances might be put, in which a liberty of this kind would be extremely grievous." And in several other cases the same doctrine was held by that learned civilian. If, therefore, [*12] that which is *ipso jure* is *ipso facto* a void *marriage, how can it be a marriage which divests the right of the first devisee to the rents in question? The rule for setting aside the nonsuit must be discharged.

PARK, J. This is an action to recover certain rents and profits bequeathed by Fuller to his widow, with a condition that in case she married again they should go over to her daughter. During her life the plaintiffs supposed she continued a widow: and unless they show that she married a second time, they are not entitled to the rents. In order, however, to retain the property, Mrs. Fuller did that which does not amount to a marriage; and the plaintiffs, instead of showing a marriage, have shown that which is directly in the teeth of the statute and of all the decisions.

The statute requires that the banns shall be published in the true names of the parties; here they were published under a fictitious name, which in effect is no publication at all; inasmuch that a minister who should be privy to it would be liable to transportation. The statute goes on to enact that a marriage solemnised without publication of banns or license shall be null and void to all intents and purposes whatever. Here the publication being in fictitious names, there was no marriage at all, and the circumstance came out in the plaintiffs' case.

The plaintiffs, therefore, have failed to establish any title to the rents in question, and the rule must be discharged. But this decision does not in any degree trench on the cases which decide that a man renders himself liable for the debts of a woman with whom he lives in concubinage.

GASELEE, J. The claim fails on the plaintiffs' own showing.

BOSANQUET, J. I am of the same opinion. In order to establish this claim, [*18] it was incumbent on the plaintiffs *to show that Mrs. Fuller had married: but as there was no marriage the plaintiffs' title falls to the ground.

And as to the effect of any representations on the subject, Mrs. Fuller represented herself, not as married, but as still a widow. It has been urged, that the testator's meaning was to include an intercourse, such as this, under the word marriage. But we must apply that word in the will to a marriage according to the law of England, and not to a contract which the parties may dissolve at pleasure. That would be making the condition in the will a condition *dum sola et casta maneret*: a condition very different from the real one.

Rule discharged.

WILLIAMS v. HARRIS. May 23.

The tenant in a real action is not entitled to costs upon a *nolle prosequi*.

THIS was a writ of intrusion, on which the demandant had entered a *nolle prosequi*; whereupon,

Merewether, Serjt., obtained a rule nisi to tax the tenant's costs, against which

Stephen, Serjt., who showed cause, contended that no costs are given in real actions: *Pilfold's case*, 10 Rep. 116, a; *Newman v. Goodman*, 2 W. Bl. 1098; *Booth on Real Actions*, 74; and that the statute of 8 Eliz. c. 2, which gives costs on a discontinuance or nonsuit, is confined to personal actions.

Merewether. In *Cooper v. Tiffin*, 8 T. R. 511, the statute 8 Eliz. c. 2 was

held to be a remedial act, and by equitable *construction, to give a defendant his costs on a judgment by *nolle prosequi*, although the language of the act taken strictly would not extend to such a case. Upon the same principle, it ought to be extended to real actions. [*14]

TINDAL, C. J. The rule must be discharged. The question is, whether, in real actions, the demandant having entered a *nolle prosequi*, the tenant is entitled to his costs. In general in real actions, the tenant is not entitled to costs, because, except in particular cases, of which a writ of intrusion is not one, the demandant is not himself entitled to any.

The words of the statute 23 H. 8, c. 15, which first gave defendants costs, expressly exclude real actions. But it is said, that the subsequent statute of 8 Eliz. having been extended to judgments on *nolle prosequi*, to which it does not strictly apply, ought also, in equitable construction, to be extended to real actions. I think not; because if it were so extended it would give the tenant costs in many cases, in which the demandant, if he succeeded, would not be entitled to them.

Our judgment, therefore, turns on the ground, that the tenant cannot claim costs except where the demandant, if he succeeded, would be entitled to them; and that this is a case in which, clearly, the demandant would not be so entitled.

PARK, J. There can be no equitable construction contrary to the positive words of the act. Now, the title of the act is, an act for avoiding wrongful vexation touching the writ of latitat; and all its enactments apply to personal actions. The decisions have gone far enough.

GASELEE, J. From the time of Elizabeth to this day, no such attempt as this has been made; this affords a *clear indication of the light in which this statute has been viewed. [*15]

BOSANQUET, J. I am of the same opinion. If the suit had proceeded, and the demandant had failed upon verdict, it is clear the tenant would not have been entitled to costs; there is no reason, therefore, why he should have them now.

Rule discharged.

CURTIS and Others, Executors of CURTIS v. SPITTY. May 27.

Nil habuit in tenementis is no plea in an action of debt for use and occupation.

THE plaintiffs declared that the defendant was indebted to the testator, in his lifetime, in the sum of 50*l.* for the use and occupation of certain tenements and land of the testator, by the defendant, and at his request, and by the sufferance and permission of the testator, for a long space of time had held, used, occupied, possessed, and enjoyed.

Plea, that the testator had nothing in the said tenements and land whereof the testator could suffer or permit the defendant to have, hold, use, occupy, possess, and enjoy.

Demurrer and joinder.

Petersdorff was to have argued in support of the demurrer; but the Court called on

Stephen, Serjt., to support his plea.

Nil habuit in tenementis is no plea in assumpsit for use and occupation. [*16]

*But it is a good plea in debt for rent, *Lewis v. Willis*, 1 Wils. 314, and therefore ought to be held good in debt for use and occupation, which, for convenience, has been substituted for debt for rent. The action of assumpsit for use and occupation was given by the statute 11 G. 2, c. 19, s. 14; it is collateral to the action on a contract for rent upon a demise: *Johnson v. May*, 3 Lev. 150; and in *Naish v. Tatlock*, 2 H. Bl. 323, *ESRE*, C. J., said, it does not "seem to have been within the scope and provision of the act to make this remedy (of assumpsit for use and occupation) co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the contract for rent." But debt

for use and occupation, like debt for rent, lay for the lessor at common law. And Littleton says (s. 58), that, except where the demise is by deed indented, *nil habuit in tenementis* is a good plea to debt for rent: *Kemp v. Goodall*, 1 Salk. 277; *Girling v. Glasse*, Yelv. 227. It was, for some time, indeed, doubted, whether a party might declare in debt for use and occupation; *Wilkins v. Wingate*, 6 T. R. 62; *Stroud v. Rogers*, cited *Ibid*: when that was once established, the generality of form given by the statute of G. 2, in actions of assumpsit was imitated for convenience; *King v. Fraser*, 6 East, 347: but the action of debt for use and occupation, lying at common law, must be attended with the incidents of debt for rent: and the admission of a plea of *nil habuit in tenementis* in the action of debt on a demise is not inconsistent with the rule which precludes a tenant from disputing his lessor's title; for if the plaintiff can reply a demise by indenture, the defendant is thereby estopped; *Trevivan v. Lawrence*, 2 *Ld. Raym.* 1051; 1 *Wms. Saund.* 276 (a), note 1.

[*17] *TINDAL, C. J. Admitting, for the sake of argument, that in an action of debt for rent, a plea of *nil habuit in tenementis* may still be put on record, that action materially differs from the present. In debt for rent the plaintiff alleges a demise; and it is some semblance of an answer to say, that he had nothing in the premises to demise. This, however, is an action on a bygone consideration: the declaration states that the defendant is indebted for the use and occupation of premises, enjoyed at his request, by the permission of the plaintiff. The action is, in its own nature, collateral to the action on a contract for rent upon a demise; and the plea of *nil habuit in tenementis* does not apply. Such was the opinion of the Court in *Lewis v. Willis*, where it was held that *nil habuit in tenementis* was a bad plea to an action on the case for use and occupation.

The form of action here, is debt for use and occupation;—a form of action not unknown at common law, and not unfrequently resorted to, to avoid the difficulties attendant on debt for rent. The statute 11 G. 2, which recognises the action on the case for use and occupation, made no other difference than to extend the remedy, and to enable the landlord to sue in that form, notwithstanding the existence of a demise by written agreement. But the action of debt for use and occupation has long prevailed, and has been placed on the same footing as assumpsit. That appears from *Stroud v. Rogers*, followed by *Wilkins v. Wingate*, and *King v. Fraser*. The two forms of action of debt and assumpsit for use and occupation having so long been considered as standing on the same footing, we cannot, at this time, establish a distinction, and allow that to be a plea to the action of debt for use and occupation which it is not competent to the defendant to plead to the action of assumpsit. The rule in both is the same as in replevin on a distress for rent on a parol demise: and

[*18] ever since *the case of *Syllivan v. Stradling*, 1 *Wils.* 208, it has been held, as in that case, that a plea of *nil habuit in tenementis* to an avowry for rent on a parol demise is ill.

The plea cannot be supported, and our judgment must be for the plaintiff.

PARK, J. I cannot see the distinction that has been attempted. As soon as it is established that the action of debt for use and occupation lies, the incidents must be taken to be the same as those of assumpsit for use and occupation. It has been contended that the action for use and occupation, is the creature of the statute; but this is not so; for before the statute, the Courts allowed the lessor, instead of going for a precise rent, to resort to the collateral action of assumpsit for what he deserved to have. But it appears from the case of *Stroud v. Rogers* in the note to *Wilkins v. Wingate*, that it is equally competent to a landlord to sue in debt for use and occupation; and that has been held for clear law ever since the case of *King v. Fraser*. The action was substituted for the more ancient form of debt for rent; and is subject to the same incidents as assumpsit for use and occupation. Now in *Syllivan v. Stradling*, it was expressly decided that where the demise is by a parol agreement, the tenant cannot plead *nil habuit in tenementis*.

ture was then and there delivered by the defendant to the said Thomas Smith, and was then in the power, custody, or possession of the said Thomas Smith, so that the defendant could not produce or show the same to the Court, and of this last-mentioned indenture, the supposed indenture in the declaration mentioned was the counterpart],—under-demised and leased to the defendant, his executors, administrators, and assigns, all the premises with the appurtenances demised to him, the said John Hutchins, by Sir Richard Sutton, by the indenture of the 1st of August, 1824, except as therein excepted, to have and to hold the same to him the defendant, his executors, administrators, and assigns, from the 29th of September, 1825, for and during the term of thirty years from thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly and every year during the said term thereby granted, unto said John Hutchins, his executors, administrators, or assigns, the yearly rent or sum of 75*l.* by equal quarterly payments. That the defendant did, in the said indenture of the 17th of December, 1825, covenant, promise, and agree, to and with the said John Hutchins, his executors, administrators, and assigns, amongst other things, that he, the defendant, his executors, administrators, and assigns, should and would well and truly pay to said John Hutchins, his executors, administrators, *or assigns, the said yearly rent or sum of [*24] 75*l.* on the days thereinbefore-mentioned for payment thereof, without any deduction or abatement whatsoever; but the said John Hutchins did not, by the last-mentioned indenture or otherwise, reserve or retain to himself, or his executors, administrators, or assigns, or otherwise, nor had the said John Hutchins, at the time of his death, any reversion of or in the said premises or any part thereof. That the said indenture of the 17th of December, 1825, was the supposed assignment in the declaration mentioned; and that the said John Hutchins afterwards, and before any part of the supposed sum in the declaration mentioned, and which was the rent reserved and made payable by the indenture of the 17th of December, 1825, became due or payable, if any such ever did become due or payable, to wit, on, &c., at, &c., died: and so the defendant said that the plaintiff and the said Mary, as executrix, did not take or derive any estate, right, title, interest, term of years to come and unexpired, property, profit, claim, or demand whatsoever, of, in, or to the premises with the appurtenances, so under-demised and leased by the said John Hutchins to the defendant, and so being the premises in the declaration mentioned, or any benefit, power, or right to sue upon the said covenant of the defendant for payment of the said yearly rent or sum of 75*l.*, reserved by the said last-mentioned indenture; or for the said sum of 243*l.* 15*s.* in the declaration mentioned, and thereby sued for, and which was stated and appeared in and by the declaration to have accrued due after the death of said John Hutchins: and that, the defendant was ready to verify, wherefore, &c.

Demurrer and joinder.

Stephen, Serjt., in support of the demurrer.

The point intended to be raised by the defendant is, *that the plaintiff's testator, by having granted an under-lease for a term exceeding in [*25] length that for which he himself held the premises, parted with all transmissible interest; that the covenant to pay rent is incident to the reversion; and that no reversion remains in respect of which the plaintiffs can sue.

But though rent is incident to the reversion, it may also be separated from the reversion; *Co. Litt.* 93, a, 151, b; and the defendant is liable on his express covenant, notwithstanding the testator might be without any reversion. The deed between him and the defendant amounts to an assignment of the testator's term; *Hicks v. Downing*, 1 *Ld. Raym.* 99, and where a lessee assigns his term, stipulating that the assignee shall render rent, the lessee may sue, although he cannot distrain for the rent: *Smith v. Mapleback*, 1 *T. R.* 441; *Com. Dig. Debt, C. E.*, *Newcome v. Harvey*, *Carth.* 161, *Ventr.* 242, 2 *Lev.* 80; *Lloyd v. Langford*, 2 *Mod.* 175; *Bro. Abr. Dette*, pl. 39;—*v. Cooper*, 2 *Wils.* 375.

If the plaintiffs cannot sue, there is no other who has any claim; and it would be unjust that the defendant should occupy without payment. The rent accruing from a leasehold cannot go to the termor's heir.

Coleridge, Serjt., contra. What is the operation of the deed between the testator and the defendant is doubtful, and what the nature of the payment reserved. However, taking the sum reserved by the testator to be not a mere annual payment, as in *Smith v. Mapleback*, but from the periods of reservation, and the nature of the premises occupied, to be clearly a rent, as such, it is subject to all the incidents of rent. Strictly speaking, rent cannot be demanded except by him who has the reversion; and though it appears from the cases [*26] which *have been cited, that a lessee who assigns, reserving rent, may sue his assignee for the same, yet that is only because the assignee is estopped to dispute the title of the party under whom he occupies. But that estoppel does not extend beyond his life; and in the present case the assignor being dead, the defendant is at liberty to show that by his death all his interest in the premises ceased, and that there is no reversion in respect of which an action lies. The plaintiffs are in the condition of a stranger, to whom rent cannot be reserved: *Litt. s. 346*; and the circumstance that the heir cannot sue, affords no argument to show that the plaintiffs can; for there are many cases in which rent becomes extinct, and the party originally liable ceases to be charged: *Thorn v. Woolcombe*, 3 B. & Adol. 586.

Stephen. In *Thorn v. Woolcombe* the term granted by the lessor had merged in the inheritance; and upon that account the rent incident to it was held to be extinguished. Here the term by virtue of which the defendant occupies is still subsisting. Rent service can only be recovered by the reversioner: but the rent sought to be recovered in this action is neither rent service nor rent seck; it is rent reserved by virtue of the defendant's covenant.

TINDAL, C. J. I think the plaintiffs are entitled to recover. This is an action of covenant, brought on an indenture entered into between the plaintiff's testator and the defendant, by which certain premises held by the plaintiff's testator for a term of thirty-one years from Christmas, 1823, were by him underdemised and leased to the defendant from the 29th of September, 1825, for [*27] thirty years, the defendant covenanting to pay *the lessor, his executors and administrators, the yearly rent or sum of 75*l.* by equal quarterly payments. It is contended, on the part of the defendant, that the plaintiff and his wife, as executrix of the lessor, are not entitled to recover during the continuance of the term. And, first, an objection is made that it is uncertain what is the operation of this deed. I think it amounts to a demise; and I need only refer to the case of *Poultney v. Holmes*, Str. 405, where the defendant having a term for years, whereof one year and three-quarters was to come, agreed with the plaintiff that he should have the premises for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease; the plaintiff took possession, and then brought trespass against the defendant for a re-entry; it was objected that that amounted to an assignment of the lease, and was therefore void by the statute of frauds and perjuries, not being in writing, to which it was answered, on the part of the plaintiff, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor; and the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion; and Lord *HARDWICKE, C. J.*, being of the same opinion, a verdict was found for the plaintiff.

Then, it is asked whether this is a covenant for the payment of a gross sum or for the payment of rent. Upon all the authorities, I consider it a payment in the nature of rent. The cases of *Newcome v. Hardy*, Carth. 161, and *Lloyd v. Langford*, 2 Mod. 175, both referred to by *Comyns (Debt, C. E.)*, show that where the whole of a term is assigned, a gross sum reserved periodically to the assignor, is a payment in the nature of rent. And if it were held otherwise,

great injustice might be occasioned, *as the tenant, if evicted, would have no answer to an action on his covenant for payment of the sum in question; whereas if it be considered as rent, eviction would be an answer to the lessor's claim. As to the case of *Thorn v. Woolcombe*, it amounts to no more than a decision, that when the term is merged in the inheritance, the rent reserved is extinguished: little more than had before been decided in *Webb v. Russell*, 3 T. R. 393, which excited so much attention at the time, but which has long been recognised as undoubted law. It is a fallacy to say the plaintiffs sue as assignees of the reversion; they sue on privity of contract: and the contract is one on which they are entitled to recover.

PARK, J., and GASELEE, J., concurred.

BOSANQUET, J. I am of the same opinion. There is no merger of a term here, but a demise from Hutchins to the defendant, with a reservation of a payment in the nature of rent; and the question is, whether the plaintiff and his wife, as executrix of Hutchins, are entitled to sue on a covenant by which the defendant has engaged to pay the rent or yearly sum of 75*l*. The term being still in existence, I am of opinion they are entitled to sue. They do not sue as assignees of the reversion, but as personal representatives of the testator. They claim the benefit of privity of contract, and towards the defendant stand in the same situation as the testator if he had lived. Our judgment, therefore, must be for the plaintiffs.

Judgment for plaintiffs.

*W. P. and R. M'ANDREW v. ADAMS. May 28.

[*29]

Defendant by charter-party of October 20th, 1832, agreed to go in ballast from Portsmouth to St. Michael's and bring back a cargo of fruit direct to London. The charterer was to be allowed thirty-five running days for loading and unloading, to commence on the 1st of December then next; and if the vessel did not arrive at St. Michael's by the 31st of January, 1833, the charterer was to be at liberty to rescind the charter-party: Held that the defendant was bound to proceed at once to St. Michael's, and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. Michael's before the 31st of January, 1833.

THE first count of the declaration stated, that on the 20th of October, 1832, to wit, at, &c., by a certain charter-party of affreightment then and there made between the defendant, master of the good ship or vessel called the *Swallow*, then lying at Portsmouth, and the plaintiffs as affreighters of the said vessel, it was mutually agreed between the plaintiffs and the defendant, that the said vessel being tight, staunch, and strong, and every way fitted for the voyage, should proceed in ballast to the Island of St. Michael's, or so near thereunto as she might safely get, and after being well and sufficiently ballasted with stone or iron, and not with sand or anything that might be prejudicial to the cargo, should receive on board from the agents of the affreighters a full and complete cargo of fruit in boxes, which the affreighters bound themselves to ship, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, stores, and furniture; and the vessel having been so loaded, should proceed with the said cargo direct to the port of London, or so near thereunto as she might safely get, and should there deliver the same: the master should not put into any port with the vessel on her homeward passage, unless compelled by stress of weather or other unavoidable necessity (restraint of princes and rulers, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the *said voyage always excepted): the freight which should be paid for the said cargo should be 7*l*. 10*s*. per ton, together with ten guineas as a gratuity to the master, for his care and attention to the cargo, according to the clauses and stipulations therein expressed for that purpose: and for the purpose of loading and unloading the said vessel, the

[*30]

affreighters or their agents should be allowed the space of thirty-five running days in the whole, if required; those days should commence on the 1st of December then next, provided the said vessel had then arrived at St. Michael's and should be in readiness to receive her cargo (notice thereof being given to the shipper); and should continue until she was laden and despatched from her loading port; recommence at her port of discharge on the day after her report at the custom-house and being ready to unload, and should finally cease on her being fully discharged of her cargo: the affreighters or their agents should also be allowed to keep the said vessel on demurrage for the space of ten running days, over and above the days already thereinbefore allowed for loading and discharging, on paying for the same at and after the rate of 3*l*. per day. And it was further agreed, that in case the said vessel should not be arrived at St. Michael's and in readiness to receive her cargo on or before the 31st of January then next, it should be optional with the agents of the affreighters, whether they should load her or not; and in case they declined loading her, the charter-party should be null and void. (The penalty for the non-performance of the charter-party was 800*l*.) And the charter-party being so made as aforesaid, afterwards, to wit, on, &c. at, &c., in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to fulfil and perform the charter-party, as

[*31] affreighters of *the said ship or vessel in all things on their part and behalf to be performed and fulfilled, the defendant undertook and then and there faithfully promised the plaintiffs, to perform and fulfil the charter-party of affreightment, in all things on his part and behalf, as such master of the said ship or vessel as aforesaid, to be performed and fulfilled. But although the plaintiffs had always performed and fulfilled all things in the charter-party mentioned, on their part and behalves to be performed and fulfilled, to wit, at, &c.; and although on the arrival of the ship or vessel at St. Michael's aforesaid, they always were ready and willing to have loaded in and on board the said ship or vessel a full and complete cargo of fruit in boxes; and although they had been always ready to pay freight according to the charter-party; and although it was the duty of the master, in pursuance of the charter-party, to have sailed and proceeded with the said ship or vessel from Portsmouth without any unnecessary deviation; yet the defendant, not regarding the charter-party, nor his promise and undertaking, nor his duty in that behalf, but intending to injure the plaintiffs in that behalf, did not nor would, although not prevented by the restraint of rulers or princes, or any other of the matters or things excepted as aforesaid, after the making of the charter-party, sail from Portsmouth aforesaid, with the said ship, and in ballast, to the Island of St. Michael's without making any unnecessary deviation therefrom; but on the contrary thereof, after the making of the said charter-party, to wit, on, &c., at, &c., did set sail with and carry the said ship or vessel towards Oporto, and on arriving near to Oporto, did unnecessarily and improperly sail and proceed back again to Portsmouth aforesaid; and thereby did make an unnecessary deviation out of the voyage from Portsmouth to the Island of St. Michael's in the charter-party mentioned, whereby the ship did not arrive at St. Michael's until a long period of time

[*32] after that at *which she might have arrived there but for such unnecessary deviation aforesaid. By means of which said premises the ship did not reach the port of London with a certain cargo of fruit in boxes, which the plaintiffs caused to be shipped in and on board the said ship, or vessel, on her arrival at St. Michael's, until a long time, to wit, two months after she ought in due course to have arrived if she had sailed without unnecessary deviation to St. Michael's, according to the true intent and meaning of the said charter-party. By reason whereof the said cargo so loaded on board the said ship or vessel was of much less value than it might and otherwise would have been if the defendant had performed the voyage without such deviation as aforesaid. And thereby the plaintiffs lost divers large sums of money, to wit, the

sum of 300*l.*; and also the plaintiffs, by reason of the delay in the arrival of the ship or vessel as aforesaid, were forced and obliged to pay, and actually paid, to certain persons, to wit, to Messrs. Bayliss & Co., and Messrs. Webb and Pilcher, to whom the plaintiffs had sold the cargo, divers large sums of money, to wit, the sum of 260*l.*, to wit, at, &c.

The defendant pleaded the general issue.

At the trial before TINDAL, C. J., it appeared, that on the 20th of October, 1832, the plaintiffs chartered the defendant's vessel, the *Swallow*, then lying at Portsmouth, to proceed in ballast to St. Michael's, there to take on board a cargo of fruit, and return direct to London. For the purposes of loading and unloading, the freighters were to be allowed thirty-five running days in the whole, if required, to commence on the 1st of December, then next, provided the vessel should then have arrived at St. Michael's and be in readiness to receive her cargo. The freighters were also to be allowed to keep the vessel ten running days more on demurrage; and if she should not be at St. Michael's ready to receive her cargo by the 31st of January, then *next, it was to be optional with the freighters to load or not, and to declare the charter-^[*33] party null and void.

The usual length of the voyage from England to St. Michael's is a fortnight or three weeks, and the time consumed in loading and unloading about a week; so that, if the defendant had sailed direct for St. Michael's about the time he executed the charter-party, it might reasonably be expected that he would have delivered his cargo in London by the 1st of January, 1833. Instead, however, of proceeding in ballast direct for St. Michael's, the defendant, on the 7th of November, sailed to Oporto, with troops for Don Pedro, intending to proceed to St. Michael's after landing the troops. Being prevented from effecting his purpose by Don Miguel's batteries, he returned to Portsmouth on the 28th of November, relanded the troops, and sailed for St. Michael's on the 6th of December. He arrived at that island before the 31st of January, was loaded with oranges, and arrived in London on the 1st of February. By that time there was a glut of oranges in the market, and the price had fallen, since the end of December (when the season of the London market begins), 10*s.* 6*d.* a box, which, upon the whole of the *Swallow's* cargo, occasioned a loss of more than 260*l.*

On the 9th of November, the plaintiffs, being informed that the defendant had sailed for Oporto, despatched a letter for him to St. Michael's, in which they said, "In having taken the *Swallow* to Oporto with passengers, on her way to St. Michael's, instead of proceeding direct, we consider you to have deviated from the due performance of the charter-party entered into with us, and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct."

The plaintiffs were agents for Brander, an orange merchant at St. Michael's, and in November, subsequently to their addressing to the defendant the letter of the *9th of that month complaining of his deviating to Oporto, they, ^[*34] on the part of Brander, contracted to let Bayliss (with whom they had negotiated on the 20th of October), have 335 boxes of Brander's oranges by the *Swallow*, and Webb and Pilcher 150 boxes, at the market price at St. Michael's. The oranges were received by Bayliss and Webb and Pilcher, who paid Brander for them.

In the fruit trade, the early ships sail about the end of October, and arrive in London about the end of December: it is advantageous to be early in the market, and Bayliss and Webb and Pilcher, having been led to expect that the *Swallow* would arrive early, called on the plaintiffs to make good the loss incurred by the fall in the price of oranges in the London market, between the end of December and the 1st of February. The plaintiffs paid them the difference, amounting, as above, to upwards of 260*l.*, and sought by this action to recover corresponding damages at the hands of the defendant.

A verdict was taken for 254*l.*, with leave for the defendant to move to enter a nonsuit, in case the Court should be of opinion that the stipulations of the charter-party were satisfied by his arriving at St. Michael's before the 31st of January, 1833, or to reduce the verdict to nominal damages, if it should be thought the plaintiffs were not responsible to Bayliss and Webb and Pilcher.

Wilde, Serjt., having obtained a rule nisi accordingly,

Spankie, Serjt., and *Watson* showed cause.

1st. The stipulations of the charter-party were not satisfied by the defendant's arriving at St. Michael's just before the 31st of January. If he did not arrive by that time, the plaintiffs had the option of rescinding the contract; *Shubrich v. Salmoud*, 3 Burr. 1637: but their intention, *and his contract, was, [*35] that he should proceed without delay and without deviation. This might be inferred from the nature of the trade, in which great advantage is derived from being early in the market; but it is in effect expressly provided for by the stipulation, that the defendant should proceed out in ballast. The obvious meaning of that stipulation is, that he should not lose time by engaging in any other adventure, or lessen the speed of his vessel outwards by any kind of load. And, even without such stipulation, it is the duty of the captain, upon such a contract as this, to proceed on his voyage without deviation and without delay. Thus, in *Davis v. Garrett*, 6 Bingh. 716, where the plaintiff put on board defendant's barge, lime, to be conveyed from the Medway to London, the master of the barge deviated unnecessarily from the usual course, and, during the deviation, a tempest wetted the lime, and the barge taking fire thereby, the whole was lost; it was held, that the defendant was liable. The same principle is established by *Max v. Roberts*, 12 East, 89. So, in *Freeman v. Taylor*, 8 Bingh. 124, the plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the Cape, and, having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter engaged to put on board a cargo of cotton for England. Plaintiff arrived at the Cape, and might have proceeded on his voyage in two days; but he remained there ten, taking in cattle for the Mauritius on his own account: he went round by the Mauritius on his way to Bombay, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct: other ships had arrived in the mean time: the freighter refused to load; and, in an action on the charter-party, [*36] the jury were directed to consider whether the deviation *was such as to have deprived the freighter of the benefit of the contract; and, a verdict being found for the defendant, a new trial was refused. And in *Mount v. Larkins*, 8 Bingh. 108, where the defendant executed, 28th of February, 1824, a policy of assurance on freight from Singapore to Europe, with liberty to sail to, touch, and stay at, any places whatsoever, to load, unload, reload, and for all necessary purposes whatever; the ship sailed from London in September, 1823; and, having been detained by the captain, for his own purposes, at Van Diemen's Land, did not arrive at Singapore till the 30th of March, 1825; she sailed thence on the voyage the 3d of May, 1825: it was held, that, by so long a postponement of the risk, the defendant was discharged, a jury having found the delay unreasonable.

The captain must be taken to know the custom of the trade, and the importance of an early arrival in market; *Vallance v. Dewar*, 1 Campb. 503.

2dly. The plaintiffs are entitled to retain their verdict for the whole amount. It is true that the cargo was consigned to Bayliss and Webb and Pilcher; but the plaintiffs were impliedly responsible to them for the vessel's early arrival in the market, and for the consequences of her delay. Even as agents or trustees for them, or as consignors, they had such a special property in the cargo as would entitle them to recover damages in trover against the defendant for loss by improper detention; and, on the same principle, they ought to recover for loss occasioned by the defendant's delay. In *Moore v. Wilson*, 1 T. R. 659, it was held, that the consignor might recover against a carrier for non-delivery,

although the charge for carriage was to be paid by the consignee: *Davis v. James*, 5 Burr. 2680; *Freeman v. Birch*, 1 Nev. & Man. 420.

**Wilde*. The fruit market continues in London for some months; and though an early arrival may sometimes be advantageous, there is [*37] nothing on the face of this charter-party to show that an early arrival was intended or desired by the plaintiffs. On the contrary, the stipulation, that the plaintiffs might rescind the contract if the defendant did not arrive at St. Michael's by the 31st of January, leads to the inference that the defendant's engagement would be satisfied if he arrived by that day. If the plaintiffs had desired an earlier voyage, they would have inserted an earlier day in that stipulation: and the time allowed for running days and demurrage leads to the same conclusion. In *Max v. Roberts*, *Davis v. Garrett*, *Freeman v. Taylor*, and *Mount v. Larkins*, the time for the voyage was not defined by any such specification of a particular day beyond which the ship-owner was to have no claim; and deviation or unreasonable delay expressly appeared. Here, the captain arrived within the specified time; and, provided he accomplished that, he had a right in the interval to employ his vessel as he pleased. With respect to the custom of the trade, he was bound to know the course of the voyage as to stowing and navigating his vessel; but the rise or fall of price in the London market is a matter out of his department. Having arrived before the last day stipulated by the plaintiffs, he must be deemed to have arrived within a reasonable time.

But, at all events, the plaintiffs are entitled only to nominal damages. The loss occasioned by the fall in the market fell, in the first instance, upon Bayliss and Webb and Pilcher, the consignees of the cargo; and the plaintiffs, having entered into no agreement that the cargo should arrive within any given time, were under no obligation to reimburse the consignees. The contract for the sale of the oranges to Bayliss and Webb and Pilcher was not entered into till after the plaintiffs knew the defendant had sailed for Oporto. They [*38] could not, therefore, at the time of that contract, have engaged with Bayliss and Webb and Pilcher that the *Swallow* should sail direct to St. Michael's.

TINDAL, C. J. This case comes before the Court on two distinct grounds. The first, on a motion to enter a nonsuit; the other, that the verdict for 25*l.* be reduced to nominal damages.

We think that the verdict ought to stand, but that it should be reduced to nominal damages.

The broad question is, whether, upon the construction of the charter-party, there has been unnecessary delay in commencing the voyage to St. Michael's.

Upon general principles, in all contracts by charter-party, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage; and, after it has been commenced, no deviation.

And the question here is, whether the defendant sailed within a reasonable time according to the terms of his charter-party. All the authorities concur in stating, that the voyage must be commenced within a reasonable time; and they are all cited and commented upon in *Freeman v. Taylor*, and *Mount v. Larkins*. If that be the general rule, where there is any delay in a voyage it is incumbent on the party to account for it. In many cases it may be difficult to say what is a reasonable or an unreasonable time for commencing a voyage. It is better, therefore, to refer to the contract itself, and see whether the voyage performed is conformable to that pointed out by the contract.

Now, looking at this contract, I think, with a view to the object of the voyage, its commencement was delayed an unreasonable time.

The charter-party was entered into the 20th of October, 1832, and provides, that the *Swallow*, "being tight, *staunch, strong, and in every way fitted [*39] for the voyage, shall proceed in ballast to St. Michael's."

I do not lay stress on the stipulation for proceeding in ballast, any further than that it seems to refer to a voyage in which the master should not lie by to take in a cargo, which might delay the ship on her voyage. The instrument then goes on,—“shall there receive on board a complete cargo of fruit; and, having been so loaded, shall proceed with the said cargo direct to the port of London.” Then, after some stipulations, to which it is unnecessary to refer,—“for the purpose of loading and unloading, the affreighters or their agents shall be allowed the space of thirty-five running days, if required, to commence on the 1st of December, provided the vessel should then have arrived at St. Michael's, and be allowed to keep the vessel on demurrage ten days over and above the running days.”

Now, inasmuch as the parties have stipulated that the lay days shall commence on the 1st of December, it may be inferred that they contemplated the voyage to St. Michael's should terminate by that day. If, indeed, by any accident or unforeseen cause, which should excuse the master, the vessel should arrive later, the charterer would have no just cause of action: but the intention at the time was, that the object of the voyage should, if possible, take effect from the 1st of December. That it *might* have taken effect from that time, is clear; for the voyage usually lasts a fortnight or three weeks, and the vessel sailed for Oporto on the 7th of November.

The instrument then goes on, “That, in case the vessel should not be arrived at St. Michael's, and in readiness to receive her cargo by the 31st of January next, it shall be optional with the agents of the affreighters whether they load or not; and in case they decline loading, the charter-party shall be null and void.” That was to give the charterer the option of repudiating *the contract if the vessel should arrive too late for any useful purpose, although, if she had been detained by any justifiable cause, he might have no right of action against the owner.

And all the evidence in the cause goes to show that the intention of the parties in entering into this contract was such as I have described: the course of the trade in London, which requires a speedy voyage, and gives advantages to those who are first in the market; and the letter of the 9th of November, in which the plaintiffs say, “In having taken the *Swallow* to Oporto with passengers, on her way to St. Michael's, instead of proceeding direct, we consider you to have deviated from the due performance of the charter-party entered into with us, and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct.”

I think, therefore, that, as the commencement of the voyage was, without any justifiable cause, delayed till the 6th of December, an action lies for the plaintiffs.

As to the second point, if the charter-party has been broken, although the plaintiffs may have incurred no actual damage, the law gives them nominal damages. But the plaintiffs allege special damage, and it is for them to make out that allegation. They state in the declaration, “that thereby the plaintiffs lost divers large sums, to wit, the sum of 300*l.*; and also the plaintiffs, by reason of the delay in the arrival of the ship or vessel as aforesaid, were forced and obliged to pay, and did actually pay, to certain persons, to wit, to Messrs. Bayliss & Co., and Messrs. Webb and Pilcher, to whom the plaintiffs had sold the cargo, divers large sums of money, to wit, the sum of 260*l.*”

Looking at the evidence, it does not appear that any such contract was entered into by the M'Andrews, as agents of Brander, with Webb and Pilcher, and with *Bayliss, as should entitle the latter to sue the M'Andrews; or that any cargo of theirs has been kept back for the delay of which M'Andrews are responsible to them. The damages, therefore, must be reduced to 1*s.*

PARK, J. In all contracts by charter-party expedition is of importance, for, by delay, the whole object of the voyage may be defeated: but expedition

appears to be peculiarly of importance in the trade in which the plaintiffs are engaged; and Lord TENTERDEN lays it down, in his work on shipping, that the intention of the parties is to be looked to with reference to the trade in which they are engaged. Looking at this charter-party, I entertain no doubt as to the intention of the parties, that the voyage should be commenced with all reasonable expedition; and the law in our books, on this point, is the same as with foreign nations.

Emérigon (c. 13, s. 10), discusses the lawfulness of undertaking another voyage pending an insurance. After citing two old cases, in which it had been decided by the French courts that such voyage might lawfully be undertaken, he observes:—"Mais cette jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que si, avant que la voyage assuré soit commencé, le capitaine entreprenne un autre, l'assurance est nulle, et la prime doit être restituée." This was cited in *Mount v. Larkins*, where the judgment turned on the same general principles; and the same law was laid down in *Freeman v. Taylor*. There, the plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the Cape, and, having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter engaged to put on board a cargo of cotton for England. Plaintiff arrived at the *Cape, and might have proceeded on his voyage [*42] in two days; but he remained there ten, taking in cattle for the Mauritius on his own account. He went round by the Mauritius in his way to Bombay, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct: other ships had arrived in the mean time. The freighter refused to load; and in an action on the charter-party, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the defendant, the Court refused to grant a new trial.

So, in *Palmer v. Marshall*, 8 Bingh. 318, TINDAL, C. J., said, "The policy bore date the 28th of January, 1831, and the vessel remained in the float at Bristol from the date of the policy till the 17th of May, when she sailed on her voyage, and was shortly afterwards lost. A policy effected in these terms, and in this shape, implies that the voyage insured shall be very shortly commenced, or is at all events, in the near contemplation of the parties; and when we see that, in the present instance, the voyage was not commenced till the middle of May, we are bound to say that the delay was unreasonable, unless it be accounted for." And ALDERSON, J., said, "A delay in sailing, in order to be justified, must be a delay incurred for the purpose of the voyage." And there was no reason why this vessel, when the defendant had entered into the charter-party on the 20th of October, should take an intermediate voyage with troops for Don Pedro.

But the strongest case is *Davis v. Garrett*, where TINDAL, C. J., says, "We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship, or hired for the special purpose of the *voyage, to proceed without unnecessary deviation in the usual and customary course." [*43]

And it is not usual or customary to touch at Oporto in the voyage to St. Michael's. The whole of the evidence shows, that, though some persons may speculate for cargoes at the close of the season, an early and expeditious voyage to St. Michael's gives the merchant an advantage in the market. The number of running days was probably appointed with a view to any accident that might detain the vessel; and the word direct, applied to the homeward voyage, does not imply that the master was to be at liberty to deviate on the outward voyage. On this contract, therefore, it seems to me clearly the intention of the parties that the vessel should sail for her destination immediately; and the letter of the 9th of November is highly confirmatory of this. With respect to the damages, I at first entertained some doubt; but, as it is admitted that, to entitle the plain-

tiffs to sue the defendant, Webb and Pilcher should be in a situation to have sued the plaintiffs, and as there appears to be no contract on which they could have proceeded, I yield to the opinion of the rest of the Court.

GASELEE, J. The first point has been so fully discussed, that I shall add no more. There is nothing to take this case out of the general principle so frequently laid down, and particularly relied on in *Davis v. Garrett*.

As to the damages, it is agreed that before the plaintiffs can recover against the defendant, they must make out that they were themselves liable to the suit of Webb and Pilcher. That, they have failed to establish; and though Bayliss began to negotiate on the 20th of October, he came to no agreement till near [*44] the end of November, a *fortnight after the plaintiffs had complained that the defendant had broken the terms of his charter-party; and even in that transaction, the plaintiffs appear to have acted rather as agent of Brander than on their own account. Nor was the contract with Webb and Pilcher entered into before the 23d of November. I think, therefore, on these grounds, the damages must be reduced.

BOSANQUET, J. I am of the same opinion on both points. The general principle is, that he who enters into a contract is bound to perform it within a reasonable time, unless there be provision to the contrary; and I see nothing in this contract to control the general principle. The vessel is to proceed to St. Michael's in ballast; which shows that it was wished she should not be impeded by engaging in other traffic. The lay days are to commence from the 1st of December; which shows the time of arrival in the contemplation of the parties; and the charterer is to have the option of being off his bargain if the vessel does not arrive out by the 31st of January. That is a stipulation inserted on his behalf to quicken the owner, but does not absolve the owner from using all reasonable expedition. Then, the contract is executed on the 20th of October, and the vessel sails on the 7th of November; which, under ordinary circumstances, would have brought her to St. Michael's by the first of December. But the captain takes in troops and sails for Oporto, which delays him till the 6th of December; so that the plaintiffs have lost the chance of advantage they would have derived from the vessel's early arrival in the market. I consider this clearly a breach of the charter-party, for which an action lies. Then comes the [*45] question, what damages they are entitled to. Now, the *plaintiffs were not principals, but entered into the charter-party for the benefit of others who might ship a cargo; they therefore, personally, have sustained no loss; but if they have entered into any contract by which they have bound themselves to deliver goods by a certain time, and have paid damages upon failing to do so, they may call on the defendant to make good such loss. However, they do not appear to have been placed in any such circumstances. The contract with Bayliss was not entered into till after they had complained of a breach of contract on the part of the defendant.

The plaintiffs, therefore, are entitled to retain their verdict, but only for nominal damages.

Rule absolute to reduce the verdict to nominal damages.

COOPER v. BLANDY and Another. May 30.

The plaintiff came into occupation under one who had paid rent upon distress by the defendant: Held, that after proof of this fact, the plaintiff was estopped to dispute the defendant's title to the rent, notwithstanding the defendant inadvertently put in evidence a document which showed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger.

REPLEVIN. The defendant Blandy avowed for two years and a half rent, due from the plaintiff as tenant to Blandy, under a demise of the premises, at 60*l.* a year.

The defendant also made cognizance as bailiffs of James Temple Mansel; And the plaintiff pleaded *non tenuit*.

At the trial it appeared that the plaintiff had obtained possession of the premises (the Three Tuns tavern in Fetter Lane) from Nightingale, the preceding occupier, *and had taken Nightingale's stock; that Nightingale succeeded one Perry, and Perry one Nelson. [*46]

The defendants proved that Perry had paid rent to Blandy under a distress in February, 1829, and Nightingale in February, 1831.

The defendants then put in evidence a deed of October, 1809, by which James Temple Mansel and his wife demised the premises to Nelson for thirty-one years.

It appeared, however, that in 1809 and previously, the legal interest in the premises was in Alexander and Barclay, the trustees under Mr. and Mrs. Mansel's marriage settlement; and that Alexander, as agent for the Mansels, had often received the rent from Nelson.

Mansel and his wife died in 1825; and in April, 1826, under a decree of the Master of the Rolls, Alexander and Barclay conveyed the fee simple in the premises to the defendant Blandy, to whom Mansel and his wife were largely indebted.

The jury having found a verdict for the defendants,

Atcherley, Serjt., pursuant to leave given at the trial, moved to set it aside and enter a verdict for the plaintiff, on the ground that the defendants, after showing that the plaintiff occupied the premises by virtue of the lease granted by Mansel and wife in 1809, ought, in order to justify a distress for rent, to have gone on and have shown a conveyance of the reversion from Mansel and wife to the defendant Blandy.

Mereuether, Serjt., showed cause. The plaintiff, having come in under Perry and Nightingale, must stand in the same situation with respect to title as his predecessors. Now Perry, in 1829, and Nightingale in 1831, submitted to pay rent under a distress made by Blandy: after payment under such circumstances they *were estopped to dispute Blandy's title; and therefore the plaintiff, claiming under them, is estopped also. Where a lessor's estate has expired, and the lessee is exposed to another claimant, he may in some cases, set up those facts against the lessor's claim: *Rogers v. Pitcher*, 6 Taunt. 202. But, here, there is no other claimant, nor any evidence that Blandy's interest has expired. In *Rennie v. Robinson*, 1 Bingh. 147, where A. hired apartments by the year of B., B. afterwards let the entire house to C., who sued A. in an action of use and occupation, for the hire of the apartments, it was held that A. could not impeach C.'s title; and *Doe v. Parker*, Peake's Evid. 283, 5th edit., is to the same effect. [*47]

Atcherley and *Kelly* in support of the rule.

The plaintiff and his predecessors, Perry and Nightingale, stand in the situation of Nelson, the original lessee under the lease of 1809, from whom they claim. And, as Nelson would have been estopped to dispute the title of Mansel and wife, the lessors in that lease, or of any who claim under Mansel and wife, so is the plaintiff. But the rule of estoppel goes no further: they may dispute the title of a stranger; and, upon the evidence in this case, the avowant is a stranger to Mansel and wife. The payment of rent is only *prima facie* evidence of admission of title, which may afterwards be rebutted by the parties showing it was paid under a mistake. And, even if it should be thought that, after such payments, the plaintiff was estopped to produce evidence infirmatory of the avowant's title, yet, when the avowant has himself shown, by the deeds he has given in evidence, that he has no title to distrain, the plaintiff may take advantage of what appears on the *avowant's own showing. Here [*48] the avowant has shown that the plaintiff occupied the premises by virtue of a lease from Mansel and wife; and he has shown no conveyance of the reversion from Mansel and wife to himself, no confirmation of the lease,

nor any attornment by the plaintiff. Upon his own showing, therefore, he has no title to distrain; and, being destitute of such title, he falls within the rule established in *Rogers v. Pitcher*. In *Fenner v. Duplock*, 2 Bingh. 10, it was held, that payment of rent by a lessee to a lessor after the lessor's title had expired, and after the lessee had notice of an adverse claim, did not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired.

TINDAL, C. J. I am unable to perceive any sufficient ground for exempting this case from the ordinary rule which prevails between landlord and tenant, namely, that, where a party has enjoyed land, he is estopped to dispute his landlord's title. Here, the plaintiff occupied the premises in question from 1831 to 1833. The avowant distrains and avows for two years and a half's rent; and all he is bound to prove under the avowry is, that the plaintiff was actually tenant at a certain rent, and that the rent was in arrear. It is immaterial whether the plaintiff occupied under a lease, or as a tenant from year to year. At the trial the defendant might have confined himself to the fact, that two persons, Nightingale and Perry, had occupied the premises from 1827 to 1830, and had paid rent to him, 60*l.* a year by quarterly payments. Then, upon proving that the plaintiff came in under Nightingale and Perry, the law would have [*49] implied a tenancy from year to year. Had *he confined his proof to those facts, the payment of rent to Nightingale and Perry under a distress would have been such an acknowledgment of the defendant's title, as would have precluded the plaintiff, coming in under Nightingale and Perry, from raising any dispute. But because the defendant went further, and unnecessarily put in evidence the deed of 1809, it is contended that he has himself shown he is not entitled to the rent. That deed is a lease made by Mansel and wife, by which they demise the premises to Nelson, to hold for thirty-one years; and it is urged that the rent paid by Nightingale and Perry, was paid in affirmance of that lease, and that the tenants may now say to their landlord, "We require you to go on and show a conveyance of the reversion to yourself." Why is that necessary? Nightingale and Perry have already admitted the defendant's title as landlord. If they apprehended a claim from any other quarter, why did they not dispute his title when he levied a distress for rent? Their abstaining from dispute at that time, is an admission that he had a right to the rent; and why are we to presume, in favor of one who has admitted the landlord's title by payment of rent under a distress, that the landlord is not entitled to receive it?

Whether or not such a payment is in all cases, and at all events, an estoppel which precludes the occupier from showing that some other person is entitled, we need not decide here. In *Rogers v. Pitcher* it was held, that under some circumstances it may not be an estoppel. But it is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion, the plaintiff should at least show that he paid the rent to the defendant by mistake, and that *some other person is entitled to receive [*50] it. So far from that, there was every reason for supposing that the right to distrain was with the defendant. He had purchased the property, and under that purchase he might be in possession of some other deed, which, under the circumstances, he was not bound to produce at the trial. And the evidence showed, either that the plaintiff was dealing with the defendant as purchaser in fee of the property, or that the lease of 1809 was made by persons who had no right to grant it, and then Nightingale and Perry, in whose place the plaintiff stood, were only tenants from year to year.

Here, therefore, we have a person who has enjoyed the land; whose predecessors have admitted the landlord's title; but who, when called upon to pay rent, says, "Because the landlord has put in evidence a deed which raises a

doubt, but does not necessarily militate with a right to distrain, I ought to be exempted from the payment of rent." He cannot be permitted to exonerate himself by such an argument, and therefore the rule must be discharged.

PARK, J. The argument at the bar turns on the fallacy of assuming that the rule of law which precludes a tenant from disputing his landlord's title, is an exception to the general principle, under which the actor in a cause is required to establish his claim; whereas it is itself a general rule, to which the cases cited, as *Rogers v. Pitcher*, *Fenner v. Duplock* and others, are cases of exception. In those cases, the title of the lessor had expired, and other persons were entitled to the rent. Here, the rent has been paid constantly to the same person, and no other has put in any claim. It is a bare case of a tenant who has paid rent to the only person who claims to be landlord. *Nightingale* and *Perry* never paid to any but the defendant, and the plaintiff stands in the same situation as *Nightingale* and **Perry*. The defendant introduced the deed of 1809 unnecessarily: he might have rested his case with the [*51] payments by *Nightingale* and *Perry*, and the assignments to the plaintiff. Then, *Panton v. Jones*, 3 Campb. 372, is in point. There, the defendant had never paid rent personally to the plaintiff, and she did not give strict evidence of title; but it was proved, that in January, 1811, the defendant being in possession of the premises, she distrained on his goods for 39*l.* 18*s.*, stated to be arrears of rent then due from him to her as his landlady. He did not replevy, and the goods were sold to satisfy the rent. It was contended on behalf of the defendant, that payment under the distress was no acknowledgment of a tenancy by the party submitting to it. But BAYLEY, J., said, "I have no doubt that submitting to a distress acknowledges the tenancy. The landlord, after distraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord."

Here there have been three distresses; one upon *Perry*, and two upon *Nightingale*, all in the name of *Blandy*, the defendant. His title was never disputed by them, and there is no one to claim in opposition to it. The law and justice of the case coincide, and the rule must be discharged.

GASELEE, J. The question is, whether or not the plaintiff was tenant to the defendant; and all the facts disclosed go to prove the affirmative. In 1827, it appears that *Blandy* was seised of the freehold of the premises in question, which before that time had been vested in the trustees under the marriage settlement of Mr. and Mrs. Mansel. He finds in occupation of the *pre- [*52] mises, *Perry*, who is succeeded by *Nightingale*; they both pay the rent which is claimed as the defendant's, and after so paying it upon distress, without objection, they would not be permitted to dispute his title. It is contended, however, that they occupied under a lease granted by Mr. and Mrs. Mansel, in 1809, with which, although the lessors had not the legal estate in them, the trustees never interfered. But the defendant is still entitled to the freehold under the conveyance of 1827; and the occupiers having admitted his title, while no other person has put in any claim, it is immaterial to the present decision, whether they occupied as tenants from year to year, or for a longer term. There is no reason for setting aside the verdict.

BOSANQUET, J. I am of the same opinion. The plaintiff is in the same situation as *Nelson*, who preceded *Nightingale* and *Perry*. The defendant distrained on them, and his rent was paid subsequently to the distress: this amounts to an acknowledgment of a tenancy at the rent for which the distress was made;—whether for one or more years, it does not show. As a general rule, it is not competent to a tenant, after submitting to a distress, or payment of rent, to dispute his landlord's title. There are exceptions, indeed, to that rule, but this case is not one of them. It is not the case where a paramount claim has been established; the landlord's title has not expired; nor has there been any payment by mistake. It is nothing more than the case of a tenant picking a hole in the title of a person to whom his predecessors have paid rent

without objection. But it is said, that though a tenant cannot dispute his landlord's title, here the defendant has himself shown that the plaintiff is not his tenant. It appears, however, that the lease unnecessarily disclosed, was one [53] which the lessors had no legal title to grant; and rent having *been paid to the defendant under a distress, it was not incompatible with that lease, that there might be a subsequent deed between the occupiers and the defendant. But at all events the payment of rent under the distress establishes his title as landlord, and the liability of the parties distrained on, as tenants, holding the premises at the rent for which the distrainor avows. In such a case, according to *Panton v. Jones*, the estoppel is reciprocal. *BAYLEY, J.*, says, "I have no doubt that submitting to a distress acknowledges the tenancy: the landlord, after distraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord."

Rule discharged.

¹ See *Fleming and Others v. Gooding*, 10 Bingh. 549.

IRVING v. CLEGG and Another. May 31.

Agreement to proceed to the East Indies, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton; 100 tons of rice or sugar to be shipped previous to any other part of the loading to ballast the vessel: Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of rice or sugar, was at liberty to complete the cargo with light goods.

ASSUMPSIT on a charter-party, by which it was agreed that the ship *Eliza*, then lying at Bristol, and of the burden of 323 tons or thereabouts, should take in and receive all such lawful goods as might be sent alongside, but not exceeding 300 tons of dead weight; and, being so loaded, should proceed therewith to Batavia, and there, or at Sourabaya, discharge the same; and being unloaded, should, at a port or ports in Sumatra or Java, both or either, load a full [54] and complete cargo of merchandise, the fore-cabin or *dining-room included to be filled with light goods, which the defendants bound themselves to ship, not exceeding what the vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, should therewith proceed to Deal for orders, whether to discharge at London, Rotterdam, or Antwerp, or so near thereunto as she might safely get, and deliver the same on being paid freight for the outward cargo 300*l.*, and for the homeward cargo at and after the rate of 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton, nett weight at the king's beam, the tare of the sugar not to exceed 6 per cent.; and for all other goods, except those already mentioned, in just and fair proportion according to the East India Company's scale of tonnage; restraints of princes and rulers during the voyage always excepted. It was further agreed, that 100 tons of rice or sugar should be shipped previous to any other part of the loading, to ballast the vessel, and keep her in proper trim for the voyage; and that the defendants should have permission to send a supercargo.

Breach, that defendants did not, nor would, load or ship on board the said vessel a full and complete cargo of merchandise, according to the tenor and effect of the said charter-party and their said promise and undertaking, either at the said port called Sourabaya, or at any other port or ports in Sumatra or Java; but wholly refused and neglected so to do; and, on the contrary thereof, the defendants loaded and shipped on board the said vessel a small and insufficient cargo, being less than a full and complete cargo by divers, to wit, 100 tons, and wholly neglected and refused to make up the deficiency in the said cargo, or to ship any more merchandise on board the said vessel, either at the said port called Sourabaya, or at any other port or ports in Sumatra or Java: by means

whereof the plaintiff lost *and was deprived of a large sum of money, to wit, the sum of 500*l.* for freight, which might, and otherwise would, [*55] have accrued to the plaintiff, if the defendants had loaded on board the said ship such a cargo as they ought to have loaded according to the terms of the said charter-party.

Upon this charter-party it was contended at the trial, that the defendants should have shipped a full cargo, so assorted and so complete as to render it unnecessary for the plaintiff to ship any ballast. It was proved, however, that, though the ship was fully loaded, the defendants had stowed such a proportion of pepper as to render it necessary for the master to ship thirty-six tons of stone ballast for the safety of the vessel, in addition to the 100 tons of rice.

A verdict having been obtained by the plaintiff for 130*l.* 4*s.* 8*d.* on a count for demurrage,

Wilde, Serjt., pursuant to leave given at the trial, moved to increase the damages by the sum of 380*l.* freight for the thirty-six tons thus devoted to ballast, as he contended, by the default of the defendants. He referred to *Wallace v. Small*, 1 M. & M. 446 (not reported as to this point), where, under a covenant to ship a full and complete cargo in the usual and customary manner, the defendant loaded a full cargo, but with such a proportion of heavy goods that the ship was improperly burdened beyond her tonnage; and *Lord TENTERDEN*, C. J., having left it to the jury to say whether such a mode of loading was permissible, the jury gave damages for the excess.

A rule nisi having been granted,

Spankie and *Coleridge*, Serjts., showed cause: Under the terms of this charter-party, the defendants had a right to load goods of whatever description they pleased, *provided they shipped 100 tons of rice or sugar previous to any other part of the lading. If it were not intended that the defendants [*56] should have this option, it had been unnecessary to enumerate the rate of freight for the coffee, rice, pepper, and other goods: it had been sufficient to require that the plaintiff should have so much freight for the entire ship. In *Wallace v. Small*, the ship was to be loaded in the manner usual and customary at the port of Calcutta. So in *Benson v. Schneider*, 7 Taunt. 272, the ship was to have a full cargo of cotton pressed according to the practice. Here, no usage of loading has been referred to, either in the charter-party or on evidence. *Hunter v. Fry*, 2 B. & Ald. 421, only decided that where a ship is to have a full cargo, the question of fulness is not to be determined by a loose recital in the charter-party, which describes her to be of a certain number of tons, or thereabouts. But in *Moorsom v. Page*, 4 Campb. 103, where, by a charter-party, the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid, it was held, that, having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although, for the want of it, the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done.

To the same effect is *Abbott on Shipping*, 287. *Roccus de navibus et naulo* (notes), p. 72 to 75.

Wilde and *Talfourd*, Serjts., in support of the rule. It may be collected from this charter-party, that the intention of the parties was that the ship should be made available to the extent of her burden, to earn freight. And this especially appears from the stipulation that the *defendants should first put in 100 tons of rice or sugar to supersede the necessity of ballast, and [*57] that the fore-cabin should be filled with light goods. The stipulation as to the early shipping of rice or sugar would have been unnecessary, if the owner was to renounce any portion of freight for the stowage of ballast. In *Moorsom v. Page*, there was no such stipulation that the freighter should supply the place of ballast by goods of a certain description. *Cur. adv. vult.*

TINDAL, C. J. The question whether the *Eliza* has been loaded with a full

and complete cargo upon her homeward voyage, appears to us to depend upon the construction which is to be put upon the terms of the charter-party itself; for as to any customary mode of loading upon the voyage described in the charter-party, none such is either referred to by the charter, nor is any such found by the jury.

Now, looking to the terms of the charter-party alone, it appears to us, that if it had not been for the insertion of the stipulation at the end, this case would have been governed by the decision in *Moorsom v. Page*, 4 Camp. 103; and that it would have been clear that, under the agreement by the freighter to furnish a full and complete cargo of merchandise, with the subsequent enumeration of the rate of freight for sugar, coffee, rice, pepper, "and all other goods," the freighter would be at liberty to load the ship with whatever goods and in whatever proportion he thought proper; and that the loss of freight, if any loss arose from the necessity of putting ballast into the ship, would be a loss that must fall on the owner.

But the question arises upon the stipulation at the end of the charter-party, by which the merchant undertakes to ship 100 tons of rice or sugar previous to [*58] any *other part of the lading; "to ballast the vessel, and keep her in proper trim for the voyage." And the question is, whether, under this stipulation, the freighter is bound to make up a full cargo of other articles in such proportions that freight shall be payable for the whole tonnage of the ship; or whether he may load a full cargo of the lightest commodities, and if any ballast is then wanting, it must be put in by the master, and occasion, pro tanto, a loss of freight. And we think the latter is the true construction of the agreement. In the first place, it is consistent with the very terms employed by the parties; and it is in some violence to those terms, to hold them to extend to 136 tons, or to any other quantity that might be found necessary to ballast the ship. If the parties had intended so uncertain a quantity, we think they might have expressed themselves to that effect. In the next place, it is the duty of the owner to find proper ballast for the ship, in order to make her trim for her voyage; the agreement in question, therefore, is an agreement made for the benefit of the owner, as it relieves him from so much of the obligation as is usually thrown upon him, and insures him a freight for what would otherwise be unproductive. But it leaves the owner still liable to that obligation, except so far as the special agreement will extend, which here, by the very terms of it, is to 100 tons only.

We therefore think, that for any ballast that was necessary beyond this, the owner is bound to supply it; and that the freighter has not stipulated in any way that he will pay freight for the tonnage of such additional ballast; or, in other words, that he was at liberty to select a full and complete cargo out of such articles as he pleased, after first putting the 100 tons of rice for ballast.

Rule for increasing the damages discharged.

[*59]

*MEEKIN v. WHALLEY. June 2.

Defendant, on being sued, paid the debt, but refused to pay costs; plaintiff's attorney proceeded to trial, and issued execution for them; but being uncertificated, and the plaintiff having made him no advances, the Court stayed the proceedings.

THE defendant, being sued for a debt due from him to the plaintiffs, paid the debt to Pasman, who acted as the plaintiff's attorney, as soon as the writ was served, but refused to pay the costs.

The attorney proceeded with the action, in order to recover the costs; but at the trial of the cause, the defendant apprised Pasman that the payment of costs was resisted because he was not in a capacity to act, having omitted to enrol himself as an attorney of the Court of Common Pleas, or to take out his certificate for the year in which the action was commenced.

Pasman had been admitted before the secondary, but had never taken the parchment instrument of admission to the clerk of the warrants; and his name was not found in the book kept by that officer, and containing a list of the attorneys who are duly admitted.

He had taken out a certificate on the 15th of January, 1833, but none subsequently, till March, 1834. The certificate of January, 1833, according to 37 G. 3, c. 90, s. 26, 28, expired on the 1st of November, 1833, and this action was commenced in the December of that year.

A verdict having been taken for the plaintiff, and execution having issued,

Wilde, Serjt., upon affidavit of the foregoing facts, obtained a rule nisi to stay the proceedings, on the ground that this execution was sued out for costs, and that Pasman, not being qualified to act as an attorney, was not entitled to receive costs. By the 37 G. 3, c. 90, s. 81, it is enacted, that "any person admitted, sworn, and enrolled in any of the said Courts as therein *mentioned, who shall neglect to obtain his certificate thereof, in the manner [*60] before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said Courts, by virtue of such admission, entry, and enrolment; and the admission, entry, and enrolment of such person, in any of the said Courts, shall be from thenceforth null and void."

Talfourd, Serjt., who showed cause, after citing and distinguishing *Vincent v. Holt*, 4 Taunt. 452, *Paterson v. Powell*, 3 M. & Scott, 195, and *Latham v. Hyde*, 1 Cr. & Mee. 128, relied on *Reeder v. Bloom*, 3 Bingh. 9, as expressly in point. There it was held, that the circumstance that the plaintiff's cause had been conducted by one who was not an attorney, did not deprive the plaintiff of his right to full costs against the defendant.

He contended, also, that an application to the discretion of the Court was too late, after execution issued; and that Pasman was not the attorney on record.

Wilde relied on *Paterson v. Powell*, where a cause in this Court had been tried, and a verdict found for the plaintiff, which was afterwards set aside, on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appeared that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of this Court. And the plaintiff was permitted to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit. In *Reeder v. Bloom*, the Court assumed the plaintiff to have paid money in advance to *the person who acted as [*61] his attorney; no advance had been made in the present case; the plaintiff had been paid his debt; and the person who assumed to act as his attorney was proceeding for costs which, not being an attorney, he was not entitled to receive. *Reeder v. Bloom* was doubted in *Young v. Dowlman*, 3 Younge & Jer. 24.

TINDAL, C. J. We may decide this question without touching in any way the authority of *Reeder v. Bloom*. There, the cause went on for the benefit of the client. Here, after the payment of the debt by the defendant, the cause proceeded solely for the benefit of the person who had acted as the plaintiff's attorney; but who, when he sued out the writ, had neither been enrolled as an attorney of this Court, nor had he taken out his certificate for the year in which the suit was commenced and carried on. Those omissions were matters within his own knowledge, as was the payment of the debt by the defendant. We think, therefore, that this is a case in which, applying our discretion in the construction of the statute 37 G. 3, we ought not to allow the defendant to pay costs.

PARK, J. I think, on the ground pointed out by the Chief Justice, this case is distinguishable from *Reeder v. Bloom*,—a decision which I should regret to see reversed.

GASELEE, J. This case is distinguishable from *Reeder v. Bloom*, in the circumstances that the debt was paid to the plaintiff, and that the action was continued only to recover costs for one who was not entitled to receive them as an attorney.

[*62] As the clerk of the warrants has no means of knowing *when an attorney is admitted, I think it the duty of the attorney to take the admission parchment to the clerk of the warrants; and that the attorney is not enrolled until his name is entered on that officer's book. It is not necessary, however, to decide that point, because Putnam was also unprovided with the certificate required by 37 G. 3, c. 90.

BOSANQUET, J. I am of the same opinion. It is not necessary to touch *Reeder v. Bloom*; because here, the action having been proceeded with solely for the benefit of the party who acted as the plaintiff's attorney, in order to obtain the benefit sought, he ought, at least, to show that he is an attorney.

Rule absolute.

HUMPHREYS v. HARVEY. June 5.

The book of the clerk of the warrants is the proper place of enrolment for the name of an attorney of the Common Pleas. It is the duty of the attorney to cause his name to be enrolled; and if he omits to do so, he is incompetent to obtain costs, though otherwise duly qualified as an attorney.

In this case, after a verdict had been found for the defendant,

Wilde, Serjt., obtained a rule nisi to stay proceedings without payment of costs to the defendant or his attorney, on the ground that the defendant's attorney had never been duly enrolled an attorney of this Court. As to which, the facts were, that he had signed the roll on which attorneys enter their names when they are sworn in Court, and also the parchment instrument by which a Judge authorized his admission; but he had never taken this instrument to the clerk of the warrants, in order to his name being enrolled in that officer's *book. He had duly taken out his certificate, and enrolled his articles, as [*63] required by 34 G. 3, c. 14, s. 2.

It was admitted that the client had advanced no money to his attorney on account of expenses in this cause.

Robinson showed cause, on an affidavit that when the attorney signed the roll in Court, upon being sworn in, he was told by the officer in attendance that his admission was complete, and that deponent was ignorant of the usage, if any, to enrol admissions with the clerk of the warrants. Also, that he was duly enrolled an attorney of the Court of King's Bench. *Robinson* relied, first, on *Reeder v. Bloom*, 3 Bingh. 9, and — *v. Sexton*, 1 Dowl. Pr. Cas. 180; but, being apprised by the Court of their recent decision in *Meekin v. Whalley*, ante, p. 59, contended that the defendant's attorney had done all that was necessary to entitle him to practise, and that it was the duty of the clerk of the warrants to make out his roll of attorneys from the roll signed by those who are sworn in Court, and not the duty of the attorney to take the parchment instrument of admission to the clerk of the warrants, who receives no fee for entering an attorney's name in his book. By 2 G. 2, c. 23, s. 6, it is enacted, "That the Judges of the said Courts respectively, or any one or more of them, shall, and they are hereby authorized and required, before they shall admit such person to take the said oath, to examine and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and if such Judge or Judges respectively shall be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Court respectively shall, and [*64] they *are hereby authorized to administer, in open Court, to such person the oath hereinafter directed to be taken by attorneys; and after such

oath taken, to cause him to be admitted an attorney in such Court, and his name to be enrolled as an attorney in such Court, without any fee or reward."

The words, "the Judges are to cause his name to be enrolled," casts the duty on the Court, and not on the attorney. It would be a great hardship to deprive the defendant of his costs for the omission of a formality, of the necessity of which he could have had no intimation. [TINDAL, C. J. As the defendant never can be liable for costs to his attorney, if not duly admitted, why is the plaintiff to pay them?] It would be still harder to cast on the attorney the expenses incurred for his client in the progress of the suit, because his name is omitted in the officer's book, when the roll signed by attorneys at the time they are sworn, shows he has been duly admitted. And no inconvenience can have been occasioned, because, by rule of the Court of King's Bench, Hilary, 8 G. 3, every attorney residing in London and Westminster is obliged to enter his address in a book in the Master's office. The defendant's attorney has been duly admitted in the Court of King's Bench; and by 34 G. 3, c. 14, a party admitted in one Court, may practise in other Courts without paying additional duty. In that act the word enrolled does not occur.

Wilde, in support of his rule, contended that the book of the clerk of the warrants was the only place of enrolment under the statute; and as that officer could have no means of knowing the address of a person lately admitted, it must be the duty of such person to take his admission to the clerk of the warrants. By the statute (2 G. 2, c. 23, s. 5), "No person shall be permitted *to act as an attorney or to sue out any writ or process, or commence, [*65] carry on, or defend, any action or actions, unless such person shall be examined, sworn, admitted, and enrolled, in manner therein mentioned; and in case any person shall sue out any writ or process, &c., as an attorney, for, or in expectation of gain, fee, or reward, without being admitted and enrolled, every such person is thereby made incapable to maintain any action for any fee reward, or disbursement on account of such proceeding." So that the attorney, even if he had made disbursements, could not recover them at the hands of the defendant. The plaintiff, therefore, cannot be called on to pay them.

TINDAL, C. J. It is with some regret in the particular case that I come to the determination which the language of the act compels. The question is, whether, when an attorney has not been duly enrolled, and that fact is brought to our knowledge, we can assist him to recover costs against an adverse party, for which costs he could not maintain an action against his own client. And I am of opinion we cannot. It might perhaps be a hardship, if the Court could not so far exercise a discretion in the matter, as to cover advances made by the client in the course of the cause, and *Reeder v. Bloom* proceeded on the general assumption, that in the course of a cause money usually passes from a client to his attorney. The authority of that case, if it be attempted to push it further, is weakened by the decision in *Young v. Dowlman*, 3 Younge & Jer. 24; and that brings us to the question in this cause, whether the enrolment of the attorney be a condition precedent to his recovering costs. It has been provided that an attorney, duly admitted of one Court, may be admitted to another, *without the payment of any additional duty: 34 G. 3, c. 14; but that [*66] brings us back to the question, what is a due admission? and we cannot hold that the omission of the word enrolled in the statute 34 G. 3, c. 14, is a repeal of the express enactment of the 2 G. 2, c. 23, s. 5, by which it is enacted that, "no person shall be permitted to act as an attorney, or to sue out a writ, or process, or to commence, carry on, or defend any action or actions, or any proceedings, either before or after judgment obtained, in the name or names of any other person or persons, in his Majesty's Court of King's Bench," unless such persons shall have been "examined, sworn, admitted, and enrolled, in manner therein mentioned."

Sect. 18 prescribes the form of oath to be taken; sect. 18, the place of enrolment: and sect. 24 recapitulates, "that in case any person shall, in his own

name, or in the name of any other person, sue out any writ, or process, &c., as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted and enrolled as aforesaid, every such person, for every such offence, shall forfeit and pay 50*l.* to the use of the person who shall prosecute him for the said offence; and is hereby made incapable to maintain or prosecute any action or suit, in any court of law or equity, for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending, any such action, suit, or proceeding."

When, therefore, it is brought to the knowledge of the Court, that the attorney has not been duly enrolled, and our interference will not be prejudicial to the client, we cannot allow his attorney to continue proceedings in order to the recovery of costs, in a case where the attorney could not recover them against his own client.

PARK, J. I come to the same conclusion with regret, in this particular case, [*67] because it is probable that when *the attorney signed the oath roll upon being sworn in this Court, he thought he was thereby enrolled an attorney. But that roll is not, strictly speaking, the roll of attorneys. The enrolment required by the statute was formerly entered on rolls of parchment, and now, in a book, alphabetically, by the clerk of the warrants. If there were no such documents to refer to, how could the Court, when called on, strike an attorney off the roll? Looking, therefore, to the words of the statute, and distinguishing between the oath roll, and the enrolment by the clerk of the warrants, I think we must make this rule absolute. *Reeder v. Bloom* passed on the notion that money is always advanced by a client to his attorney in the progress of a cause; there were no facts incompatible with that assumption of the Court; and PATTESON, J., in *Young v. Dowlman* puts the case upon that footing. *Young v. Dowlman* is decisive in the present case.

GASELEE, J. The roll signed by the attorney in Court, upon being admitted, is a roll containing merely the names of those who are sworn, without their address. The parchment instrument of admission signed by the Judge, contains the attorney's address; and that instrument he ought to take to the clerk of the warrants, and have his name and address enrolled, pursuant to the statute, in that officer's book.

BOSANQUET, J. The attorney for the defendant not having been enrolled in the manner required by law, was not authorized to practise as an attorney, and could not have recovered from his client any fees or disbursements. Costs when recovered are paid for the benefit of the suitor, and the Court will not enforce the payment by the opposite party where the suitor has not incurred any expense [*68] or liability. *Reeder v. Bloom* *passed on the ground of an assumed advance by the client to his attorney. And in *Young v. Dowlman*, where it appeared that there had been no such advance, the Court refused to enforce the payment of costs by the adverse party. That is a sound principle in the construction of this statute, and to that principle we must adhere.

Rule absolute.

FURNIVAL v. STRINGER. June 2.

Where, by consent of both parties, the venue was laid in L.: Held, that no objection could afterwards be taken to the venue, notwithstanding it ought, under an act of parliament, to have been laid in S.

THIS was an action on the case against the sheriff of Surrey, for treating the plaintiff, a prisoner for debt in Horsemonger Lane gaol, with unnecessary rigor, and shutting him up on the felon's side.

The venue was laid in London.

A verdict having been found for the defendant,

Wilde, Serjt., obtained a rule nisi to set it aside, as contrary to evidence.

Spankie, Serjt., and *Thesiger* opposed the rule, on the ground, among other

objections, that the defendant was entitled to the protection afforded by 4 G. 4, c. 64, ss. 10, 75; and, if so, the plaintiff ought, at all events, to be nonsuited for having laid his venue in London instead of Surrey, the county in which Horsemonger Lane gaol is situate.

It appeared, however, that the venue had been changed from London to Surrey by the defendant; that the plaintiff afterwards obtained a rule to take it back to London, on the ground that the defendant, as sheriff of Surrey, was connected with the magistrates and jury of that county; and that [*69] this rule was made absolute, the defendant not having opposed it.

The Court held that the trial had taken place in London by mutual consent; and that the defendant was, therefore, precluded from taking the objection.

Spankie argued that the statute was imperative.

Sed per Curiam. Consensus tollit errorem.

Rule absolute.

EICKE v. NOKES. June 3.

Plaintiff being liable to defendant for the costs of a nonsuit, issued a fiat of bankruptcy against the defendant. The Court refused to stay defendant's proceedings in the action.

THE plaintiff, having been nonsuited, moved for a new trial; but his rule was discharged in this term.

Curwood now moved to stay proceedings, on the ground that, two days before the plaintiff moved for the new trial, he had sued out a fiat of bankruptcy against the defendant; and the statute 6 G. 4, c. 16, s. 59, enacts, that no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be *in prison or custody at the suit of, or detained by, [*70] such creditor, he shall not prove or claim as aforesaid without giving a sufficient authority in writing for the discharge of such bankrupt; that the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor, to take the benefit of such commission with respect to the debt so proved or claimed; provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him. [TINDAL, C. J. The election is a discontinuance as against the creditor; but he has no right to avail himself of his own act to avoid payment of costs. If he had moved to discontinue, he could only have done so on payment of costs.] The language of the statute is general, and makes no distinction.

TINDAL, C. J. All that the clause directs is, that "the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor, to take the benefit of such commission, with respect to the debt so proved or claimed, provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him." That evidently points to a commission by some other person, and does not apply to a case where the plaintiff himself is the person who sues out the commission. It would be neither within the words nor the spirit of the act to stay these proceedings.

Rule refused.

*PEPPER v. WHALLEY. June 3.

[*71]

The names of two defendants having been inserted in the writ of summons, separate proceedings were taken against each: Held, irregular.

Wilde, Serjt., obtained a rule nisi to set aside the declaration and subsequent

proceedings in this cause for irregularity, the names of two defendants having been inserted in the writ of summons, and separate proceedings having been taken against each. "Every writ of summons, capias, and detainer, shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or names of any defendant or defendants, in more actions than one." R. M. 3 W. 4.

Talfourd, Serjt., who showed cause, said, that though there were two names in each writ, there were also two writs, and that the defendants had waived the irregularity by entering separate appearances.

Wilke. The irregularity pointed out is subsequent to appearance. And,
Per Curiam ; It cannot be got over. Rule absolute.

[*72] *BUSH v. PARKER, THOMAS and JOHN POWELL, and
 KEARSLAKE. June 3.

The plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and there imprisoning him. Plea, justifying the assaulting, seizing, and laying hold of the plaintiff, and pulling and dragging him about:

Held, no sufficient answer to the entire charge in the declaration.

TRESPASS, for assaulting the plaintiff, seizing and laying hold of him, pulling and dragging him about, striking him many violent blows, forcing him out of a certain field into and through a pond, and there imprisoning him.

Second count for assault and imprisonment.

The defendants pleaded, first, not guilty; and then, as assistants of John Powell, justified the assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about, on the ground that the plaintiff was unlawfully in a close of John Powell's, and refused to go out when civilly requested.

The jury having found Parker and John Powell guilty on the general issue, with 5*l*. damages, and having found a verdict for the defendants on the residue of the record,

Ludlow, Serjt. moved to enter up judgment for Parker and Powell, notwithstanding the verdict against them on the general issue, on the ground that the dragging through the pond, which was not adverted to in the pleas of justification, was only matter of aggravation; the gist of the action being the assault and battery, which were covered by the pleas of justification. In *Taylor v. Cole*, 3 T. R. 297, where the action was for entering the plaintiff's house and turning him out, *BULLER*, J., said, "The first count is for breaking, entering, [*73] and expelling; the plea only justifies the breaking and entering, *showing a good cause for it; and that is a full answer to the first count; for the breaking and entering are the gist of action, and the expulsion is only matter of aggravation. If the plaintiff had wished to take advantage of the expulsion, he should have shown the special matter in a new assignment." And *Dye v. Leatherdale*, 3 Wils. 20; *Gates v. Bayley*, 2 Wils. 313; and *Fisherwood v. Cannon*, 3 T. R. 297 (cited), establish that position. In *Stammers v. Yearsley*, 10 Bingh. 35, the gist of the action was the disgrace incurred by the plaintiff in consequence of his being imprisoned on a charge of assault with intent to commit a felony; and it was rightly held, that a plea justifying the imprisonment on a charge of mere assault, was no answer to the action. Here the defendants were justified in forcing the plaintiff out of their employer's field by the nearest way; and whether that way led them through a pond or a hedge was immaterial. If it were material, the plaintiff should have new assigned: *Cheaseley v. Barnes*, 10 East, 73.

A rule nisi having been granted,

Wilde, Serjt., showed cause.

The defendants having pleaded not guilty to the whole declaration, and having omitted to justify the dragging through the pond, it was unnecessary for the plaintiff to new assign; *Cheasley v. Barnes*, therefore, does not apply: and the dragging through the pond was parcel of the gist of the action. It was an act which the defendants could not avow without alleging and proving facts in justification, and no such facts appear on these pleadings. For though the defendants had a right to expel the plaintiff from their employer's field, and to use the force necessary for that purpose, they *had no right, when he was out of the field, to proceed to corporal infliction. That infliction is a [*74] serious ground of action, independently of the expulsion. In *Taylor v. Cole*, the expulsion of the plaintiff was no ground of action, independently of the trespass by entering his house; for the only question to be decided there was, whether the lessee of a term might quietly enter. But in *Phillips v. Howgate*, 5 B. & Ald. 220, where, in trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about; justification, that defendant arrested plaintiff under process of court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.; it was held, that that latter part of the justification not being proved, the plaintiff was entitled to judgment; and that it was not necessary to new assign the battery by the defendant. It was held also, that the second count of the declaration (which omitted the battery), having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses as laid in the first count.

Ludlow and Talfourd, Serjt., contra.

In *Phillips v. Howgate*, the plea of justification was such as to preclude the plaintiff from a new assignment; for the defendant alleged in justification of his battery, an attack by the plaintiff which never took place. Here, if the dragging through the pond were a corporal infliction unnecessary for the defendant's purpose of extruding the plaintiff, he ought to have new assigned the extra violence. But for aught that appears to the *contrary, the pond was parcel of the close, and the only direction by which it might be possible to [*75] expel the plaintiff. He might have refused to mount a stile. The gist of the action was the expulsion from the field. The track by which the plaintiff was driven, was immaterial. *Taylor v. Cole*, therefore, is in point. In 1 Wms. Saunders, 28, note 3, it is laid down, "If a plea begin only as an answer to part, and is in truth an answer to part, or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by nil dicit. But this rule must be understood with this limitation, that the part of the declaration, which is not answered by the plea, is material, and the gist of the action; for, where anything is inserted in the declaration as matter of aggravation, the plea need not answer or justify that; for the answering of that which is the gist of the action will cover the whole declaration." Accordingly, in *Montprivatt v. Smith*, 2 Campb. 175, where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours, under a writ of fi. fa., it was held that the plea covered the whole declaration.

And in *Lambert v. Hodgson*, 1 Bingham 317, where the declaration was of two counts, for assault and imprisonment; plea, that defendant being bail for plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action: replication, de injuria: it appeared that defendant, in addition to detaining plaintiff till he satisfied the demand in the action, detained him an hour longer, till he paid the expenses of the defendant's becoming bail, &c. It was held, that that was one continuing trespass; and that, there-

[*76] fore, in *order to recover for that part of it which was unjustifiable, namely, the additional detention for the bail expenses, the plaintiff ought to have newly assigned. *Dale v. Wood*, 7 B. M. 83, is to the same effect.

TINDAL, C. J. I agree in the rule of law as laid down by the counsel for the defendants, that where in trespass, a defendant pleads a justification, going to the gist of the action, it is not necessary to include that which is mere matter of aggravation. But that brings us to the application of the rule, and to the inquiry whether it will serve the defendants or not. And we have only to look to the pleadings here, and to apply our common sense to the allegation that the defendants dragged the plaintiff through a pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the plaintiff first complains. He alleges that the defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field, into and through a pond, and there imprisoned him. It does not appear where the pond was, whether in the field or not. However, waiving that, how much do the defendants justify? The assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about: altogether omitting to notice the allegation in the declaration, that the plaintiff was forced through a pond. The question is, whether this was a separate and distinct trespass, or a mere aggravation of the original assault; and it is plain that this was one link in a chain of trespasses following each other, and not a mere aggravation of the first assault. If that assault were alone the gist of the action, and justifying the gist were to be considered a justification of all that followed,

[*77] *we might suppose a case in which, after the assault, the assailant might throw his adversary over a precipice and break his arm. Would that, which stands on such distinct grounds, be justified by any answer to the assault? From one assault to another it might proceed to a contest in which the life of the plaintiff might be at stake. In like manner, as the outrage in question is no part of the trespass included in the justification, and would have required a distinct statement of facts to justify it, it is not covered by the defendants' plea. The case relied on for them is *Taylor v. Cole*. There, the plaintiff declared in trespass against the defendant, for breaking and entering the plaintiff's house and expelling him therefrom; the defendant, in one plea, justified the entry under a writ of *fi. fa.*, and in another plea, the expulsion, under a sale of the plaintiff's leasehold interest in the premises by virtue of the *fi. fa.*; and the Court held, that the breaking and entering were the gist of the action, and that the expulsion was only matter of aggravation. But I beg to call attention to the way in which that point was treated in the court of error. That court distinguishing as to the case in which expulsion might or might not be a substantive trespass,

Lord LOUGHBOROUGH says, "It is not necessary to consider in what cases expulsion may be a substantive trespass. Undoubtedly to enter into a house, and to expel the possessor, may be distinct acts, and they may be also connected. But when the plaintiff charges them as parts of one trespass, as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new assignment, state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation. The plaintiff complains that the defendant broke and

[*78] *entered his house and expelled him: the defendant shows a justification of the entry: if the expulsion makes him a trespasser *ab initio*, it takes away his justification, and therefore should be replied." 1 H. Bl. 561.

Here, the dragging through the pond is not a trespass existing at the same time, but succeeding those trespasses in the declaration, which the defendant justifies. It is one of a chain of trespasses, which is not justified by merely justifying that which preceded it. *Philips v. Howgate* goes the full length of this proposition; and, although the converse of it, proves the principle. There, in trespass, the first count of the declaration stated, that defendant assaulted

and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about: justification, that defendant arrested plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c. The defendant failed in proving that the plaintiff, while in custody, conducted himself so violently as to render it necessary the defendant should strike him to prevent his escape, and then said, "let me get out of my difficulty by saying it was a mere aggravation of the original trespass." But the Court said, no. The circumstance of the defendant having put matter into his justification, of which no proof had been given, would not, of itself, vitiate the justification. But the proof given was not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he stated that the plaintiff resisted when in custody. That not being done, the Court thought the justification was not proved, and that the plaintiff would be entitled to a verdict. That case is in point; and, therefore, the present rule must be discharged.

*PARK, J. I am of the same opinion. The whole point is, whether this is a distinct trespass or an aggravation of the first assault. It is clear that, upon the declaration, the charge of dragging through the pond is a distinct and substantive offence. And I think that, upon this record, it appears that the pond was not part of the field from which the plaintiff was expelled; for the declaration alleges that the defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him. Having got the plaintiff out of the field, the defendants have shown no reason for getting him into the pond. That was a substantive trespass, for which the plaintiff is entitled to retain his verdict. [*79]

GASELEE, J. I am also of opinion that this was a substantive trespass, and is not covered by the plea. If, in such cases, we were to say that the whole is one transaction, and covered by a plea justifying a single assault, much would remain unanswered. Suppose a case of assault, and dragging the party assaulted, in handcuffs, through the streets to a place of confinement: could a defendant justify that by pleading that he arrested the party for a debt? *Stammers v. Yearsley* is much like the present case. There, the plaintiff complained of assault and battery, of being taken in custody along the streets, and of being imprisoned on a charge of assault with intent to commit a felony: defendant pleaded, that plaintiff having assaulted him, defendant gave plaintiff in charge of a peace officer, who laid hands on him and took him before a justice. At the trial, although one assault only was proved, the facts pleaded were held to be an insufficient answer to the facts declared on.

Here, the declaration alleges, that the defendants *assaulted, seized, and laid hold of the plaintiff, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him. And it is impossible to consider that as merely an aggravation of the first trespass. [*80]

BOSANQUET, J. I am of the same opinion. The question is, whether this is part of the manner in which the trespass was committed, or, in itself, a separate trespass. The declaration states, that the defendants assaulted, seized, and laid hold of the plaintiff, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him.

The defendants profess to justify the assault, battery, and pulling and dragging about; and then contend, because they have justified that, that the dragging through the pond is only part of the manner in which the trespass was committed. That is not a reasonable construction of the declaration. The defendants have pointed their justification to the battery only, leaving the affair of the pond unanswered; and, as that was also a substantive trespass, the plaintiff ought to retain his verdict.

Rule discharged.

[*81] *NIBLETT and Others v. POTTOW. June 4.

By a local act a toll was imposed on horses drawing carriages; for default of payment the collector was authorized to distrain any horse or carriage upon which toll was imposed by that act. No person was to pay more than once a day in respect of any carriage or any horse, and no toll was to be taken in respect of any carriage, horse, or beast conveying materials for the road:

Held, that the toll was imposed on the horse only, and not on the combination of carriage and horse; and that the same horse passing a second time the same day, with a different carriage and different passengers, were exempt from toll.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiffs. The defendant pleaded the general issue, upon which issue was joined; and the following facts were stated by consent of the parties, and by order of one of the Judges, for the opinion of this Court, according to the statute in such case made and provided.

By an act of 39 G. 3, c. 49, entitled "An Act for more effectually repairing, widening, altering, and improving the road at or near Beckhampton, &c., in the County of Wilts," it was enacted, "That the respective tolls following should be demanded and taken at every turnpike gate of the person or persons attending any cattle or carriage, before any such cattle or carriage should be permitted to pass through the same, that is to say, for every horse, mare, gelding, mule, or other cattle drawing any coach or other such carriage, the sum of three pence. For every horse, mare, gelding, mule, or other beast or cattle drawing any wagon, wain, cart, or other such carriage, the sum of 4d. For every horse, mare, gelding, mule, or ass, laden or unladen, and not drawing, the sum of 1d. And if any person or persons subject to the payment of any of the said tolls should, after demand thereof made, neglect or refuse to pay the same or any part thereof, it should be lawful for the person or persons appointed to collect the tolls to seize and distrain any horse or horses or other cattle, together with their bridles, saddles, gears, harness, or accoutrements, or their loading, or to

[*82] stop, *seize, and distrain any carriage, with its loading, upon which toll was by that act imposed. And it was further enacted, "That no person should be subjected or liable to pay any of the tolls thereby granted, more than once in any one day, to be computed from twelve o'clock at night to twelve o'clock at the succeeding night, within each district, for or in respect of any carriage or any horse, mare, gelding, or other cattle passing through all or any turnpike or turnpikes continued or erected by virtue of that act within that district, such person producing a ticket denoting that the respective tolls had been paid on that day; which tickets the collectors of the tolls were thereby required to deliver gratis on receipt of such tolls."

By an act of 58 G. 3, c. 82, entitled "An Act to continue the term and enlarge the powers of an Act of his present Majesty, for repairing the road at or near Beckhampton, &c., in the County of Wilts," reciting, that it was expedient that the toll granted by that act should be increased, it was therefore enacted, "that the said recited act of 39 G. 3, and the several powers, provisions, matters, and things therein contained, except such as are hereby varied, altered, or repealed, shall be and continue in full force and effect, and be exercised for and during the term hereinafter mentioned, in like manner, and as fully and effectually to all intents and purposes as if the same were repeated and re-enacted in the body of this act, but subject, nevertheless, to the amendments, variations, alterations, and additions in this act contained." By section 4, reciting that the tolls granted by the said act of 39 G. 3 had been found insufficient for the purposes therein mentioned, it was enacted, "that from and after the 13th day of December then next, the said tolls should be, and the same were thereby

[*83] repealed, and that instead thereof there should be demanded and *taken for every horse or other beast drawing any wagon, cart, or other such carriage, the sum of 6d.; for every horse or other beast drawing any coach or

other carriage, of whatever description, the sum of 4½d.; for every horse or other beast, laden or unladen, and not drawing, the sum of 1½d." "Provided, always, that in cases where any wagon, cart, or other such carriage should be drawn by oxen or other neat cattle, two such oxen or neat cattle should be considered as one horse." And by section 5 it was enacted, "that the said tolls should not be demanded or taken at more than one toll gate in any one day, from any person or persons, for the same horses or other cattle upon the said respective districts of roads; such day to be computed from twelve o'clock in one night till twelve o'clock in the next succeeding night." By section 6 it was further enacted, "that upon payment of the tolls by that act granted, the collector or receiver thereof should, and he was thereby required to deliver gratis, to the person paying such toll, a note or ticket denoting such payment." By section 8 it was enacted, "that none of the tolls by that act granted, should be demanded or taken for or in respect of any carriage, horse, cattle, or beast, employed in carrying or conveying, or going to carry or convey, or returning from carrying or conveying, or having been employed only in carrying or conveying on the same day, stones, brick, lime, timber, wood, gravel, or other materials for repairing of the said roads, or any other roads in the said townships, parishes, hamlets, or places in which any part of the said roads are situate."

The defendant was collector duly appointed under the statutes of 39 and 58 G. 3, at Beekhampton turnpike gate, of the tolls authorized to be taken by the act of 58 G. 3. On the 18th of December, 1833, the plaintiff came to, passed upon, and along that road, and through that turnpike gate, with a common stage coach *of the plaintiffs, with passengers, called the Regulator, [*84] drawn by four of the plaintiff's horses, and paid the toll of 1s. 6d., being at and after the rate of 4½d. for each and every of the four horses so drawing the said coach; and the defendant delivered to the coachman a note or ticket denoting such payment. On the same day, and before twelve o'clock at night, the plaintiffs came and passed upon and along the said road, with another common stage coach of the plaintiff's called the Regulator, drawn by the same four horses as the first mentioned coach, but carrying different passengers; and the plaintiffs then produced the note or ticket so received as aforesaid, and claimed to pass through the same gate with their said last-mentioned coach and passengers, and the same four horses, without further payment of toll under the said last-mentioned acts; but the defendant refused to allow the horses so drawing the last-mentioned coach to pass through the toll gate with the last-mentioned coach until he had been paid 1s. 6d., being the amount of toll claimed for the horses drawing the coach, at and after the rate of 4½d. for each and every horse so drawing the same; and the defendant demanded and received the last-mentioned sum of 1s. 6d. from the plaintiffs, and against their will.

The question for the opinion of the Court was, whether the plaintiffs ought to recover as money had and received by the defendant to the use of the plaintiffs the said sum of 1s. 6d. so demanded and received by the defendant for and in respect of the said horses so drawing the said last-mentioned coach coming and passing through the said toll gate.

Blackburne for the plaintiffs. By these acts the toll is imposed on the horse and not on the carriage, and the defendant had no right to a second toll the same day in respect of the same horses although drawing a different carriage. Toll cannot be taken unless the *language of the act imposing it be unambiguous; *Bussey v. Storey*, 4 B. & Adol. 98; *Leeds and Liverpool Canal Company v. Hustler*, 1 B. & C. 424; and where the exemption from toll is clear, it shall always prevail: *Hopkins v. Thorogood*, 2 B. & Adol. 916; *Chambers v. Williams*, 5 B. & C. 36, n.; *Fearnley v. Morley*, 5 B. & C. 25; *Jackson v. Curwen*, *Ibid.* 31. Here, by s. 5, of 58 G. 3, no toll shall be taken at more than one gate on the same day from any person for the same horses; and by s. 16, 39 G. 3, no person shall pay more than once on the same day in respect of the same carriage or horse. *Gray v. Shilling*, 2 B. & B. 30, is in point for the plaintiff. There, by a local act under which a turnpike gate was

erected at L., the toll when carriages passed was imposed on the carriages, not on the horses drawing them; and persons having paid on passing were, on their return the same day, exempt from toll. By a subsequent local act, applying to the same turnpike, and reciting the former act, the old tolls were repealed, and the new toll, when carriages passed, was imposed, not on the carriages, but on the horses drawing them: in the latter act, all the provisions, regulations, and clauses of the former were continued as fully as if they had been re-enacted: it was held, that where the toll imposed by the latter act had been paid for horses passing with a carriage, those horses were exempted from toll on returning the same day, though with a different carriage.

Stephen. Serjt., contra. Taking the two acts together, it is clear that in this case the toll is imposed on the coach, and not on the horses. One toll is imposed on horses drawing; a lower toll on horses not drawing; and the exemption in [*86] the first act, which is incorporated into the second, is on carriage or horse passing a second time the same day; and the collector is authorized to distrain for his toll, carriages on which toll is imposed. The word *carriage* in those clauses, and in the clause exempting stone carts and the like, must have some meaning; and it can have none, unless, taking it in conjunction with the circumstance that the toll is collected for horses drawing, the Court shall infer that, substantially, the toll is imposed on the carriage. And it would be unreasonable if it were otherwise; for the tax falls ultimately upon the passengers in the coach, being calculated and charged by the coach proprietor in the amount of the fare: but, according to the construction contended for on the other side, the second set of passengers would contribute nothing to the expenses of the road. The subject of the toll is the combination of carriage and horse; and that distinguishes the present case from *Gray v. Shilling*, where the word carriage is not found in the exempting clause, the exemption being expressly conferred on persons having paid the toll. So, in the other cases cited, the language of the respective acts of parliament differed from that used in the present case, and the argument now urged for the defendant was not presented to the Court.

TINDAL, C. J. It is unnecessary, on the present occasion, to refer to the various cases determined on other acts of parliament: it is sufficient to look at this act, and apply a plain understanding to it, always remembering that we are not affirmatively to impose a toll, unless the language of the legislature be clear. The question here is, whether a second toll is imposed on the same horses passing the same day with a different carriage. It is said that this depends on the clause of exemption in the statute 39 G. 3. It may be so; but we must first [*87] look at the section in 58 G. 3, which imposes the toll: "for every horse or other beast drawing any wagon, cart, or other such carriage, the sum of 6d.; for every horse or other beast drawing any cart, or other carriage, of whatever description, the sum of 4½d.; for every horse or other beast, laden or unladen, and not drawing, the sum of 1½d." Looking no further, can any one doubt whether the toll is imposed on the animal or the carriage? In many acts the toll is imposed specifically on the carriage. If the legislature be aware that words so different must be used when that is intended, why are we to suppose that the horse is not meant here?

It is said, look at the clause of exemption, "that no person shall be subject or liable to pay any of the tolls hereby granted more than once in any one day, to be computed from twelve o'clock at night to twelve o'clock the succeeding night, within each district, for or in respect of any carriage, or any horse, mare, gelding, or other cattle passing through all or any turnpike or turnpikes continued or erected by virtue of this act within this district, such person producing a ticket denoting that the respective tolls have been paid on that day." To which I answer, although it may be difficult to give an explicit meaning to the word carriage, where no toll has been imposed on the carriage, we can never give it the meaning required by the defendant, when there is a toll directly and affirmatively laid on the horse.

It is then said that there are other clauses in which the word carriage occurs, and in which it will be difficult to attach any meaning to the word, unless a carriage be the subject of toll. "If any person or persons subject to the payment of any of the said tolls shall, after demand thereof made, neglect or refuse to pay the same or any part thereof, it shall be lawful for the person or persons appointed to collect the tolls, to seize and distrain any horse or horses or other cattle, together with their bridles, saddles, gears, *harness, or accoutrements, or their loading, or to stop, seize, and distrain any [88] carriage, with its loading, upon which such toll is by this act imposed." We might reasonably say, that as the power of distress first specifies the horse upon which the toll has previously been imposed, the inference is, that the words, "upon which such toll is by this act imposed," apply to the horse and not to the carriage, and that the power of distress is extended to the carriage, only for the sake of further security. But it is unnecessary to give a construction to every clause in which the word carriage is incidentally used, when it is plain that the toll is imposed on horses.

PARK, J. Every case of this sort must depend on the words of the act imposing the toll: the cases are numerous, because such acts are often incorrectly drawn; and as most tolls are let out, the lessees, who desire to make all they can, will try their hand again, although the point may have been decided. But I cannot distinguish this case from *Gray v. Shilling*; and though, in the other cases which have been mentioned, there may be here and there expressions which suit the defendant, yet, in substance, the cases all coincide with *Gray v. Shilling*.

GASELEE, J. From the beginning it appeared to me, that there never was a clearer case than the present, and I have heard nothing to induce me to change my opinion. A toll is clearly and explicitly imposed on the horse and none on the carriage. The difficulty, if any, has arisen from the introduction of the word carriage into the eighth clause, but even there the words are, that none of the tolls imposed by the act shall be taken for "or in respect of any carriage" employed in conveying materials for the repair of the road; and when we see that the toll on a horse employed in drawing *a carriage is 4½d.; and on [89] a horse without any carriage 1½d., we might say that the toll is imposed on the horse drawing, in respect of the carriage.

However, the toll being imposed by sect. 4 explicitly on the horse, that cannot be altered by any conjectures as to ambiguities in a succeeding clause.

BOSANQUET, J. I am of the same opinion. Cases of this kind depend on the construction of the particular act, and most acts of this sort are inaccurately drawn. However, there can be no doubt here, that in both the acts the toll is imposed on the horse, and not on the carriage. In the exempting clause of the first act the word carriage has been inserted, and undoubtedly it is unnecessary: but it is omitted in sect. 5, the clause of exemption in the second act, and it must have appeared there also, if there had been any intention to impose the toll on the carriage.

If we revert to authority, there is no material distinction between this case and *Gray v. Shilling*, or *Jackson v. Curwen*. Judgment for the plaintiff.

TREMEERE v. MORISON. June 4.

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rents and taxes, and for non-repair, to say, that the premises yield no profit.

COVENANT. The plaintiff declared (venue Middlesex) that, by an indenture of June, 1812, he demised to one Edward Howes a certain messuage, with the appurtenances, for thirty-one years (wanting fifteen days) from the 25th of

[*90] December, 1809, Howes covenanting *to pay plaintiff a rent of 37l. a year, and all levies, taxes, charges, assessments, and payments whatsoever charged on the premises, and to keep the premises in repair: that Howes entered; and that afterwards, in June, 1833, all Howes's estate, right, title, interest, and term of years then to come and unexpired in the premises legally came to and vested in the defendant, who thereupon entered into the premises, and became possessed thereof, to wit, in the county of Middlesex: that after the making of the indenture and during the term thereby granted, and after the defendant became such assignee as aforesaid, and whilst he continued such assignee, to wit, on, &c., at, &c., a large sum of money, to wit, the sum of 27l. 15s., of the rent aforesaid for three-quarters of a year of the said term then elapsed, became and was due, and still was in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true intent and meaning, of the said indenture and of the covenant in that behalf so made as aforesaid, to wit, at, &c., that the defendant did not, nor would, after the said assignment and during the said term, and whilst the defendant was so possessed of the said demised premises with the appurtenances as aforesaid, bear, pay, and discharge the levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable after the defendant became such assignee as aforesaid, and whilst he was and continued such assignee, but wholly omitted and neglected so to do, to wit, at, &c., that there was now a large sum of money, to wit, the sum of 10l., for and in respect of such levies, taxes, charges, assessments, and payments as aforesaid, for three-quarters of a year of the said term, during which period the defendant was so possessed of the said demised premises with the appurtenances, in arrear, unpaid and undischarged by the defendant, contrary to the [*91] tenor and effect, true intent *and meaning, of the said indenture, and of the said covenant in that behalf so made as aforesaid; and that the defendant did not, nor would after the said assignment and during the continuance of the said demise and whilst he was so possessed of the demised premises with the appurtenances as aforesaid, at his own proper costs and charges, as often as need required, well and sufficiently repair the said demised premises.

The defendant, after two pleas on which no question arose, pleaded, thirdly, that he ought not to be charged with any damages by reason of the said breaches of covenant, or any or either of them, or any part thereof, otherwise than as administrator of P. Walker as thereafter-mentioned, because, after the making of the indenture in the declaration mentioned, and during the term thereby granted, to wit, on, &c., at, &c., the said P. Walker duly made and published his last will and testament in writing, and thereby, amongst other things, then and there appointed one James Morrison sole executor thereof, and afterwards, to wit, on, &c., at, &c., the said P. Walker died so possessed of the said demised premises, without revoking or altering his said will; after whose death, to wit, on, &c., at, &c., the said J. Morrison, in due form of law, renounced the probate and execution of all and singular the goods, chattels, and credits, which were of the said P. Walker at the time of his death; and administration thereof, with the will of the said P. Walker annexed, in due form of law, was afterwards, to wit, on, &c., at, &c., granted to the defendant, who afterwards, and after the decease of the said P. Walker, to wit, on, &c., at, &c., as such administrator, entered into and upon the said demised premises, and became and was possessed thereof for the residue of the said term of years by the said indenture granted and then and yet to come and unexpired of and in the said demised premises. And the [*92] defendant further said, that he had not, at any time *since the death of the said P. Walker, received and derived, or been able to receive or derive, any profit, interest, or advantage as such administrator or otherwise, by or from the said demised premises with the appurtenances, or any part thereof; and that the said demised premises had not, nor had any part thereof since the death of the said P. Walker yielded any profit whatsoever; and that the said term was not now, nor at any time since the death of the said P. Walker had

the said demised premises or any part thereof, been, of any value whatsoever. And the defendant further said, that the estate, right, title, interest and term of years, property, profit, claim, and demand whatsoever of the said P. Walker, of and in the said demised premises, with the appurtenances or any part thereof, had not at any time come to or vested in the defendant by assignment, otherwise than under and by virtue of such administration as aforesaid, and that the said entry of the defendant was made by him as such administrator as aforesaid: and that the defendant was ready to verify, &c.

The fourth plea was to the same effect, with the addition of an averment of *plenè administravit* and an offer to surrender before the breaches occurred.

The plaintiff in his replication as to the third plea of the defendant, so far as the same related to the breach of covenant in the declaration first assigned, said, that the plaintiff, by reason of anything by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant, in respect of the said breach of covenant first above assigned, because the said demised premises from the time of the death of the said P. Walker hitherto had been and still were of great yearly value, to wit, of the value of the said yearly rent in the declaration mentioned, to wit, at, &c., and that, the plaintiff prayed might be inquired of by the country, &c.; and the plaintiff, as to *the third plea of the defendant, so far as the [93] same related to the said breach of covenant in the declaration secondly above assigned, said, that the plaintiff by reason of anything in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the defendant, in respect of the said breach of covenant secondly above assigned, because the said demised premises from the time of the death of the said P. Walker hitherto had been and still were of great yearly value, to wit, of a yearly value sufficient for the payment and discharge of the said levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable as in the declaration mentioned, to wit, at, &c., and that, the plaintiff prayed might be inquired of by the country, &c.; and the plaintiff, as to the third plea of the defendant, so far as the same related to the said breach of covenant in the declaration lastly above assigned, said, that the plaintiff by reason of anything by the defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the defendant, in respect of the said breach of covenant lastly above assigned, because the defendant, since the death of the said P. Walker, could and might have and had received and derived great profit, interest, and advantage by and from the said demised premises with the appurtenances, and that the same from the time of the death of the said P. Walker had been and still were of great yearly value, to wit, of the yearly value of 100*l.*, to wit, at, &c., and that, the plaintiff prayed might be inquired of by the country, &c. The replication to the fourth plea was to the same effect, and in addition, took issue on the averment of *plenè administravit*.

The defendant demurred to these replications.

Joinder.

**Atcherley*, Serjt., in support of the demurrer. The replication is ill, [94] for it puts in issue an immaterial fact, viz., whether the premises were of any value. They might be of some value for the purpose of sale, and yet they might yield no profit, to the administrator; and unless they yield a profit, the administrator is not liable for rent or taxes; at all events, not beyond the profit yielded. The result of the cases is stated in 1 Wms. Saunders, 112, note c. (edit. 5). "If an executor be sued in his representative capacity for rent accruing in his own time, either in debt or covenant, where the lease is by deed, or in debt or assumpsit for use, and occupation, where the lease is not by deed, he may plead *plenè administravit*, and under that plea may show that the land yields no profit, and that he has no assets aliunde; but if the land yields a profit equal to the rent, he will fail on a plea of *plenè administravit*, for he is bound to apply the profits of the land towards payment of the rent in the first

instance, and his not doing so will be a devastavit; if therefore, the land yields some profit, but less than the rent, it should seem that his plea should be *plene administravit, præter* the profit. If, on the other hand, the executor be sued, as he may be when he enters and is in the actual occupation, in his individual capacity as assignee of the term, in debt on a lease by deed, he must plead specially that he holds only as executor, that the land yields no profit, or less than the rent, and pray whether he shall be charged otherwise than in detinet: in covenant, he must plead the same matters specially:” Hargrave’s case, 5 Rep. 3; Bolton v. Canham, Pollexf. 125, Freem. 327; Helier v. Casebert, 1 Lev. 127; Buckley v. Pirk, 1 Salk. 316; Remnant v. Bremridge, 8 Taunt. 191; Rubery v. Stevens, 4 B. & Adol. 241.

[*95] *If the defendant be sued as assignee and not as administrator, the venue ought to be local, as founded on privity of estate; and then, the declaration is ill for not showing the county in which the premises lie. [TINDAL, C. J. That sufficiently appears in the averment that the defendant entered in Middlesex, the county in which the venue is laid.] Then, the fourth plea not only tenders the same immaterial issue as the third, but is double, in offering also an issue on the *plene administravit*.

Coleridge, Serjt., contra. The third plea being pleaded to all the breaches is ill; for it is no answer to the third breach alleging non-repair: and a plea which is bad as to part, is bad for the whole: Webb v. Martin, 1 Lev. 48. That it is no answer to the third breach distinctly appears in Tilney v. Norris, 1 Ld. Raym. 553, 1 Salk. 309, Buckley v. Pirk, 1 Salk. 316, and Shepherd’s Touchstone, 178. But, independently of this, the replication takes issue on a material fact. Whether the premises were of value is the proper question: whether the defendant could or not have made profit of them is either identical with it, or evidence of it. Where an executor, in possession, is sued as assignee on the covenants for rent and repairs, the whole liability is personal, and founded on privity of estate. The law presumes the possession to have value; but the liability is not in principle founded on the perception of the profits, nor measured by them. An ordinary assignee could no more relieve himself from keeping the covenants by alleging the want of profits, than the original lessee. But as regards rent, the law has made a distinction between an executor sued as

[*96] assignee and an ordinary assignee. It limits the liability on this head *to the profits actually received; taking so much of these profits as equals the rent, out of the general body of the assets, and specifically appropriating them to the landlord: Hargrave’s case, 5 Rep. 31 b. No such distinction, however, prevails as to liability for repairs, the lessor having no such privilege in respect of the assets,—the executor assignee no such exemption; but the general rule prevails: Spencer’s case, 5 Rep. 18, 6th resolution; Dean and Chapter of Windsor’s case, 5 Rep. 25; Dyer, 13 b, n. 67; Tilney v. Norris, 1 Roll. Abr. Covenant, L., citing Hyde v. Dean and Chapter of Windsor, Cro. Eliz. 552. The object of the covenant for repair was the maintenance of the thing in being when the lease was made. Besides, administration is taken upon himself by the defendant *sponte sua*. The incurring the liability is his own act: the offer to surrender the premises (founded on the case of Remnant v. Bremridge) can have no effect on the defendant’s liability for repairs: and that case turned in effect on the circumstance that the premises yielded no rent. It was an action for use and occupation.

Atcherley, in reply, persisted that the defendant as administrator was altogether discharged if the premises yielded no profit; and the replication, therefore, should have taken issue on that precise point.

As to the taking out letters of administration being the spontaneous act of the administrator, the same thing might be predicated of an executor who took out probate, since he was at liberty to renounce it.

TINDAL, C. J. It is unnecessary for us to give any opinion as to the sufficiency of this replication, because we think that the third and fourth pleas are

both bad in law. A plea which is bad in part, is bad altogether; *and these pleas, affecting to give an answer to the breach of covenant in not repairing, as well as not paying rent and taxes, cannot be supported; because the law, as it applies to personal representatives with respect to non-payment of rent or taxes, does not stand on the same footing as the law which binds them to repairs. The two cases are not within the same reason. Rent is received by an executor, not so much in the light of assets, as a profit of the land which is to be handed over to the landlord, in satisfaction or diminution of arrears that may be due. No such reason is applicable to the covenant for repairs. It would be a strange thing to say, for instance, that an executor or administrator shall not be bound to repair in the first year of a term, because they had derived no profit from the premises: in effect, that would be saying that the lessor shall have no rent till the end of the term; for if the executor is not bound to repair in the first year because he has no profits, the same answer might be made in the second, and the premises might go on in a course of deterioration, till the end of the term, when, if the executor were without assets, the lessor might be deprived of any redress. But there is no case to show, that when an executor is sued as assignee, he is not liable for repairs in the same manner as any other assignee. All the cases relied on for the defendant are actions for debt, and turn on the debt, or debt and detinet, which are only applicable to demands for non-payment of rent. On the other hand, the cases cited for the plaintiff tend to show, that the rule with respect to rent does not extend to a covenant for repair. Let us look at the case of waste, which bears a strong analogy to the present. The law is clear, that "the executor or administrator of a tenant for years shall be punished for waste done in their own time; and that the judgment for the damages shall be against them *de bonis propriis*. And there is no *difference between permissive and voluntary waste, that will influence this case, [*97] because this breach of covenant is in nature of permissive waste; except that the case of waste is stronger; because treble damages are recoverable there, but single damages only in covenant. And if the executor assigns over, waste will lie against him in the tenuit; therefore, it is not hard to support this action; and judgment shall be against him *de bonis propriis*," 1 Ld. Raymd. 554. An executor, therefore, is liable for non-repair; and that, even where he permits dilapidation to continue, which did not commence in his own time. The same point was established in the Dean and Chapter of Windsor's case, where a man demised a house by indenture for years; the lessee, for him and his executors, covenanted and granted with the lessor to repair the house at all times necessary; the lessee assigned it over to Hyde, who suffered it to decay; the lessor brought an action of covenant against the assignee. And it was adjudged by POPHAM, C. J., and the whole Court, "that the action of covenant did lie, although the lessee had not covenanted for him and his assigns; for such covenant, which extends to the support of the thing demised, is quodammodo appurtenant to it, and goes with it. And in respect the lessee hath taken upon him to bear the charges of the reparations, the yearly rent was the less, which goes to the benefit of the assignee, and *qui sentit commodum sentire debet et onus*."

On the ground, therefore, that the plea is now brought forward, for the first time, as an answer to an action of covenant for repairs; that no authority has been adduced in support of such a plea; and that the reason of the thing is altogether inconsistent with such a defence; we think that the plea is ill; that judgment must be given for the plaintiff; and that, as to this *point, it is unnecessary to consider whether there is any distinction between the situation of executor and that of administrator. [*99]

PARK, J., and GASELER, J., expressed their concurrence.

BOSANQUET, J. The general rule is, that the executor of a lessee is liable as assignee, except that, with respect to rent, his liability does not exceed what the property yields. No such exception applies to the covenant for repairs.

Judgment for plaintiff.

ALCHIN v. HOPKINS, Clerk. June 5.

A composition with a clergyman, in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under 18 Eliz. c. 20.

IN answer to an action for a debt of 253*l*. due from the defendant to the plaintiff, the defendant put in an agreement for a composition entered into between the defendant and such of his creditors as signed the same, who thereby agreed not to sue, arrest, or molest the defendant, "in consideration that the future income of the defendant might be received by the Rev. Harry Lee, or some other person duly appointed by the defendant, and applied in liquidation of the defendant's debts, after providing a competent stipend for a curate to serve the church."

The defendant had no income other than the profits of a benefice with cure of souls, amounting to about 148*l*. a year.

Mr. Lee had received the amount, and after allowing 90*l*. a year for the performance of the duty, had distributed the residue, with the sanction of the defendant, among the defendant's creditors.

[*100] *The defendant, however, had never signed the agreement.

The plaintiff, upon the production of this agreement, was nonsuited, with leave to move to enter a verdict for the amount of his debt. Accordingly, Coleridge, Serjt., in Easter term obtained a rule nisi to that effect, on the ground that the agreement was not binding on the defendant, for want of his signature; for want of consideration; and as an infraction of the statute 13 Eliz. c. 20, which prohibits "all chargings of any benefice with cure, with any pension or any profit out of the same to be yielded or taken."

Merewether, Serjt., showed cause.

The defendant, having acted on the agreement by sanctioning the application of the profits, is bound by it, notwithstanding his omission to sign: *Good v. Cheesman*, 2 B. & Adol. 328. And the forbearance of each creditor to sue is a sufficient consideration to bind the others. Nor is the agreement within the prohibition of 13 Eliz., for a curate is first to be provided for, and it does not appear on the face of the instrument that the profits of the benefice are actually conveyed away or charged; and a sequestration arising only incidentally, as a consequence of the clergyman's general liability, is not a charge within 13 Eliz. c. 20. *Flight v. Salter*, 1 B. & Adol. 673; *Newland v. Watkin*, 9 Bingh. 113.

Coleridge. Taking the agreement and the conduct of the parties together, an intention to charge the benefice plainly appears; and therefore the case falls within the principle laid down in *Gibbons v. Hooper*, 2 B. & Adol. 784, *Kirlew v. Butts*, 2 B. & Adol. 736, note, and *Flight v. Salter*, where all the decisions

[*101] *are collected. The agreement is, at all events, indirectly a charge; and the defendant cannot do indirectly, what he is prohibited from doing directly. *Doe dem. Mitchinson v. Carter*, 8 T. R. 300.

Our. adv. vult.

TINDAL, C. J. The question brought before the court in this case, is whether the agreement for a composition entered into between the defendant and such of his creditors as signed the same, operates as an answer to the present action. By the terms of the agreement, the several creditors who signed the same agreed not to sue, arrest, or molest the defendant "in consideration that the future income of the said defendant might be received by the Rev. Harry Lee, clerk, or some other person duly appointed by the said defendant, and applied in the liquidation of the said debts." It was found at the trial of the cause, that the defendant had no other income than the profits of a benefice with cure of souls. The agreement, may, therefore, be considered to refer to the income of the defendant arising from his living, and no other.

The objection made on the part of the plaintiff is that the agreement is void

by the statute 13 Eliz. c. 20, by which "all chargings of any benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, shall be utterly void." The effect of the instrument, supposing it to have any effect whatever, is to appropriate the future profits of the living to the payment of the debts of the defendant; for we cannot think the clause by which it is provided that a competent stipend for a curate to serve the church shall be first paid, will take the agreement out of the statute. There are many purposes to which the profits of a benefice ought to be *employed, on principles of public policy, besides the finding of a [*102] curate, such as the repairs of the chancel and parsonage, the money payments to which the church is liable, and the like. The effect of the instrument, therefore, although not operating as a direct charge, is an agreement to charge the profits of the living; and if such an agreement were not held to fall within the prohibition of the statute, all its purposes might be avoided with the greatest facility.

But, independently of the objection under the statute of Elizabeth, it appears that this agreement was never signed by the defendant. In case, therefore, the creditors should sue upon it, they would be met by the preliminary objection, that a contract for the profits of a living to be paid over to a trustee or receiver, was a contract "for an interest in or concerning lands, tenements, or hereditaments," and that no action would lie upon it, as it "had not been signed by the defendant, or by any person thereunto by him lawfully authorized." We think, upon this ground also, the agreement for composition is not of such a description as can be held a bar to the present action. For the principle on which such an agreement is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement, by mutual consent, and on good consideration, in the stead or place of the old contract. This is the point established by the case of *Good v. Cheesman*, to which we entirely accede. The new or substituted agreement must, therefore, of necessity be one which is legal and valid; or the whole ground on which the release of the former contract depends, is destroyed. Inasmuch, however, as the agreement in question is liable to the objections above adverted to, we think it fails as a composition that can be enforced at law.

Rule absolute for entering verdict for plaintiff for 253*l*.

***BUSHELL and Others v. BEAVAN. June 5.**

[*103]

Plaintiffs, owners of a ship hired on charter-party by H. S., refused to let her sail till certain disputes about the freight between them and H. S. were settled, by H. S. giving security: whereupon defendant, in consideration that plaintiffs would let H. S. sail without giving security, undertook to get T. M. to sign the guaranty hereunder set forth, and deliver it to plaintiffs in a week: Held, that this was not an undertaking for the debt, default, or miscarriage of another, within the statute of frauds.

The guaranty to be signed by T. M. was as follows:—"Whereas H. S. has hired your ship for six months from the 12th of July, 1880, and such longer time as his intended voyage may require, and has paid or secured the freight for six months, from the 20th of August, 1880, and is about to leave England, I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months:" Held, an undertaking within the statute of frauds, and insufficient for want of a consideration apparent on the face of it; and consequently that only nominal damages could be recovered against defendant for failing to procure T. M.'s signature, according to his promise.

ASSUMPSIT. The first count of the declaration stated that on the 12th of June, 1829, to wit, at London, by a certain charter-party then and there made and concluded between W. S. Jacques, for and on behalf of himself and the plaintiffs, other the owners of the ship called the *Warrior*, then lying in the port of London, of the one part, and H. C. Sempill, freighter of the said ship, of the other part, the said charter-party being sealed with the seal of the said

H. C. Sempill, it was witnessed, that the said W. C. Jacques, acting as aforesaid, for the consideration thereafter mentioned, did thereby promise and agree to and with the said freighter, his executors, administrators, and assigns, that the said ship should set sail and proceed to Swan River and Sydney, New South Wales, and then proceed to such port or ports, place or places, and for such purposes, as the said freighter, his executors, administrators, or agents, might order or direct; that the ship should immediately go into the St. Katharine Docks, and the poop and cabins be erected, altered, and finished in the [*104] manner prescribed by the charter-party, on or *before the 24th of June; in consideration whereof, and of everything above mentioned, H. C. Sempill, for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with W. S. Jacques, his executors, administrators, and assigns, to take the said ship into his service for the voyage thereinbefore specified, and for and during the term or space of six calendar months certain; and also to pay or cause to be paid unto W. S. Jacques, his executors, administrators, and assigns, freight for the use or hire of the said ship, at and after the rate of 17s. per register ton per calendar month, for and during the term or space of six months at the least, to reckon and be accounted from the 12th day of July then next ensuing, and at and after the like rate for all further time (if any) that might be necessary for the completion of her aforesaid intended voyage and service, and until she should be finally discharged as aforesaid, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, one-third of the six months' pay to be paid on the clearing of the vessel outwards, at the Custom House, in the port of London; 400*l.* in further part of the said monthly pay to be receivable by the said commander out of the freight payable at New South Wales, or some other intermediate port; and the remainder of the said monthly pay to be paid by good and approved bills of exchange, at six months' date from the day the said vessel should clear outwards at the custom-house of London:

That after the making of the said charter-party, and before the making of the promise and undertaking of the defendant next mentioned, divers disputes and differences had arisen and were depending between the plaintiffs and H. C. Sempill, as to whether or not the period of hire of the said ship should commence from the said 12th of *July, 1829, and whether or not the payment of the freight so as aforesaid to be paid by H. C. Sempill, for the use or hire of the said ship, should commence and be payable from the said 12th of July, 1829; and also as to whether or not H. C. Sempill should give the plaintiffs security for the payment of freight for the use and hire of the said ship, which should or might become due and payable from H. C. Sempill for any period beyond six months, to be reckoned and accounted from the said 12th of July, 1829, according to the terms and conditions of the charter-party, to wit, at, &c.: and that before and at the time of the making of the promise and undertaking of the defendant as next mentioned, the plaintiffs had refused to suffer and permit H. C. Sempill to leave England in the said ship or vessel, under the charter-party, until he had given such security as aforesaid, to wit, at, &c.:

And thereupon, on the 6th of October, 1829, to wit, at, &c., in consideration of the premises, and that the plaintiffs would put an end to the disputes and differences, and consent and agree that the period of hire of the said ship should commence from the 20th of August, 1829, and that the payment of the freight should commence and be payable from the said 20th of August, 1829, and that H. C. Sempill should not be liable for any charge for the said freight for any period antecedent to the 20th of August, 1829, and also in consideration that the plaintiffs, at the special instance and request of the defendant, would suffer and permit H. C. Sempill to leave England in the said ship or vessel without giving the said security, the defendant undertook, and then and there faithfully

promised the plaintiffs to procure one Thomas Potter Macqueen duly to sign and enter into a written guaranty, and that he would deliver the same to one Henry Brittan, within a week then next following; by which guaranty the said *T. P. Macqueen should guarantee the plaintiffs the due and faithful [*106] payment of all freight for the use or hire of the said ship, which should or might become due and payable from the said H. C. Sempill for any period beyond the said six months, pursuant to such charter-party, such period of six months to commence from the said 20th of August, 1829, according to the terms and conditions of the said charter-party; and that, in default of payment thereof as aforesaid by H. C. Sempill or his agents, the said T. P. Macqueen would pay the same on demand. And the plaintiffs averred, that they, confiding in the said promise and undertaking of the defendant, did afterwards, to wit, on the said 6th of October, 1829, to wit, at, &c., put an end to the said disputes and differences, and consented and agreed that the period of hire of the said ship should commence from the said 20th of August, 1829, and that the payment of the freight should commence and be payable from the said 20th of August, 1829, and that H. C. Sempill should not be liable to any charge for the freight for any period antecedent to the 20th of August, 1829, and did then and there suffer and permit H. C. Sempill to leave England in the said ship or vessel, without giving the said security: and although a week from the time of the making the defendant's said promise and undertaking had long since elapsed, yet the defendant, not regarding his promise and undertaking, but contriving to injure the plaintiffs in that behalf, did not nor would, within the time aforesaid, or at any time before or afterwards, procure T. P. Macqueen to sign or enter into any written guaranty, whereby he guaranteed the due and faithful payment of all freight for the use or hire of the said ship, which should or might become due and payable from H. C. Sempill for any period beyond the said six months, pursuant to such charter-party, *such period of six months to [*107] commence on the said 20th of August, 1829, according to the terms and conditions of the said charter-party; and that, in default of payment thereof as aforesaid by H. C. Sempill or his agents, the said T. P. Macqueen would pay the same on demand; nor did the defendant, within the space of the said week, or at any time afterwards, procure such or any guaranty of T. P. Macqueen to be delivered to the said H. Brittan; but so to do had hitherto wholly neglected and refused, and still did neglect and refuse. And the plaintiffs averred, that H. C. Sempill had had the use and hire of the said ship on freight as aforesaid for a long space of time after the expiration of the said six months, commencing from the said 20th of August, 1829, to wit, from thence hitherto; and that the freight of the said ship or vessel during that period amounted to a large sum of money, to wit, to the amount of 2,000*l.*, which was still due and owing to the plaintiffs: and by means of the premises the plaintiffs had been and were likely wholly to lose the same, and any future freight that might become due and payable from H. C. Sempill for and on behalf of the said ship: and also by means of the premises the plaintiffs had been and were otherwise much injured and damaged, to wit, at, &c.

The fourth count stated, that on the 12th of June, 1829, to wit, at, &c., by a certain other charter-party then and there made and concluded between the plaintiffs, the owners of the ship in the first count mentioned, of the one part, and H. C. Sempill of the other part, sealed with the seal of H. C. Sempill, it was witnessed of and concerning the said ship, and the freight and hire of the same as in and by the charter-party in the first count mentioned, to wit, at, &c.: That on the 6th of October, 1829, to wit, at, &c., in consideration that the plaintiffs, at the special instance and *request of the defendant, had consented [*108] and agreed that the period of hire of the said ship should commence from the 20th of August, 1829, instead of the 12th of July, 1829; and that H. C. Sempill should not be liable for any charge for the said freight for any period antecedent to the said 20th of August, 1829; and also, in consideration that the plaintiffs, at the special instance and request of the defendant, had suffered and

permitted H. C. Sempill to leave England in the said ship, on the defendant's guaranteeing the payment of the said freight, to commence after the period of six months, which said six months were to be counted from the said 20th of August, 1829, the defendant undertook, and then and there faithfully promised the plaintiffs, to guarantee the plaintiffs the due and faithful payment of all freight for the use or hire of the said ship or vessel, which should or might become due and payable from H. C. Sempill for any period beyond the said six months, such period of six months to commence from the said 20th of August, 1829, according to the terms and conditions of the said charter-party; and that, in default of payment thereof by H. C. Sempill or his agents, the defendant would pay the same on demand; it being understood that the defendant was not to be bound by the commander's certificate alone of the amount of freight due, without further proof of such amount being due. And the plaintiffs averred, that afterwards, to wit, on the 17th of May, 1831, to wit, at, &c., a large sum of money, to wit, the sum of 2000*l.*, became and was still due and owing from H. C. Sempill to the plaintiffs for freight for the use and hire of the said ship, the same having become due and payable from him for a period beyond the said six months, such period of six months commencing from the said 20th of August, 1829, according to the terms and conditions of the said charter-party, *to wit, from thence hitherto, and H. C. Sempill and his agents [*109] had hitherto made default in payment of the same; of which said premises the defendant afterwards, to wit, on the said 17th of May, 1831, to wit, at, &c., had notice: and thereupon payment of the freight so due was then and there demanded of him by the plaintiffs. Yet the defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure the plaintiffs in that behalf, had not as yet paid them the said freight or sum of 2000*l.* so due and owing as aforesaid, but so to do had hitherto wholly neglected and refused, to wit, at, &c.

The defendant pleaded the general issue.

At the trial before TINDAL, C. J., London sittings after last Hilary term, a verdict was found for the plaintiffs for 1557*l.* 9*s.* 8*d.*, subject to the opinion of the Court on the following case:—

The plaintiffs, at the time of entering into the charter-party set out in the pleadings, and up to the time of this action, were the owners of the ship *Warrior*. On the 12th of June, 1829, the charter-party set out in the pleadings was made and concluded in London between the plaintiff W. S. Jacques, acting for and on behalf of himself and the other plaintiffs, and H. C. Sempill, under the respective seals of W. S. Jacques and H. C. Sempill.

In pursuance of that charter-party, the ship went into the St. Katharine's Docks on the 24th of June, 1829, and was, on the day after, in a fit state to receive and take on board her cargo; and the freighter then took possession of her: but the poop and cabins were not completely fitted up and furnished in pursuance of the charter-party until some time afterwards, although many passengers were engaged and took possession of the ship some time before the painting was completely finished.

Previous to the ship's being ready for sea, and about *the latter end of [*110] September, 1829, disputes and differences arose between the plaintiffs and H. C. Sempill, arising out of the poop and cabins not being completely fitted up and finished by the 24th of June, and otherwise as to whether or not the period of hire of the ship should commence from the 12th of July, as stipulated in the charter-party; and as to whether or not the payment of freight should commence and be payable from that day; and also as to whether or not H. C. Sempill should give the plaintiffs a security for the payment of the freight which should become due for any period beyond the six months, to be reckoned from that day; and also as to whether or not H. C. Sempill should continue the ship in his service after her arrival and discharge at Swan River. The plaintiffs refused to allow the vessel to go to sea until the settlement of such disputes and differences.

On the 2d of October, 1829, the defendant, then acting as the attorney for H. C. Sempill, and also as the attorney for T. P. Macqueen, wrote to the plaintiff Jacques the following letter :—

"Sir,—My friend and client Mr. Sempill has been with me, accompanied by Mr. Cross and the captain of the *Warrior*, to arrange finally the settlement of the affairs of that ship previous to her departure from the port of London. The only difficulty that presented itself to a fair and proper conclusion, was the period from which Mr. Sempill's payment of the six months' rent should commence; Mr. Cross proposing that the day should be from the first week in August: Mr. Sempill declining to accede to such a proposal, and suggesting that the period of payment should not commence till the 1st of September. Upon reference to your captain, it was admitted (and in which admission Mr. Cross acquiesced) that the reparations and completion of the cabins and other parts of the ship were not completed until the 12th of August, although the owners covenanted that all should be completely finished by the 24th of June; in which case the rent was to commence from the 12th of July, thus giving Mr. Sempill a clear period of eighteen days from the day of completion of repairs to the day of commencement of payment. Mr. Sempill really is not bound to make the payment required of him: and on his behalf I decline to advise him to do so. Mr. Cross has asked me for some security for the surplus of six months' rent, if his hire exceeds that term; this Mr. Sempill is not bound to give, neither have the owners any right to require; but if the other part of our difference on Mr. Sempill's reasonable request be acquiesced in, I have no objection on his part to give them good and sufficient security, otherwise I must decline it.

"I beg the favor of hearing from you by return of post, with the determination of the owners of Bristol. J. P. Beavan."

In consequence of that letter, and for the purpose of settling the disputes and differences between the parties, on the 6th of October, 1829, a meeting took place between W. Cross, one of the plaintiffs, the said H. C. Sempill, the defendant as attorney on his behalf, and Mr. Brittan, as attorney for the plaintiffs.

On that occasion, H. C. Sempill drew up and signed the following letter :—
"Gentlemen,—I beg leave to inform you that I will not require the *Warrior* for any period after she has performed her voyage to Sydney, and discharged her cargo. I am, &c., H. C. Sempill."

The following memorandum was also endorsed on the charter-party held by H. C. Sempill, and it was signed by W. Cross for himself and the other plaintiffs :
"For, and on behalf of W. S. Jacques, myself, and the other owners of the ship *Warrior*, chartered by H. C. Sempill, I hereby, in consequence of *the reparations to such ship not having been completed by the period [*112] in the charter-party mentioned, covenant, promise, and undertake that the period of hire of the before-mentioned ship shall commence from the 20th of August last past; and that the payment of the freight of such vessel shall commence and be payable from the 20th of August last past; and that Mr. Sempill shall not be liable for any charge for freight or rent for any period antecedent to such 20th of August, 1829. For self and other owners, W. Cross."

On that occasion, also, a guaranty written in the shape of a letter, in the following form, and addressed to W. S. Jacques, was drawn up for the signature of T. P. Macqueen, and agreed on by the defendant, viz. :

"Sir,—In consideration of your having, on behalf of yourself and other owners of the ship called the *Warrior*, entered into a charter-party of affreightment with Mr. H. C. Sempill for a voyage of the said ship or vessel to the Swan River and Sydney, New South Wales, whereby it is agreed that the said ship shall remain and continue in the service of the said freighter for and during the term or space of six calendar months at the least, to reckon and be accounted from the 12th day of July last past, and for and during such longer time or

term, if any, as may be necessary to complete the said intended voyage up to the day of her final discharge; and whereby, after covenanting for the payment of the freight for and during the said six months, at the times and in manner therein mentioned, the said H. C. Sempill did covenant that the freight for any period beyond the said six months shall be paid in London by the freighter or his agents, as in the said charter-party mentioned; and whereas the said H. C. Sempill hath paid or secured to be paid the said freight for the space or period of six months, commencing from the 20th of August last; and the said H. C.

[*113] Sempill being about to leave England in the said ship, I have consented to guarantee the owners of the said ship the payment of the said freight, to commence after the said period of six months, which six months is to be accounted from the 20th of August last past; I do hereby guarantee unto you, on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use or hire of the said ship which shall or may become due and payable from the said H. C. Sempill for any period beyond the said six months, pursuant to such charter-party, such period of six months to commence from the 20th of August last, according to the terms and conditions of the said charter-party; and in default of the payment thereof as aforesaid by the said H. C. Sempill, or his agents, I hereby undertake and agree to pay the same on demand. Dated London, this 6th day of October, 1829. Yours, &c."

And the defendant, at the foot of the said guaranty, wrote and signed the following undertaking: "I undertake to get a copy of the above guaranty duly signed by Thomas Potter Macqueen, Esq., M.P., and within a week delivered to Mr. Brittan. J. P. Beavan."

A witness stated that the memorandum on the charter-party, and the undertaking of the defendant to get the signature of Mr. Macqueen to the guaranty for the payment of the freight, were so signed reciprocally, in consideration the one of the other.

After the transactions which took place at that meeting, the ship set sail and left England on her voyage, on the 10th of October, 1829.

The defendant never got a copy of the above-mentioned guaranty signed by T. P. Macqueen, although repeated applications were made by the plaintiffs to the defendant for that purpose; nor did T. P. Macqueen ever sign the same. But the defendant proposed to the attorney for the plaintiffs, that he would, himself, [*114] in lieu of the guaranty by T. P. Macqueen, sign the following letter; and he did, in the month of November, 1830, write and sign a letter addressed to W. S. Jacques, of which the following is a copy:

"Sir,—In consideration of your having, on behalf of yourself and other owners of the ship called the Warrior, entered into a charter-party of affreightment with Mr. H. C. Sempill, for a voyage of the said ship to Swan River and Sydney, New South Wales, whereby it is agreed that the said ship shall remain and continue in the service of the said freighter for and during the term or space of six calendar months at least, to reckon and be accounted from the 12th of July last past, and for and during such longer time or term, if any, as may be necessary to complete the said intended voyage up to the day of her final discharge; and whereby, after covenanting for the payment of the freight for and during the said six months, at the times and in manner therein mentioned, the said H. C. Sempill did covenant that the freight, for any period beyond the said six months, shall be paid in London by the freighter or his agents, as in the said charter-party mentioned; and whereas the said H. C. Sempill hath paid or secured to be paid the said freight for the space or period of six months, commencing from the 20th of August last, and the said H. C. Sempill being about to leave England in the said ship, I have consented to guarantee the owners of the said ship the payment of the said freight, to commence after the period of six months, which six months is to be accounted from the 20th of August last past; I do hereby guarantee unto you on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use or hire of

the said ship or vessel, which shall or may become due and payable from the said H. C. Sempill for any period beyond the six months, such period of six months to commence *from the 20th of August last, according to the terms and conditions of the said charter-party; and in default of pay. [*115] ment thereof as aforesaid, by the said H. C. Sempill or his agents, I hereby undertake and agree to pay the same on demand: it being understood that I am not to be bound by the commander's certificate alone of the amount of freight due, without further proof of such amount being due. Dated the 6th of October, 1829. Yours, J. P. Beavan. London."

The ship remained in the service of H. C. Sempill, under the said terms, until the 15th of June, 1830, when she finally discharged her cargo at Sydney, New South Wales.

There was 1557*l.* 9*s.* 8*d.* due from H. C. Sempill to the plaintiffs, for freight of the ship for a period beyond the six months, commencing from the 20th of August, 1829, and the defendant had notice thereof before the commencement of the action, and had refused to pay the same.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiffs were entitled to recover under all or any one or more of the counts of the declaration in this action. If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict was to stand, either for the said sum of 1557*l.* 9*s.* 8*d.*, or for nominal damages, as the Court should direct, with liberty to the plaintiffs to enter it up on any one or more of the said counts as might be thought fit. But if the Court should be of opinion that the plaintiffs were not entitled to recover in this action, then a nonsuit was to be entered.

The case was argued in Easter term by *Wilde*, Serjt., for the plaintiffs, and *Coleridge*, Serjt., for the defendant.

On the part of the defendant the following objections were raised.

*First, that the charter-party produced in evidence was misstated [*116] in the first count. It is not sufficient in pleading to set out a deed in *hæc verba*; it must be set out according to its legal effect: 2 Wms. Saund. 97, b (note). The legal effect of the charter-party produced in evidence was, an agreement between Jacques, on the one side, and Sempill, the freighter of the ship, on the other; for one party cannot bind another by deed: *Harrison v. Jackson*, 7 T. R. 207; and though the deed be adopted by the other, the one who executes it must sue alone: *Metcalfe v. Rycroft*, 6 M & S. 75; *Berkeley v. Hardy*, 5 B. & C. 355; *Steiglitz v. Egginton*, 1 Holt, N. P. C. 141. But the declaration here alleges that by the charter-party, Jacques, acting on behalf of himself and the other plaintiffs, agreed with Sempill; stating it therefore, in effect, to be an agreement, not between Jacques and Sempill, but between all the plaintiffs and Sempill.

Secondly, As the plaintiffs, according to the authorities cited, could not have sued Sempill upon the charter-party, neither can they sue the defendant for a cause of action arising out of such charter-party. There is no consideration accruing to them for the defendant's supposed liability.

Thirdly, The consideration, as alleged, has not been proved. Part of that consideration is, that the plaintiffs would allow Sempill to leave England in the ship without giving the security that had been required; and it is nowhere stated, in the special case, that Sempill departed without giving such security.

Fourthly, The promise on which the action is brought is a promise to answer for the debt, default, or miscarriage of another; and therefore under the statute of frauds no action can be maintained upon it because the consideration for the promise, as well as the promise *itself, does not appear in writing, either on the undertaking, or any of the documents connected with it: *Coe v.* [*117] *Duffield*, 7 B. M. 252; *Boehm v. Campbell*, 3 B. M. 15; *Benson v. Hippus*, 1 M. & P. 246. No consideration appears here. The plaintiffs could not have

sued on the deed set out, Roll. Abr. *Faits*, F. pl. 1, 2; and even if they could, their agreement that the hire of the ship should commence from the 20th of August, instead of an earlier period, did not exempt Sempill from any portion of the amount of hire for which he might be supposed to be liable, but only shifted the period in respect of which it was to be paid.

Lastly, Assuming for the sake of argument, that the defendant is liable to the plaintiffs upon his promise, as collateral to the charter-party, on which Jacques only could have sued, yet as the intended guaranty by Macqueen, which the defendant has failed to procure, is a guaranty upon which, for want of a consideration expressed on the face of it, the plaintiffs could not have recovered under the statute of frauds, they can recover no more than nominal damages against the defendant. The guaranty to be signed by Macqueen expresses none but bygone considerations. The same objection applies to the guaranty signed by the defendant.

For the plaintiffs it was answered,

First, That the effect of the charter-party was correctly described as an agreement by Jacques on behalf of the other owners, on which Jacques was the party legally entitled to sue. But great latitude is allowed by the Courts in the statement of matters merely introductory to the contract on which the plaintiff sues: [*118] *Purcell v. McNamara*, 9 East, 157; *Phillips v. Shaw*, 4 B. & Ald. 435; *Stoddart v. Palmer*, 3 B. & C. 2; *Ditcham v. Chivis*, 4 Bingh. 706; *Frith v. Gray*, 4 T. R. 561, note.

Secondly, That even admitting the plaintiffs could not have sued on the charter-party, they might, nevertheless, be competent to sue on an independent agreement made by the defendant with them, on a matter collateral to the charter-party.

Thirdly, That it might be collected from the special case, that the whole of the consideration alleged for the defendant's separate agreement had been proved, for it appeared that Sempill had been allowed to sail upon the defendant's promise to procure Macqueen's guaranty; and it must be thence inferred that he had sailed without giving the security originally required.

Fourthly, That the defendant's promise was not an undertaking for the default, debt, or miscarriage of another, but an original promise to procure a guaranty for the plaintiffs in case of their renouncing certain claims they might have enforced against Sempill; for which promise such renunciation afforded a sufficient consideration: and,

Lastly, that there were sufficient considerations for the defendant's guaranty, and the guaranty to be given by Macqueen; and that such considerations—being in substance the same as those on which the defendant's promise was given—sufficiently appeared upon Macqueen's guaranty, or the documents connected with it. Among others, the defendant's letter of the 2d of October, 1829, which being written by the defendant as attorney for Macqueen, may be considered as if it had been signed by Macqueen himself. In the construction of [*119] such documents, considerable inducements are *always made in favor of the consideration, and in support of the contract: *Newbury v. Armstrong*, 6 Bingh. 201; *Stadt v. Lill*, 9 East, 348; *Coe v. Duffield*, 7 B. M. 252; *Redhead v. Cator*, 1 Stark. 14; *Wilson v. Hart*, 1 B. M. 45; *Benson v. Hippinus*, 1 M. & P. 246; *Boehm v. Campbell*, 3 B. M. 15; *Pace v. Marsh*, 1 Bingh. 216.

Cur. adv. vult.

TINDAL, C. J. This is an action of assumpsit, brought by the plaintiffs to recover damages for the breach, by the defendant, of a promise to procure one Thomas Potter Macqueen to sign a written guaranty, and to cause the same to be delivered to the plaintiffs within a certain time. The plaintiffs have also declared in some of the counts upon a guaranty given by the defendant himself; but it appears to us that the principal question arises on the promise to procure the guaranty of another, as set out in the first count of the declaration.

Many objections have been urged against the plaintiff's right to recover upon

that count. In the first place, it is objected, that the charter-party set out in that count is misdescribed. The first count states it to be a charter-party under seal, "made between Richard Singer Jacques for and on behalf of himself and the said plaintiffs, other the owners of the said ship or vessel called the *Warrior*, of the one part, and Sempill, the freighter of the ship, of the other part," and proceeds to allege, that by such charter-party "it was witnessed that Jacques acting as aforesaid, did agree with the freighter" that the ship should receive a cargo from the freighter, and sail on the voyage specified in the charter-party.

The charter-party having been pleaded in the very *terms in which it is made, the objection of misdescription, which resolves itself into an [*120] objection of variance between the deed as stated on the record, and the deed produced in evidence, cannot apply to the present case. But it is further urged in argument that the party who pleads a deed, must plead it according to its legal operation, and not in the words of the deed itself; and that by pursuing the latter course, the deed is improperly set out. Now, although it is undoubtedly true (see the cases collected in the note to 2 Wms. Saund. 97, b), that where a deed may operate different ways, the party who pleads it is bound to plead it as he intends to use it, and not to leave it to the Court to draw the inference from the deed itself; yet, in the present case, the plaintiff has in effect so pleaded it: for the other owners not being made parties to the deed, and not having executed it, the legal operation of the charter-party was, that it was the agreement of Jacques only, though made as the deed purports, and as the declaration states, on behalf of himself and the other joint owners of the vessel.

It is objected, secondly, that upon the face of the count itself the present action must fail, because as the persons who are plaintiffs in this action could not have sued Sempill upon the charter-party, so they cannot sue upon the cause of action stated in that count. It must be admitted on the authority of the cases cited in the argument, that the deed not having been executed by the several plaintiffs, and the plaintiffs not having been expressed to be parties to it, they could neither sue nor be sued thereon. But as the present action is not brought upon the charter-party, but upon a new contract made directly between the defendant and the plaintiffs, which contract is perfectly collateral to the contract contained in the charter-party, we think it is by no means a consequence that because the plaintiffs could not have *sued upon the original charter-party, therefore they cannot become plaintiffs in an action [*121] brought on the new contract.

The ground of the present action is not that the former charter-party was executed by the plaintiffs, but that a charter-party had been executed by one of the joint owners for the rest, and that all the joint owners had acted upon the stipulations of that charter-party; that they had allowed the freighter to take possession of the ship, in pursuance of the charter-party; to put his goods on board the ship; had allowed the ship to sail, and the voyage to be performed; and had, in fact, adopted the charter-party in the same manner, and to the same extent, as if they had been made parties to, and had executed the same. Under these circumstances, we see no objection if a collateral promise is made between the defendant and the plaintiffs for the payment of the freight, that such promise should be made the ground of action in the name of all the joint owners to whom such promise was made, notwithstanding the same plaintiffs could not have maintained an action in their own name for the non-compliance with the stipulations in the original charter-party. No authority has been cited to that effect, and we see no objection on general principle to such their right to sue.

It is thirdly objected, that the consideration, as stated in the first count, has not been proved. Upon looking, however, at the terms in which the consideration is alleged, and at the facts as stated in the special case, we think there is no substantial or material variance between them. The consideration is alleged to be, first, "in consideration of the premises." This includes the execution of the charter-party by Jacques on behalf of himself and the other part owners

of the ship, and the disputes and differences which had taken place as to the freight. Now, these facts are proved by the *written documents set [*122] forth in the case, and by the allegations therein contained. A further consideration for the promise is stated to consist of the consent and agreement of the plaintiffs, that the period of hire of the ship should commence from the 20th of August, 1829, and the payment of freight from the same day, and that Sempill should not be liable for any charge for the freight antecedently to that day. This, again, is proved from the statements in the case. And, lastly, it is alleged, as part of the consideration, that the plaintiffs would permit Sempill to leave England in the ship without giving the security that had been required. Now, although this is not stated expressly and in terms in the special case, yet it appears to us to be the necessary inference from the two facts found in the case, that the plaintiffs had refused to allow the ship to go to sea until the settlement of the disputes and differences; and that she was afterwards, upon the undertaking of the defendant to get Macqueen's guaranty, permitted to sail and to leave England on her voyage on the 10th of October, 1829. The consideration, therefore, as stated in the first count, appears to us to have been substantially, if not accurately, proved.

It is next objected, that the promise on which the action is brought is a promise to answer for the debt, default, or miscarriage of another person; and that no action is maintainable upon it according to the well-known rule of law, because the consideration of the promise does not appear in writing as well as the promise itself. The promise on which the first count is framed is an undertaking by the defendant to get a copy of a guaranty which is written above it, duly signed by Mr. Potter Macqueen, and, within a week afterwards, delivered to the plaintiffs' agent. The immediate consideration for that promise was the removal by the plaintiffs of a stop which they had put upon the vessel, [*123] then lying in St. Katharine's Docks, and the permitting her to sail on the voyage before the security was signed. Under these circumstances the contract appears to us not to be a contract to answer for the debt, default, or miscarriage of any other person, but a new and immediate contract between the defendant and the plaintiffs. If Mr. Macqueen had signed the guaranty, that guaranty would, indeed, have been within the statute of frauds; for his is an express guaranty to be answerable for the freight due under the charter-party, if Sempill did not pay it. But no person could be answerable on the promise to procure his signature but the defendant. Sempill had never engaged to get the guaranty of Macqueen, nor had Macqueen engaged to give it. There was, therefore, no default of any one for which the defendant made himself liable; but he did so simply upon his own immediate contract. For, as to any default of Sempill in paying the freight, the action, on the undertaking of the defendant, could not be dependent on that event; for it would have been maintainable if the guaranty were not signed at any time after the day on which the defendant engaged it should be given, that is, long before the time when the freight became payable.

But we think the intended guaranty of Macqueen is, itself, an agreement within the statute of frauds; and consequently, in order to ascertain the amount of damage which the plaintiffs have sustained by reason of its not having been given, we must be satisfied that it is such a guaranty as could itself be made the ground of an action. But, after careful examination, we think there is no consideration upon the face of it, either directly expressed or to be supplied by fair and necessary inference. All expressions in it refer to matter that is past, and not to anything that is future or prospective. The guaranty states that [*124] the plaintiff Jacques *had entered into the charter-party which is there recited: it then states that Sempill had paid the six months' freight, and that Sempill was about to leave England in the ship. This is the whole of the written letter which can, by any construction, be held to refer to consideration. But this is no more than a statement of facts which had already taken place at

the time of the guarantee given. It is all past and bygone consideration. Nothing appears on the agreement to move for the promise on the part of Macqueen, which is either beneficial to Macqueen or detrimental to the plaintiffs. Reading, therefore, this letter of guaranty with the desire to discover the mind and intention of the writer, we cannot extract from it, by any necessary intendment, any ground of consideration as between the plaintiffs and Mr. Macqueen; and we cannot think the letter of the defendant, written on the 2d of October, could be called in aid to make out such consideration, merely upon the statement in the case that the defendant was, at that time, "acting as the attorney for Sempill and for Mr. Macqueen;" such a statement by no means being equivalent to what is required by the statute of frauds,—that it must be signed "by the party to be charged therewith, or some other person thereunto by him lawfully authorized." We, therefore, think that, if an action had been brought against Macqueen upon his guaranty, such action must have failed. And the consequence is, that the present defendant is liable to a verdict against him on the first count, upon the ground that he has broken an original contract; but that he is liable to nominal damages only, upon the principle laid down in the case of *Marzetti v. Williams and Others*, 1 B. & Adol. 415.

As to those counts of the declaration which are *framed upon a direct guaranty given by the defendant himself, it would be sufficient to ob- [*125] serve that his contract is liable to the same objection as that above stated to the guaranty of Macqueen. But it may further be answered, that the defendant's guaranty was not given until after the ship had been allowed to sail, that is, until after the consideration had taken place. For the letter was not written until the month of November, whereas the ship was allowed to sail on her voyage on the 10th of October, preceding. And although it may be true, as was urged in argument, that it is of no consequence that the agreement was not reduced to writing till long after it was made, nothing more being necessary than that an agreement in writing should be produced in evidence at the trial of the cause; yet, in this case, the defendant's guaranty was not only not written, but never entered into or given until long after the ship had been allowed to sail, that is, long after the alleged consideration for giving it had taken place. His guaranty was never thought of at the time, nor until long after, when it was found impossible to get Mr. Macqueen's. Such guaranty, therefore, appears to have been given without any consideration whatever.

Upon the whole, therefore, we think the verdict ought to stand for the plaintiffs, but that the damages ought to be reduced to 1s.

Judgment for plaintiffs accordingly.

*SIMONS and BATTLETT v. FARREN. June 6.

[*126]

Carrying on the business of a retail brewer, Held to be no breach of covenant not to carry on the business of a common brewer, or retailer of beer.

COVENANT for two years and a half rent, due by virtue of an indenture of demise of the 9th of July, 1830, between plaintiffs and defendant.

The deed being set out on oyer, disclosed a covenant by the defendant that he would not, at any time during the term thereby granted, set up, use, exercise, carry on, or follow, or permit or suffer to be set up, used, exercised, carried on, or followed, in, upon, or about the messuage, tenement, or dwelling-house and premises thereby demised, or any part thereof, the trade or business of (among others) a retailer of beer, ale, or spirituous liquors, without the leave, license, and consent in writing of the said Simons and Battley, their executors, administrators, and assigns, first had and obtained.

The defendant then pleaded that long before the making of the said indenture of lease in the declaration mentioned, one Robert Chantrell and Mary Ann

his wife, were seised, in right of the said Mary Ann, in their demesne as of fee, of and in the said messuage, tenement, or dwelling-house in the declaration mentioned, and being so seised theretofore, to wit, on the 1st of August, 1820, at, &c., by a certain indenture then and there made between Robert Chantrell and Mary Ann his wife of the one part, and Stephen Ponder of the other part (which said lease, sealed with the seals of the said Robert Chantrell and Mary Ann his wife, the defendant then brought there into Court), the said Robert Chantrell and Mary Ann his wife did demise, lease, set and to farm let the [*127] said messuage, tenement, or dwelling-house, *with the appurtenances in the declaration mentioned, unto Stephen Ponder, his executors, administrators, and assigns, to have and to hold the same with the appurtenances unto the said Stephen Ponder, his executors, administrators, and assigns, from the 24th day of June then last, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be completed and ended. And Stephen Ponder for himself, his heirs, executors, administrators, and assigns, did in and by the last-mentioned indenture, amongst other things, covenant, promise, and agree with and to Robert Chantrell and Mary Ann his wife, and the heirs and assigns of the said Mary Ann, that he, Stephen Ponder, his executors, administrators, or assigns, should not at any time during the term by said last-mentioned indenture granted, set up, use, exercise, carry on, or follow, or permit, or suffer to be set up, used, exercised, carried on, or followed, in, upon, or about, the messuage, tenement, or dwelling-house and premises thereby demised or any part thereof, the trade or business of (amongst others) a common brewer, or retailer of beer, without the leave, license, and consent of said Robert Chantrell and Mary Ann his wife, and the heirs and assigns of said Mary Ann, in writing under his, her, or their hands or hand for that purpose first had and obtained. And in and by the said last-mentioned indenture, it was provided always, and the said last-mentioned indenture was declared to be upon the express condition, that if the said Stephen Ponder, his executors, administrators, and assigns, should not in all things well and truly perform, fulfil, observe, and keep all and every the covenants, clauses, conditions, provisos, and agreements, in the said last-mentioned indenture contained on his and their parts and behalves, to be paid, performed, fulfilled, observed, and kept, then and [*128] from thenceforth, and in either of the said cases so happening, *the term estate and interest and lease by said last-mentioned indenture granted should from thenceforth cease and determine and be utterly void, and from thenceforth it should and might be lawful to and for said Robert Chantrell and Mary Ann his wife, and the heirs and assigns of said Mary Ann, into or upon the said messuage, tenement, or dwelling-house, or any part thereof, in the name of the whole wholly to re-enter. That the plaintiffs, after the making of the said indenture in the declaration mentioned, to wit, on, &c., at, &c., by a certain license or consent in writing did authorize and permit the defendant to use and exercise the trade of *retail brewer* upon the messuage, tenement, or dwelling-house in the declaration mentioned; that, on the day and year last aforesaid, at, &c., the defendant entered on the said premises demised to him as aforesaid, and did then and there before any of the said rent in the declaration mentioned became due and payable, use, exercise, carry on, and follow the trade of a retail brewer; and that whilst he was in the possession and enjoyment of the premises as aforesaid, and whilst he was so using, exercising, carrying on, and following the trade of a retail brewer as aforesaid, and by reason and on the ground that the defendant so carried on the business of a retail brewer as aforesaid, and that a forfeiture of the said lease secondly above mentioned was occasioned thereby, one Robert Dennis Chantrell, having good right and title to the demised premises with the appurtenances, as eldest son and heir-at-law to the said Mary Ann Chantrell, and before any part of the rent in the declaration mentioned became due and payable, to wit, in Michaelmas term, in the first year of William IV., commenced an action of trespass and

ejectment in the Court of our Lord the King, before the King himself at Westminster, in the name of one John Doe as lessee of him the said Robert Dennis Chantrell, against one Richard Roe, *a casual ejector, for recovering the possession (amongst other things) of the said messuage, tenement, or dwelling-house in the declaration mentioned, with the appurtenances, and caused a declaration in the said action to be delivered to the defendant, then tenant in possession of the demised premises, with the appurtenances; and such proceedings were thereupon had in the said Court that he, R. D. Chantrell, in the name of the said John Doe his lessee aforesaid, to wit, in the term of the Holy Trinity, in the 1st year of William IV., by the consideration of the same Court, recovered against the said Richard Roe a certain term then to come (amongst other things) of and in the said demised premises, with the appurtenances; and afterwards, in the same term, a certain writ of our said Lord the King issued out of the said Court, upon the said judgment, to cause John Doe, as lessee of R. D. Chantrell, to have full possession then to come, among other things, of and in the said demised premises, with the appurtenances as aforesaid; and thereupon the defendant, being so tenant in possession of the said demised premises, with the appurtenances, afterwards and before any part of the rent became due from the defendant to the plaintiffs, to wit, on the 5th of August, 1831, at, &c., according to the form of the statute in that case made and provided, did attorn and become tenant to said R. D. Chantrell, amongst other things, of and for the said messuage, tenement, and dwelling-house, with the appurtenances, and held and enjoyed the same as tenant to the said R. D. Chantrell from thenceforth, whereby the term of years in the indenture of lease in the declaration mentioned from thenceforth wholly ended and determined, and that, the defendant was ready to verify, &c.

Upon demurrer the question was, whether carrying on the trade of a retail brewer was, under a covenant *not to carry on the trade of common brewer, or of retailer of beer, such a forfeiture of the plaintiff's lease- [*130] hold interest in the premises, as to justify the defendant in suffering judgment to go by default in the ejectment described in his plea.

The Court having called on

Watson to support the plea, he contended that the trade of a retail brewer and of a retailer of beer, were in effect, the same trade; and that, though every retailer of beer was not a retail brewer, yet every retail brewer was a retailer of beer. But

The Court referring to 5 G. 4, c. 54, s. 6,—by which it is enacted, "That it shall and may be lawful for any brewer or brewers of strong beer only in Great Britain for sale, who shall have taken out and paid for his, her, or their license to brew, at and after the rate of 2*l.* at the least, to retail such beer from the premises where such beer is or has been brewed, and for any person not being a brewer of beer, either or sale for private use, to sell strong beer only brewed by any other brewer, in casks containing not less than five gallons, or in not less than two dozen reputed quart bottles at one time, upon such brewer or other person respectively taking out under the provisions of this act such respective excise license for that purpose,"—said, that retail brewer did not *ex vi termini* mean a retailer of beer; and there being no covenant against carrying on the trade of retail brewer, the defendant might have resisted the ejectment, and, if so, the ejectment was no answer to the plaintiff's demand. Whereupon *Watson* prayed and obtained

Leave to amend, on payment of costs.

*HAMMOND v. HOOLEY. June 6.

[*131]

By 4 G. 4, c. 62, post-masters are to pay for horses let out for a distance not exceeding eight miles, a duty of 1*s.* 9*d.* a horse, or one-fifth of the sum charged to the hirer, and are to make a return to the stamp-office of the number of horses let, the number of miles, the amount charged to the hirer, the fifth part of that amount, or 1*s.* 9*d.* for each horse. For a false return the post-master is liable to a penalty; and the farmer

of the duty may compel him to verify his return on oath. Defendant returned, as the amount of duty for two horses let out for five miles, 2s. 6d., and omitted to state the sum charged to the hirer:

Held, that, notwithstanding such omission, he had sufficiently indicated his election to pay the duty of one-fifth, and that the farmer could not claim 1s. 9d. for each horse.

THIS was an action of assumpsit for money had and received for post-horse duties. At the trial before BAYLEY, B., Chester, Spring assizes, 1833, a verdict was found for the defendant. Upon a motion for a new trial, it was directed that the opinion of the Court should be taken on the following case:—

The plaintiff was, during the whole period over which the demand extended, the farmer of the post-horse duties for the counties of Chester and Lancaster. The defendant was a post-master, letting out horses for hire at Knutsford in the county of Chester, and within the district of the plaintiff. From the 7th of February, 1828, to the 25th of January, 1831, the defendant let to hire, on various occasions, divers horses, to go no greater distance than eight miles from the place of letting to hire: on each of those occasions such horses were let to take out and bring back the persons hiring them; and, on each occasion, actually did bring back one or more persons.

Blank forms for the weekly returns of duties, prepared according to the directions of the eighth section of the 4 G. 4, c. 62, were from time to time delivered to the defendant by the collector for the plaintiff, which were filled up by the defendant, and periodically delivered back to the collector.

[*132] *In those returns such lettings as are above described, viz., to go no greater distance than eight miles, and bring back, were entered according to the following scale:—

Month and Day of the Week.	Day of Month.	Description of Carriage.	No. of Carriage.	Christian and Surname of Driver, also of the Traveller, if hired by the Day, Distance not ascertained.	To what Place hired to go and return, if so hired.	Sum charged.	Post Work.		Day Work.			Amount of Duty.
							No. of Horses.	No. of Miles.	No. of Horses.	No. of Miles.	No. of Days.	
December	26	Chaise		Charles	Castle and back.		2	5				s. d.
	29	Ditto		Kiljah	Tabley and back.		2	3				2 6
												2 0

The sum thus returned as the amount of duty payable upon such lettings to hire respectively were, every six weeks during the whole period covered by this action, paid by the defendant to the collector of the plaintiff.

In none of the entries so made by the defendant and delivered to the plaintiff which relate to the several lettings above described was there any statement of the sum charged to the hirer for such letting to hire.

By the second section of the 6 G. 4, c. 62, there is imposed for every horse let for hire, to go no greater distance than eight miles from the place of letting for hire every such horse, a duty of one-fifth part of the sum charged for such letting for hire, or 1s. 9d. for every horse: and upon every horse let for hire to go no greater distance than eight miles from the place of letting, where such horse shall not bring back any person, and shall not deviate from the usual line of road between the place of letting and the place to which every such horse shall be hired to go, the sum of 1s.

By the eighth section of the act above referred to, it is enacted, "That the commissioners, at the time *of issuing any license, shall deliver or cause [*133] to be delivered to every post-master, or other person to whom such license shall be granted as aforesaid, printed or written papers, entitled 'Stamp Office

Weekly Accounts,' which shall be adapted for the insertion of the following particulars relating to the horses which may be let for hire : viz., the day of the month, the month and the year of such letting for hire, the names of the towns or places from which and to which, or from which and to which and back again, according as the hiring may be, the number of every carriage required by this act to be numbered, the Christian and surname of every postilion or driver employed, the amount of the sum charged for or in respect of every letting for hire, the number of horses let for hire, the number of days, and the number of miles for which such horses shall be let for hire, and the amount of the duty payable for and in respect of every such letting for hire, as the case may be or shall require, according to the following, or such other form as the said commissioners shall judge convenient for keeping the accounts." By the twelfth section, the post-master is to give bonds in a penalty for rendering a true account; and by sect. 30, it is enacted, "That from and after the 31st day of January, 1824, every person letting horses for hire as aforesaid, shall insert and set forth in his stamp office weekly account, the several particulars following (that is to say); whenever he shall let for hire, by the mile, any horse, the day of the month, the month and year, for which such horse shall be let for hire, the names of the towns or places from which and to which, or from and to which and back again, such horse shall be hired to go, the number of every carriage which he shall furnish with any such horse (if by this act required to be numbered), the Christian and surname of every postilion or driver employed therewith, the number of *horses so let for hire, and also the amount of the duty payable for and [*134] in respect of every such letting for hire; and whenever such person letting horses for hire as aforesaid, shall let any horse for hire for a day or less period of time, to be used within the distance of eight miles from the place of letting for hire such horse as aforesaid, for the purpose of drawing any carriage conveying any person as aforesaid, he shall insert and set forth, in his stamp office weekly account, the several particulars following (that is to say); the day of the month, the month and year, on which such horse shall be let for hire, the number of every carriage, if by this act required to be numbered, the Christian and surname of every postilion or driver employed with such horse, the number of horses so let for hire, and the amount of the sum charged for such letting for hire; and shall be answerable and accountable for one-fifth part of such sum of money so charged, or for the sum of 1s. 9d. for each horse so let for hire; and shall enter in his stamp office weekly account, such one-fifth part of such sum charged, or the sum of 1s. 9d. for each horse, as and for the duty payable in respect of any horse so let for hire as aforesaid; and whenever such person or persons letting horses for hire as aforesaid, shall let for hire any horse to go no greater distance than eight miles from the place of letting for hire such horse, where such horse shall not bring back any person or persons, and shall not deviate from the usual line of road between the place of letting, and the place or distance to which such horse shall be hired to travel or go for the purpose of drawing any carriage or vehicle conveying any person as aforesaid, he shall insert and set forth in his stamp office weekly account, the several particulars following (that is to say); the day of the month, and month and year, on which such horse shall be so let for hire, the number of every carriage, if by this act required to be numbered, the Christian and surname of *every postilion and driver employed with such horse, the number of horses so let for [*135] hire, and also the amount of the duty payable for and in respect of every such letting for hire as aforesaid."

The duty prescribed by this section is the same as that in the second.

The statute then goes on to prescribe the mode of weekly accounts in cases of lettings of horses for less than twenty-eight days: and in cases of lettings of horses for twenty-eight days and more.

By the thirty-third and thirty-fourth sections, the farmer of the duty is authorized to require the post-master to verify his account on oath before a magistrate.

The question for the opinion of the Court was, whether by virtue of the act of the 4 G. 4, c. 62, the defendant was liable to pay in respect of each letting to hire of any horse for no greater distance than eight miles, such horse being hired to bring back, and actually bringing back some person, the sum of 1s. 9d. for each horse so let to hire as aforesaid. If the Court should be of opinion that he was so liable, then a verdict was to be entered for the plaintiff for 20l. 5s. 3d., being the difference between the several sums paid, and those which on that principle ought to have been paid by the defendant to plaintiff, for the duties on such lettings.

If the Court should be of a contrary opinion, then the verdict was to stand for the defendant.

Lloyd, for the plaintiff, contended that the post-master having an option to pay 1s. 9d. a horse, or one-fifth of the whole sum charged, where the horses are let for a distance of less than eight miles, and being called on to return the whole sum charged or 1s. 9d. for each horse, must, if he omits in his weekly return to specify the whole sum charged, be taken to have elected to pay the 1s. 9d. a horse.

[*136] **Jervis*, contra. It is clear from the weekly account that the post-master has not elected to pay 1s. 9d. a horse, since he returns in one case 2s. 6d. for two horses, and in another, 2s. And his option is not determined by the mere informality of omitting to state the gross sum charged to the hirer of the horses. For that informality he may be liable to a penalty, if it amounts to an omission to render a true account. But the post-master can have sustained no inconvenience, for he may estimate the gross amount by the number of miles; and at all events may summon the post-master before a magistrate to verify his account on oath.

Lloyd. The farmer cannot avail himself of the penalty in the bond conditioned for rendering a true account: that penalty goes to the crown: nor will the number of miles afford any certain criterion for discovering the sum charged to the hirer of the horses. In the absence of any gross sum charged to the hirer, the number of horses hired is the only certainty on which the farmer of the duty can calculate; and for that number therefore the post-master must be taken to have made his election.

TINDAL, C. J. The question on this cause arises on the construction to be put on two clauses of the act 4 G. 4, c. 62, compared with the form required to be delivered by the post-master under the eighth section of the act. By the second section of the act, the duty required to be paid is, "for and in respect of every horse let for hire, to go no greater distance than eight miles from the place of letting for hire every such horse, one-fifth part of the sum charged for such letting for hire, or the sum of 1s. 9d. for every horse let for hire."

An option, therefore, is given to the party charged with the duty, whether he [*137] will pay a fifth of the whole sum earned, or 1s. 9d. for each horse let out; and the question is, whether the post-master here has made his option so as to show that the fifth of the sum earned is the duty for which he meant to be charged. He has filled up the blank in the form prescribed by the statute as follows: No. of horses, 2; No. of miles, 5; amount of duty, 2s. 6d.: No. of horses, 2; No. of miles, 3; amount of duty, 2s.

It is clear from this that he has not elected to be charged in the duty of 1s. 9d. for each horse, since that would have amounted to 3s. 6d. If he has not elected to be charged at that rate, how are we to say he shall be so charged?

It is answered, that he has omitted to state the gross sum earned, and that without such a statement the farmer of the duties has no means of ascertaining whether he has been wronged or not. That may be so; but it does not follow that, against the clear evidence that the post-master has not elected to pay the duty of 1s. 9d. a horse, we are to draw the uncertain inference that he intended to pay it, because he has not stated the amount on which the duty of one-fifth is chargeable. Looking at the number of miles specified, there is every reason

for believing he has returned a fifth of the entire sum charged; and we are not to assume he has committed a fraud, when, if the fact had been so, the farmer of the duty had the means of discovering it by a summons to appear before a magistrate, and verify on oath the truth of the return. We think that the affirmative allegation to be made out by the plaintiff has not been established, and that therefore our judgment must be for the defendant.

PARK, J. I am of the same opinion; and the impression which I entertained at first has been changed in the course of the argument. No doubt the *defendant ought to have specified the gross sum on which the duty of one-fifth is calculated. But, looking at all the clauses of the act, and seeing that [*138] no fraud was intended, or could have been committed, I think our judgment must be for the defendant. It is manifest the defendant has not elected to pay the duty of 1s. 9d. a horse, for the sum to be returned would then have been 3s. 6d. instead of 2s. 6d.; and, seeing that the distance specified is only five miles, it is probable that the duty of one-fifth has been duly returned. At all events, it was easy for the collector on those data to ascertain the actual amount; and if he remained in any uncertainty, he might have summoned the defendant before a magistrate.

GASELEE, J. Upon reading the case, I thought the plaintiff was entitled to the duty of 1s. 9d.; but, after hearing the argument, I do not think the statute so clear as to induce me to differ from the rest of the Court.

BOSANQUET, J. I am of opinion that, upon these facts, the defendant is not liable to be charged the duty of 1s. 9d. a horse. It is admitted he had an option to pay either at the rate of 1s. 9d. a horse, or one-fifth of the whole sum earned; and it is contended that, on the face of this return, he has made his option. Now, the return mentioning only two horses, shows negatively that he has not elected to pay the duty of 1s. 9d. But it is urged, that if it appears from the return he does not mean to be charged at the rate of one-fifth, it follows that he is liable to pay the duty of 1s. 9d.; and it is said, his omission to specify the gross sum earned shows that he does not mean to be charged at the rate of one-fifth of that sum. But it is not because he has omitted to do something which by the means appointed *in the statute he may be com- [*139] pelled to do, that he is to be charged in a way in which he has clearly elected not to be charged.

The number of miles specified shows, however, that the sum returned is probably the fifth of the gross sum earned; and if the farmer of the duties was dissatisfied, he had only to say, "Fill up that column in the return, or I shall apply to a magistrate."

Judgment for defendant.

STRETTON v. BUSNACH. June 6.

The plea of coverture, replication, that the husband was an alien, not a subject of this country by naturalization or otherwise, and at the time of the contract residing in France, that the defendant lived in this kingdom separate from her husband, that the plaintiff gave no credit to her husband, but contracted with her as a *feme sole*. Held, ill.

To debt for use and occupation

The defendant pleaded that, before and at the time of the making of the several supposed contracts in the declaration mentioned, she was the wife of one Moise Busnach, to wit, at, &c.

Replication, that the said Moise Busnach was an alien, born in foreign parts out of the allegiance of our lord the king, and within the allegiance of a foreign state, to wit, in the kingdom of Barbary, and not a subject of our said lord the king by naturalization, denization, or otherwise, to wit, at, &c.: That Moise Busnach, so being such alien born, long before and at the time of making the said several contracts in the declaration mentioned, and each

and every of them, and from thence hitherto lived and resided in parts beyond the seas, to wit, in the kingdom of France; and that, during all that time, the defendant lived in this kingdom, separate and apart from the said Moise Busnach, as a single woman, to wit, at, &c. : That the plaintiff did not [*140] give any credit to Moise Busnach, but contracted with *defendant as a feme sole, and on her sole credit; and that the defendant made the said several contracts in the declaration mentioned, and each and every of them as such feme sole as aforesaid. And that, the plaintiff was ready to verify. Wherefore, &c.

Rejoinder, that the said Moise Busnach, on the 1st of May, 1825, and from thence until and upon the 1st of July, 1825, lived and resided with the defendant as his wife within the kingdom of England, to wit, at, &c.

Demurrer and joinder.

Butt, for the defendant, contended that the replication was ill, there being nothing to show that the defendant's husband was an alien enemy, exile, civilly dead, or even that he intended permanently to reside abroad. The action, therefore, should have been against the husband, or, at least, he should have been joined for conformity: *Williamson v. Dawes*, 9 Bingh. 292; *Ex parte Franks*, 7 Bingh. 762; *Duchess of Mazarin's case*, 1 Salk. 116, 2 Salk. 646; *Walford v. Duchess de Piennes*, 2 Esp. 554.

Comyn, contra, relied on *De Gaillon v. L'Aigle*, 1 B. & P. 357, and contended that, where the husband is abroad and the credit is given to the wife, the wife may be sued alone. [TINDAL, C. J. *De Gaillon v. L'Aigle* is prior to *Marshall v. Rutton*, 8 T. R. 545. GASELEE, J. In *De Gaillon v. L'Aigle* it does not appear the husband was ever in England; here, the rejoinder shows he was.] Where it is clear the husband has no intention of returning, the circumstance that he has been once in England will not discharge the wife. If it were otherwise, she might perish for want of credit for necessaries. [BOSANQUET, [*141] J. That argument would apply equally to the wife of an *Englishman who went abroad. In *De Gaillon v. L'Aigle* it was averred that the wife traded generally as a feme sole.] Here, it may be collected from the rejoinder that the husband has been abroad eight years; and absence of such a length places the wife on the footing of a feme sole. But

The Court being of opinion that, upon the plea and replication, the defendant was entitled to judgment,

Comyn prayed and obtained

Leave to amend, on payment of costs.

PICKFORD and Others v. DAVIS. June 9.

Where a local turnpike act directs a higher or lower rate of toll to be collected in respect of the greater or lesser breadth of wheels, and where in addition to the tolls under such local act, the additional tolls in respect of breadth of wheels authorized to be taken by 18 G. 3, c. 84, have been collected and imposed, although erroneously, parties are not relieved from such additional tolls by 4 G. 4, c. 95, s. 6.

AT the trial before BOLLAND, B., Buckingham Spring assizes, 1833, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:—

In Hilary term, 1833, the plaintiffs, who were carriers, brought this action to recover back the sum of 3*l*. from the defendant, clerk to the trustees under an act of 1 & 2 G. 4, c. 85, passed the 28th of May, 1821, entitled, "An Act for amending and more effectually repairing the Highway between Hockliffe and Woburn in the county of Bedford, and for repairing the road leading through Woburn to Tickford Bridge in Newport Pagnell, in the county of Buckingham," as received by the said trustees to the plaintiff's use, under the following circumstances:—

A van of the plaintiffs', on four wheels, having the *fellies of the wheels [*142] of less breadth or gauge than four inches and a half from side to side at

the bottom or sole thereof, and drawn by four horses, on various days within three months next before the commencement of this action, passed through a turnpike or toll-gate legally erected upon the road leading through Woburn to Tickford Bridge, being part of the road in the said act mentioned; on each of those days the toll-gate keeper, by direction of the trustees, demanded at the said gate the sum of 6½d. for each of the horses drawing the van, and refused to allow the van and horses to pass through the gate before the plaintiffs had paid the sum of 6½d. for each of the four horses, although the plaintiffs on the said occasions, offered to pay the sum of 4½d. for each of the horses. The plaintiffs in consequence, under protest, paid the sum of 6½d. as a toll for passing through the gate; and the trustees thereby received 3l. more than they would have received if 4½d. only had been demanded and paid for each of the said horses.

Between the months of May and August, 1821, the toll actually demanded and received at each of the gates on the road under the same trust, leading through Woburn to Tickford Bridge, upon the plaintiffs' van, with the said wheels, drawn by four horses, was 4½d. for each of the horses drawing the same.

Between August, 1821, and May, 1822, and previously to the passing of the act of 3 G. 4, c. 126, the trustees and commissioners of the said turnpike road demanded and received from the plaintiffs, at the same gates, in respect of the plaintiffs' van and horses, a toll of 6½d. for each of the horses drawing the same; and in and continually from August, 1822, to April, 1832, the trustees took and collected on the said road in respect of the plaintiffs' van and horses the same amount of toll as they had taken and collected between August, 1821, and May, 1822.

*Between April and August, 1832, the toll demanded and received at each of the gates on the plaintiffs' van, drawn by four horses, was 4½d. [*143] for each horse drawing the same.

From August, 1832, the toll demanded and received on plaintiffs' van, drawn by four horses, was 6½d. for each horse drawing the same.

By the general turnpike act, 13 G. 3, c. 84, s. 23 (1778), the trustees of turnpike roads are required "to demand and take for every wagon, wain, cart, or carriage having the fellies of the wheels thereof of less breadth or gauge than six inches from side to side at the least at the bottom or sole thereof, and for the horses or beasts of draught drawing the same, one-half more than the tolls or duties which are or shall be payable for the same respectively."

Under the before-mentioned local act of 1 & 2 G. 4, c. 85, the tolls to be taken on the road in question, were, "for every horse or other beast drawing any wagon, wain, or such like carriage, having the fellies of the wheels of the breadth of six inches and upwards, and drawn by five or more horses or other beasts, the sum of 4d., and drawn by four, or any less number of horses or other beasts, the sum of 4½d. For every horse or other beast drawing any wagon, wain, or such like carriage, having the fellies of the wheels of less breadth than six inches, and drawn by four horses or other beasts, the sum of 4½d., and drawn by three or any less number of horses or other beasts, the sum of 3d.

By the general turnpike act of 3 G. 4, c. 126 (6th of August, 1822), all the then existing general turnpike acts were repealed; and by sect. 4, after reciting the great importance that one uniform system should be adhered to in the laws for regulating the management and maintenance of turnpike roads throughout the kingdom, it was enacted, that "from and after the 1st of January, 1823, all the provisions and enactments of that act should be extended [*144] to all acts of parliament then in force, and to all acts that should thereafter be passed for regulating, repairing, &c., turnpike roads." And by section 7, power was given to the trustees of all local acts to take, after the 1st of January, 1823, for every wagon, wain, cart, or other such carriage, having the fellies of the wheels thereof of less breadth than 4½ inches at the bottom or soles thereof, or for the horse or horses or cattle drawing the same, one-half more than the tolls

which were payable by such local acts for any carriage of the same description having the wheels thereof of the breadth of six inches.

By the general turnpike act of 4 G. 4, c. 95, s. 5 (19th of July, 1823), entitled "An Act to explain and amend the 3 G. 4, c. 126," it was enacted, "that where the trustees of any road should not, previously to the passing of the 3 G. 4, c. 126, have taken and collected the additional tolls directed by the 13 G. 3, and the local act should not have provided a scale of tolls applicable to the road, such trustees should, from the 1st of January, 1824, continue to take and receive for every wagon and other such carriage having the fellies of the wheels of less breadth than 4½ inches, the same tolls as were by such local act payable in respect of such wagon and other such carriage." And by the sixth section of the same act, it was enacted, "that where any local act should have a prescribed rate of toll in respect of the breadth of the wheels of carriages, and where the additional toll authorized to be taken by the 13 G. 3, c. 84, should not have been collected and imposed, the trustees should, after the 1st of January, 1824, continue to collect the tolls prescribed in the local act, and should not collect the increased toll under the seventh section of the 3 G. 4, c. 126."

[*145] *The plaintiffs contended that their vans were, previously to the 1st of January, 1823, and had been ever since the 1st of January, 1824, subject only to the tolls imposed by 1 & 2 G. 4, c. 85, s. 2, and were not subject to the additional toll under 3 G. 4, c. 126, s. 7.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover back the amount of the tolls they had been compelled to pay over and above the 4½d. upon each horse imposed by the local statute of 1 & 2 G. 4, c. 85.

If the Court should be of opinion the plaintiffs were so entitled, the verdict was to stand; but if otherwise, a nonsuit was to be entered.

The case was argued in Hilary term, by *Wilde*, Serjt., for the plaintiffs, and *Storks*, Serjt., for the defendant.

The proposition by which the plaintiffs claimed their exemption from the additional toll imposed by the seventh section of the 3 G. 4, was, that the twenty-third section of the general act of the 13 G. 3, c. 84, imposing additional toll upon wheels having fellies of less breadth than six inches, was, as to this road, rendered inoperative by the specific provisions of the local act of the 1 & 2 G. 4: *Ridge v. Garlick*, 2 B. Moore, 481; that, at the passing of the general act of the 3 G. 4, there were some roads which were not liable to the additional toll of the 13 G. 3, by reason of their having a local act regulating the toll according to the breadth of wheel; and other roads, upon which, although liable to the additional toll, such additional toll had not been collected. That it was the intention of the legislature, by the fifth and sixth sections of the 4 G. 4, to exempt from the additional toll imposed by the seventh section of 3 G. 4, those roads upon which the additional toll imposed by the 13 G. 3, had not

[*146] been collected, whether such *omission to collect resulted from non-liability, or from the consent of the trustees of the road; that the fifth section was intended to relieve in the latter case, and the sixth section in the former; that the road in question, not being liable upon the passing of the 3 G. 4 to the additional toll of the twenty-third section of the 13 G. 3, that section having been superseded by the specific provisions of the local act of the 1 & 2 G. 4, was a road which the legislature intended to relieve from the operation of the seventh section of the 3 G. 4, and was therefore within the equity of the sixth section of the 4 G. 4.

For the defendant it was contended that the case did not fall within the sixth section of 4 G. 4, because, although the local act of 1 & 2 G. 4, imposed a rate of toll varying with the width of wheel, yet the additional toll authorized by the general act 13 G. 3 had actually been collected. The two conditions of the sixth section of 4 G. 4 had not both been complied with. *Cur. adv. vult.*

TINDAL, C. J. The question which has been raised upon this special case, is

this, whether the defendant was entitled to claim the larger toll of 6½d., or the smaller toll of 4½d. for each horse drawing the plaintiffs' van, such van having the fellies of the wheels of less breadth than four inches and a half. The toll sought to be recovered back had been taken at the end of the year 1832; and the right of the plaintiffs to recover, appears to us to depend upon the inquiry, first, whether the general turnpike act, 3 G. 4, c. 126, s. 7, made any and what addition to the tolls imposed by the local act which governs this particular road; and, secondly, if such addition has been made, whether it is in any way altered or affected by the subsequent general turnpike act, 4 G. 4, c. 95. The local act which governed this highway at the time the tolls were *taken, was [147] the 1 & 2 G. 4, c. 85, an act which received the royal assent on the 28th of May, 1821, and which came into operation from that day. This act repeals the local acts therein enumerated; and in section 18 sets out a scale of tolls to be taken from the time of its passing. By this scale it is enacted, that there shall be taken for every horse drawing any wagon having the fellies of the wheels of the breadth of six inches and upwards, and drawn by four or any less number of horses, the sum of 4½d.; and for every horse drawing any wagon, having the fellies of the wheels of less breadth than six inches, and drawn by four horses, the sum of 4½d.

Under this scale, therefore, it is obvious, that unless it is affected by some of the provisions contained in any former or any subsequent general turnpike act, the toll to be taken from the month of May, 1821, down to the present time, for every horse drawing the plaintiffs' van, under the circumstances stated in the case, would have been 4½d. and no more; the same amount of toll appearing to be imposed where the wagon is drawn by four horses only, whether the fellies of the wheels are of the breadth of six inches and upwards, or of less breadth than six inches.

It appears, accordingly, that from the passing of this act, that is, from May, 1821, the toll of 4½d. per horse, and no more, was for some time the toll demanded and taken from the plaintiffs in respect of their van above described. But in the month of August, 1821, the trustees of the road demanded and took the larger toll of 6½d. per horse, insisting as it would seem upon the application of the provision contained in the general turnpike act then in force, viz., the 13 G. 3, c. 84, s. 23, to the present case; under which, where the fellies of the wheels were of less breadth than six inches from side to side, the trustees should take one-half more than the tolls or duties which should be payable under any local act. *And this increased toll continued to be taken from August, [148] 1821, without any alteration, down to the passing of the general turnpike act, 3 G. 4, c. 126, which received the royal assent on the 6th of August, 1822; and indeed from thence until April, 1832. But this clause of the general turnpike act, 13 G. 3, was determined by the Court of Common Pleas, in the case of *Ridge v. Garlick*, 2 B. Moore, 481, not to apply to tolls imposed by local acts, which contained a specific enactment of toll in respect of a particular description of wheel: in which case it was held, that the particular provision of a specific toll, proportioned to the width of the wheels, took the case out of the operation of the general turnpike act, by showing what the legislature intended in the particular case. We think it clear, therefore, that this increased toll, so long as it depended on the authority of the 13 G. 3, was an illegal toll, being grounded on a misapplication of the provisions of that act.

This brings us to the question, whether the increased toll of 6½d. per horse, which was illegal under the powers of the former general act, became legal under the powers of the new general turnpike act, the 3 G. 4, c. 126, which came into operation on the 1st of January, 1822; and we think the latter act had the effect of authorizing such increased toll to be taken. By that act the old general turnpike act 13 G. 3 is repealed, and by section 7, the trustees under any local act then made, or thereafter to be made, were empowered from and after the 1st of January, 1823, to take for any wagon having the fellies of less breadth than four inches and a half, or for the horses drawing the same, one-

half more than the tolls payable by such local act, for any carriage, &c., having the wheels of the breadth of six inches.

[*149] That clause differs from the provision contained in *the 13 G. 3 in this important respect; that whereas the old act contained no reference whatever to tolls payable under local acts, proportioned to the width of the wheels, but proposed to legislate only for the case where a toll was imposed generally on the horse or the carriage; the new act, on the contrary, applies itself distinctly and in terms to the case of local acts containing a scale of tolls proportioned to the width of the wheels, being above or below six inches. To such cases it creates and applies a new scale of increase, namely, a scale where the wheels are less than four inches and a half; or more than four inches and a half, and less than six. Now the precise provision contained in the local act under which this road is governed, is a scale where the wheels are of a width above or below six inches. And we can see no principle of construction upon which it can be held that the scale of increased tolls enacted by the new general turnpike act, should not be held to apply to the scale given by this local act.

We therefore think the increased toll of 6½d. became the legal toll upon each of the horses in question, from the 1st of January, 1823, and that at all events it continued to be the legal toll until the passing of the subsequent general act of 4 G. 4, c. 95; and the only remaining question appears to be whether such subsequent act has made any alteration in this respect. The only sections in that act which appear to have any bearing on the question, are the fifth and sixth:

The fifth section relates to one class of cases only; viz., where the commissioners shall not, previous to the passing of the former act, that is, previously to the 6th of August, 1822, have taken the additional tolls on wagons having the wheels of less breadth than six inches from side to side, directed to be taken by 13 G. 3, c. 84, and the particular or local act shall not have provided a scale of tolls applicable to the road. In that case the *commissioners are [*150] directed, after the 1st of January, 1824, to continue to take, for every wagon having the fellys of the wheels of less breadth than four inches and a half, the same tolls as are by the local act payable in respect of such wagon. This section, however, cannot apply to the present case; as neither of the conditions specified therein exists here; for the special case finds that the commissioners did take previously to the 6th of August, 1822, the additional tolls directed to be taken by the 13 G. 3, c. 84; and again, the local act has provided a scale of tolls applicable to the particular road.

The sixth section directs, that where any particular act of parliament then in force shall direct a higher or lower rate of toll to be collected, regulated in respect of the greater or lesser breadth of the wheels, and where, in addition to the tolls received under the particular act, the additional tolls in respect of the breadth of wheels authorized to be taken by the act of 13 G. 3, shall not have been collected and imposed, the commissioners shall, after the 1st of January, 1824, continue to take the tolls under the powers of the local act, and shall not impose the additional tolls imposed by the act therein recited, that is, the 3 G. 4, c. 126. And we think the present case does not fall within this section; because, although one of the conditions mentioned therein, namely, that the particular act directs a higher or lower rate of toll to be taken, is found to exist: yet, the second condition, that the additional toll authorized by 13 G. 3, had not been collected and imposed, is denied by the special case. For we cannot give any other sense to the words "collected and imposed" than their ordinary and natural meaning, that is, taken under the real or supposed authority of that statute.

The present case, therefore, appearing to us to be a third case, differing from [*151] both those intended to be *remedied by the fifth and sixth sections, namely, a case in which the local act does direct a higher or lower rate of tolls to be taken in respect of the greater or lesser breadth of the wheels,

and in which the additional toll authorized by 13 G. 3, has been collected and imposed, we think it is left untouched by the last general turnpike act; and consequently that the increased toll of 6 $\frac{1}{2}$ d. is the legal toll.

We therefore think there must be judgment for the defendant.

Judgment for the defendant.

TRIMBEY v. VIGNIER. June 9.

By the law of France, an endorsement in blank does not transfer any property in a bill of exchange: Held, that the holder of a bill drawn in France, and endorsed there in blank, cannot recover against the acceptor in the courts of this country.

THIS action was brought in February, 1833, by the plaintiff, an Englishman resident in London, as holder, against the defendant as the maker of the two promissory notes (one for 610 francs, the other for 300), in the following form:—

“A la fin Decembre prochain je payerai à l'ordre de M. Burillon la somme de six cents dix francs valeur en marchandize.

“Paris, le 10 Juillet, 1829.

“B. P., 610 francs.

“E. VIGNIER,

“Rue St. Denis, 193.”

Endorsed,

“Payez à M. Durant valeur en compte. Paris, le 30 Juillet, 1829.

“P. BURILLON.

*“Je garantis à M. Durant le protet et la denonciation du present billet, comme s'il avait été fait, le dispensant de ces formalités. Paris, [152] le deux Janvier, 1830.

“P. BURILLON,

“P. DURANT.”

At the trial before BOSANQUET, J., the plaintiff produced the notes, which were on unstamped paper, and proved the handwriting of the respective parties, and the value of the notes in English currency.

The defendant then called a witness, who stated himself to be an avocat, and that he had practised as such upwards of twenty years, and was then attached in that capacity to the French consulate in London; that he was conversant with the laws of France; that, by the law of France, a protest must always be made, and that no action could be maintained upon promissory notes and bills of exchange unless they were protested; that the endorsement to the plaintiff being in blank, and not according to the formalities required by the Code de Commerce, articles 136, 137, 138, was invalid, and passed no interest to the holder. In support of that statement the articles in the Code de Commerce above referred to were read and translated to the jury:—By 136, “La propriété d'une lettre de change se transmet par la voie de l'endossement;”—137, “L'endossement est daté. Il exprime la valeur fournie. Il énonce le nom de celui à l'ordre de qui il est passé;”—138, “Si l'endossement n'est pas conforme aux dispositions de l'article précédent, il n'opère pas le transport, il n'est qu'une procuration.”

It was also proved that, at the time the action was brought, the defendant was domiciled and carried on business in London; but, at the time when the notes respectively were drawn and fell due, the maker and *endorser [153] thereof were all resident in France, and French subjects.

The jury found, in reply to the inquiries of the learned Judge, that the defendant was living in France at the time when the notes were drawn, and when they fell due; that Durant, the endorser, was also a resident in Paris at the same time; that according to the laws of France the endorsement was invalid, and that a protest was necessary. On that finding the learned Judge directed a verdict to be entered for the defendant, reserving all questions of law: and such verdict was entered accordingly, with leave to move to enter a verdict for the plaintiff on the points reserved.

Subsequently to the verdict, by leave of the Court, and with consent of the parties, it was given in evidence that the plaintiff was in England when he received the bills.

In the following term, *Taddy*, Serjt., moved to set aside the verdict on the following grounds:—

First, That, admitting the law of France to be as stated, it could not govern the right of parties resident in England, the requisites of the code relied upon by the defendant being merely municipal regulations.

Secondly, That the law of France was misrepresented by the defendant's witnesses.

The Court, thereupon, granted a rule calling on the defendant to show cause why the verdict should not be entered for plaintiff; or, why there should not be a new trial; and directed that before cause was shown, the opinion of French advocates should be obtained, as to the law of France upon the points at issue.

Upon the rule coming on for argument, the Court directed the circumstances to be set forth in a special case; and that it should contain any opinions of French advocates which had been taken on either side up to that period.

[*154] *The opinion obtained by the plaintiff as to the endorsement in blank,—the only point on which the Court pronounced judgment,—was as follows:—

“This circumstance was no obstacle to Mr. Trimbeys right of action, for the 138th article of the Code de Commerce thus expressed, ‘If the endorsement is not conformable to the requisition of the preceding article, it does not operate as a transfer of interest, but only as a procuration,’ is only available on behalf of the party making the endorsement in blank against the immediate holder under such endorsement. If, however, the holder under an endorsement in blank does not proceed against the party immediately endorsing to him, but against the maker of the note, or against the parties who have made regular endorsements, neither the maker nor such parties can avail themselves of the provision of the 138th article of the Code. Upon this point the jury has been completely led into error.

“Paris, the 21st of May, 1833.

BLANCHET.”

An opinion had been obtained by the defendant prior to the period when the rule nisi came on for argument, which, as to the endorsement in blank, was as follows:—

“There is no doubt that, according to the French law, an endorsement in blank is insufficient to transmit regularly the property in a bill of exchange or promissory note. The Code de Commerce is precise on this point. Art. 137, says, ‘The endorsement is dated; it expresses the value given for it, and states the name of him to whose order it is passed.’ The art. 138, adds, ‘If the endorsement is not conformable to the preceding article, it does not operate as a transfer,—it is only a procuration.’

“Paris, the 21st of October, 1833.

VERVOORT.”

[*155] *The various authorities in the French law as to endorsement, which were relied upon in favor of the defendant, are to be found in the Code de Commerce, arts. 136 to 139, and art. 110.

The questions for the opinion of the Court were,—

First, If the correct construction of the terms of the Code de Commerce which apply to the circumstances in this action were such as to prevent the plaintiff from enforcing payment against the defendant in the courts of France, would the law of France govern the rights of the parties under the circumstances of this case?

Secondly, If the decision of this case were to depend upon the terms of the Code de Commerce, then the Court was to say how far the articles of the code relied upon by the defendant applied to the circumstances of this case; and whether a correct construction had been put upon such articles by the evidence and opinions produced by the respective parties.

If the Court should be of opinion that, under the circumstances, the plaintiff ought to have recovered, then a verdict was to be entered for him; if not, the verdict for the defendant was to stand.

The case was argued in Easter term.

Taddy, Serjt., for the plaintiff. Admitting, for the sake of argument, that Trimbeay could not have sued the defendant in the French courts, because Durant's endorsement is not conformable to the 137th article of the Code de Commerce, he may, nevertheless, sue in the English courts, where an endorsement in blank operates as a complete transfer. The interpretation of a contract is governed by the law of the country in which the contract was made; but the judicial procedure applicable to it depends on the law of the country in which the action is brought. *Huberus de Conflictu *Legum*, tit. 3, s. 7: [*156] "Receptum est optimâ ratione, ut in ordinandis judiciis loci consuetudo ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet *Sandius*, lib. 1, tit. 12, def. 5, ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci in quo fit executio, non ubi res judicata est." De la Vega v. Vianna, 1 B. & Adol. 284; British Linen Company v. Drummond, 10 B. & C. 903; Williams v. Jones, 13 East, 439; Wynne v. Jackson, 2 Russ. 351; Shaw v. Harvey, 1 M. & M. 527; Doe v. Vardill, 5 B. & C. 438. And the objection taken on the part of the defendant does not apply *ad valorem contractûs*, but *ad modum actionis instituendæ*.

Stephen, Serjt., for the defendant. The objection applies *ad valorem contractûs*, and not *ad modum actionis instituendæ*; for if the endorsement be not in conformity with the French code, no interest passes to the holder, and consequently there is no contract between him and the maker. To ascertain whether there be any contract or not between the parties, we must resort to the law of the country where the contract was made: *Lacon v. Higgins*, 1 Dowl. & Ryland's Nisi Prius Cases, 38; *Dalrymple v. Dalrymple*, 2 Haggard's Rep. 58. So, for the construction of the contract: *Talleyrand v. Boulanger*, 3 Ves. jun. 447; and the right of action upon it: *Burrows v. Jemino*, 2 Str. 733; *Ballantine v. Golding* (cited in *Smith v. Buchanan*), 1 East, 10; *Solomons v. Ross* (cited in *Folliott v. Ogden*), 1 H. Bl. 131; *Potter v. Brown*, 5 East, 124; *Clegg v. Levy*, 3 Campb. 166. For the maker cannot be supposed to have contemplated that he would be subject to rights of action according to the law of England, and if the foreign law furnish the *rule on one point, it must also furnish it on the others: *Tenon v. Mars*, 8 B. & C. 638; *Innes v. Dunlop*, 8 T. R. [*157] 595. In *Shaw v. Harvey*, Lord TENTERDEN decided in effect that the contract was not a foreign contract. The *British Linen Company v. Drummond* is a decision on the statute of limitations which affects only *tempus et modum actionis*; and *De la Vega v. Vianna* turned on the same distinction. The question, therefore, turns on the construction of the 137th and 138th articles of the Code de Commerce. Now the 138th article is express and without qualification, that an endorsement in blank does not operate as a transfer of the note; and *Potier*, in his commentary on the article (4th vol. edit. Dupin, 1827), says, that the object of the law is to prevent fraud against the creditors of the endorser, and cites *Heineccius* to show that an endorsement in blank passes no property. It is a mere procuration, and a procurator cannot sue.

Taddy in reply. *Pailliet*, Manuel de Droit Français, p. 1225, ss. 6, 8, in a note to article 138, gives a different view of the law of France as to a blank endorsement. "L'accepteur ne peut se refuser au paiement d'une lettre de change, sous le prétexte que l'ordre est en blanc. Les endosseurs et leur créanciers sont les seuls qui puissent faire valoir ce moyen."—"L'endossement en blanc peut valoir autrement que comme procuration. Il peut valoir comme titre propre et personnel au porteur, s'il est constant que l'effet endossé en blanc fut remis au porteur avec l'intention de la saisir du titre; par exemple, pour lui servir de garantie des valeurs qu'il aurait fournies au souscripteur de l'effet."

If it can confer a title on the holder, why not a title to sue also? for if the

endorser can transfer the property, the endorsee must have the right to obtain it. But endorsement *is a mere formality, and not of the essence of the contract, and therefore the mode of proceeding upon it must be determined by the law of the country in which the action is brought: Huber, p. 538, 540. Dalrymple v. Dalrymple was a case concerning marriage, which is a status and not a mere contract; and Potter v. Brown and most of the other cases cited for the defendant, turned on the law of bankruptcy, in which the courts here have always given effect to the regulations of other countries.

Our. adv. vult.

TINDAL, C. J. The point which has been reserved for consideration in this case is, whether the plaintiff, under the circumstances stated in the special case, is entitled to maintain this action in an English court of law, in his own name? for, as to the several other objections which have been raised, the view which we have taken of the question above adverted to renders it unnecessary for us to give any opinion.

The promissory note was made by the defendant in France; and it was endorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and endorsing the note domiciled in that country. The first inquiry therefore is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France.

Upon this point of French law, the opinions of the foreign advocates which have been taken, by consent, since the trial of the cause, appear to be contradictory; but as each of them founds his opinion on the Code de Commerce, Art. 137, 138, we feel ourselves at liberty to refer to the text of that code, in order to form our own judgment on the point; and upon reference thereto, we think the language of the code is clear and express, that an endorsement in [*159] blank, that is, without containing the *date, the consideration paid, or the name of the party to whose order it is passed, does not operate as a transfer of the note; it is but a procuration. And the language of the Code being general, and unrestricted by any expressions which confine its operation to questions between the endorsee and the endorser of the note, we think, that if an action had been brought in any of the courts of law in France against the maker of the note, it would have been held not to be maintainable in the name of the plaintiff, but that he should have sued in the name of the last endorser by procuration.

The question, therefore, becomes this. Supposing such rule to prevail in the French courts by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England applicable to the case of a note endorsed in blank in England, allowing the action to be brought in the name of the holder?

The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractûs*), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). See Huberi Prælectiones Civilis Juris, tit. 3, De Conflictu Legum, sect. 7. This distinction has been clearly laid down and adopted in the late case of *De le Vega v. Vianna*, 1 B. & Adol. 284. See also the case of the *British Linen Company v. Drummond*, 10 B. & C. 908, where the different authorities are brought together.

[*160] The question therefore is, whether the law of France, *by which the endorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case it must be adopted by our courts, in the latter it may be altogether disregarded, and the suit commenced in the name of the present plaintiff.

And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the endorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences that would follow, if the plaintiff sues in his own name, or is compelled to use the name of the former endorser as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing.

We therefore think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here.

Judgment for the defendant.

*DOE dem. *LAWFORD v. ROE.* June 9.

[*161]

In C. P. Judgment against the casual ejector must be moved for within the first four days of Hilary and Trinity term. Within one week of the first day of Michaelmas and Easter term.

By rule of this Court, of Trinity term, 1680, 32 Car. 2, judgment against the casual ejector ought to be moved for within the first four days of Hilary and Trinity term, and within one week of the first day of Michaelmas and Easter term.

E. V. Williams obtained a rule nisi for judgment against the casual ejector on the sixth day of this term, that being consistent with the practice in the other courts, and the unrepealed rule of Car. 2 being the only instance in which the practice of this Court differs from that of the King's Bench and Exchequer.

Watson showed cause on an affidavit which disclosed that this ejectment was brought for a forfeiture, and that the lessor of the plaintiff had commenced in the Court of King's Bench another ejectment for the same premises.

Williams contended that the lessor of the plaintiff, having pursued the ordinary practice, and the tenant having incurred no inconvenience, the Court, in its discretion, would not strictly enforce the observance of a rule merely *juris positivi*, and almost absolute.

Sed per Curiam. The tenant may have relied on the practice of this Court; and, having found no rule at the end of four days, may have dismissed the matter from his thoughts. *In favor of a claim by forfeiture we cannot [*162] interpose with the established practice, although it is by an oversight that the rule of Car. 2 has not been repealed.

Rule discharged.

IRELAND v. JOHNSON, VAUGHAN, and Others. June 10.

In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due; and a variance in this respect is fatal.

CASE. The plaintiff declared that the defendants distrained the goods of the plaintiff on the plaintiff's premises, for and in the name of a distress for arrears of rent due to the defendants Johnson and Vaughan, in respect of the premises, upon a demise of the same; yet the defendants, disregarding the statute in that behalf, and contriving to injure the plaintiff, did not cause the goods to be appraised by two sworn appraisers, according to the form of the statute; but before they had been appraised wrongfully sold them.

Plea, not guilty. At the trial it appeared that the premises had been demised to the plaintiff in September, 1832, by Margaret Thom, as committee of Benjamin Burd, a lunatic, and the warrant authorizing the distress was signed by Johnson and Farquhar as agents of Margaret Thom.

A verdict having been found for the plaintiff, with leave for the defendants to move to enter a nonsuit instead, on the ground, among other objections, of a variance in the description of the party to whom the rent was due; and

Spankie, Serjt., having obtained a rule nisi accordingly,

Wilde, Serjt., showed cause. The gist of the action is the wrongful mode of [*163] conducting the distress; it is *impliedly admitted in the declaration that there was a right to make the distress, and it is immaterial to whom the rent was due; the allegation therefore that it was due to Johnson and Vaughan may be rejected as surplusage. [TINDAL, C. J. If you are not limited to the distress for the rent specified in the declaration, you might bring a second action.] The existence of the debt for rent arrear is mere matter of inducement to the wrong committed in the mode of levying the distress, and in matters of inducement a variance is immaterial; as in the introductory allegations of a declaration for a false return, or in actions against carriers for failing in their duty, and the like: *Stoddart v. Palmer*, 3 B. & C. 2; *Phillips v. Shaw*, 4 B. & Ald. 435; *Bromfield v. Jones*, 4 B. & C. 380; *Frith v. Gray*, 4 T. R. 561, note; *Barbige v. Jakes*, 1 B. & P. 225; *Ditcham v. Chivis*, 4 Bingh. 706; *Draper v. Garrett*, 2 B. & C. 2.

Spankie and *Kelly* in support of the rule. The correct statement of the party to whom rent is due is material, and the foundation of the action. For if the statement be incorrect,—if rent be not due to the party named,—the action should have been trespass or replevin for distraining on behalf of one to whom no rent was due, and not case for a mere irregularity in the conduct of a distress rightful in its inception. In no instance in which the tenant has redress by replevin or trespass is it competent to him to sue in case of irregularities under the statutes of Marlbridge and 11 G. 2, c. 19. *Bradley on Distresses*, 276. In order therefore to sustain an action on the case for irregularities in the distress, the plaintiff must begin by showing that the distress was lawful in [*164] the first instance. Here the *distress, if made for Johnson and Vaughan, as the declaration alleges, was unlawful in the first instance, the rent being due to Margaret Thom, and the plaintiff, as against Johnson and Vaughan, should have replevied. It would have been a valid defence if the defendants had pleaded that the distress was not made for rent due to Johnson and Vaughan. The cases referred to on behalf of the plaintiff are decisions on variance chiefly of time or place, allegations as to which are seldom material. *Ditcham v. Chivis* turned on the vernacular meaning of the word London. But *Webb v. Hill*, 1 M. & M. 253, is in point for the defendants. There, in an action for a malicious arrest, it was held that the allegation that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy, &c.," was not supported by proof of a discontinuance; and that such an error in the record could not be amended at nisi prius under 9 G. 4, c. 15, not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof.

TINDAL, C. J. The question is, whether there is a material variance between the declaration and the evidence. The count on which the verdict has been taken states that a distress was made on the plaintiff's goods for arrears of rent due to Johnson and Vaughan in respect of the premises occupied by the plaintiff, upon a demise of the same; and then, that the defendants conducted the distress irregularly.

This, therefore, is an allegation that the distress was for rent due to Johnson and Vaughan upon a demise by them: but instead of showing a demise by them, [*165] the plaintiff showed a demise, either by the lunatic, Burd, or *his committee, Margaret Thom: and the question is, whether this variance is material or not. In order to determine that, we must consider the nature of the action, and of the right out of the exercise of which the collateral injury arises.

The action is brought on the statute 11 G. 2, c. 19, s. 19, which, in order to prevent injury to the landlord by his becoming a trespasser ab initio for every

trifling irregularity in the conduct of a distress, enacts, "Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover satisfaction for the special damage." The fair intendment of this is, that the rent must be due to the party who distrains as landlord. If it were not due, the tenant might sue in trespass, and need not have recourse to an action on the case on this statute. That this was the intention of the legislature appears from the statute 2 W. & M. c. 5, s. 5, which enacts, "That in case any such distress and sale as aforesaid shall be made by virtue or color of this present act for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors and administrators shall and may, by action of trespass or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double the value of the goods or chattels so distrained and sold, *together with full costs of suit." The mode in which the rent becomes due, the party to whom it is due, and by whom [*166] the distress is made, are all material allegations, because, if the rent be not due, the tenant may sue in trespass.

Taking it up, however, as a question at common law, upon the pleadings, could there be any objection to the defendant's singling out this particular allegation and taking issue upon it? and upon such an issue, in this case, the verdict must have been for the defendants. Even under the new rules this is a point which the defendants might have traversed. In the cases cited on the part of the defendants the variances have chiefly been in allegations of time or place; allegations for the most part immaterial; and the question has always been, whether they were material or not. That brings us round to the inquiry whether the variance here is material, and it seems to be of the very essence of the plaintiff's case. *Pool v. Court*, 4 Taunt. 700, is in point. There the defendant's tenancy of land in F. at a certain rent was alleged as the consideration for his promise to manage it in a husbandlike manner. The land for which the rent was reserved was in F. and C. That was held to be a fatal variance in stating the consideration of the promise. In that case it might have been urged that in assessing damages it was immaterial whether the land was in one parish or another; but it was held, that as part of the contract it ought to be accurately stated. *Morgan v. Edwards*, 2 Marsh. 96, also comes near the present case.

GASELEE, J. I am of the same opinion. The cases cited are mostly variances of place or time; and in *Ditchman v. Chivis* the Court would have held there had been a variance but for the act of the defendant himself, *who had described his coach as a coach from London to Blackheath, though, in fact, [*167] it ran from Westminster. If in the present case the defendants had pleaded, under the new rules, that there was no such demise and no such rent due as that alleged in the declaration, and the plaintiff had demurred, could any one have contended that the allegation was immaterial, and improperly traversed?

BOSANQUET, J. I am of the same opinion. I should be glad to get over the difficulty, but it seems to me that the variance is in a material point. In an action of tort arising out of a contract the statement of the contract is often as material as in an action on the contract itself; so here, the variance is on a point which goes to the very essence of the action. The distress should be shown to be in respect of rent from premises demised by the persons named in the declaration. It turns out that no rent was due to those persons, although the foundation of the action is abuse in distraining for rent alleged to be due to them. I think the variance cannot be got over, and the rule for entering a nonsuit must be absolute.

Rule absolute.

[*168]

*Ex parte MARY GILL. June 12.

Under 3 & 4 W. 4, c. 74, ss. 77, 91, a feme covert, when her husband has absconded, and has not been heard of for some time, may pass a contingent life interest in freehold property.

UPON an affidavit that the husband of the applicant had absconded in 1831, after committing an act of bankruptcy, had never been heard of since, but was believed to be in America;

Bere obtained leave for the applicant to pass her vested reversionary life interest in certain freehold property, pursuant to 3 & 4 W. 4, c. 74, ss. 91, 77, by which it is enacted, "That if a husband, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a feme sole, and

[*169] when done, *executed, or made by her, shall (but without prejudice to the rights of the husband, as then existing, independently of this act) be as good and valid as they would have been if the husband had concurred."—"That after the 31st day of December, 1833, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right may have in any lands of any tenure, or in such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, or unless the deed be acknowledged by her as hereinafter directed."

[*170] *AYLWIN, Administrator of DISMORR, v. TODD. June 12.

Where plaintiff had been misled by defendant as to the nature of a charter-party, the Court permitted plaintiff to amend by striking out a count in covenant on a charter-party, and declaring for freight, not upon the charter-party:

And this, after many years had elapsed since the commencement of the action, the defendant having been the cause of the delay.

In 1815, Dismorr sued the defendant in this Court, in covenant on a charter-party, entered into by the defendant in December, 1810, as freighter of the ship *Emma*, to recover 221*l.* 3*s.* 7*d.* freight, and 221*l.* 6*s.* 4*d.* primage, which the defendant had failed to pay, notwithstanding the ship performed her voyage, and the cargo was duly delivered to him. The defendant pleaded non est factum and several special pleas.

In Hilary term, 1816, the defendant filed a bill in Chancery against Dismorr for a discovery, and obtained an injunction to stay the action at law.

Various proceedings were had thereupon in Chancery till 1823, when Dismorr died.

In February, 1825, the plaintiff took out letters of administration to the effects of Dismorr. In June, 1825, the defendant filed a bill of revivor and supplement against the plaintiff; the plaintiff put in his answer; and in February, 1826, the injunction to restrain proceedings at law was dissolved.

A few days afterwards, the plaintiff commenced the present action of covenant on the charter-party entered into by the defendant to recover the freight and primage above-mentioned.

In June, 1826, the defendant filed a supplemental bill in Chancery against the plaintiff: and, in November, 1826, obtained an injunction to restrain the plaintiff from proceeding at law.

In January, 1827, this injunction was dissolved. In July, 1827, the defendant obtained a commission for the examination of witnesses, upon which, however, he failed to proceed. After some negotiation,

*The cause was referred to arbitration in July, 1828.

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In January, 1829, the arbitrator died, before making his award, and the defendant refused to agree to a new reference.

In May, 1832, the plaintiff gave a term's notice of intention to proceed in the action; and, in Michaelmas term, 1832, delivered the issue with notice of trial, which he afterwards countermanded, because he could not find the charter-party on which he had declared.

In Hilary term, 1833, the plaintiff gave a rule for the defendant to produce his witnesses in the suit instituted by the defendant in Chancery in 1826. The defendant failed to comply; and his bill was dismissed with costs in July, 1833.

The plaintiff, being unable to proceed to trial for want of the original charter-party, in Hilary term, 1833, filed a bill of discovery in Chancery against the defendant.

In October, 1833, in his answer to this bill, the defendant—notwithstanding he had stated in his own bill, filed in 1816, that he had, in December, 1810, entered into a charter-party under seal between Dismorr, master of the ship *Emma*, on behalf of the owners thereof, of one part, and himself, as freighter of the said ship, of the other part—denied that he had ever entered into an agreement with Dismorr for freighting the said ship upon the terms to be contained in a charter-party, but admitted having in his possession the duplicate of a charter-party according to the form set out in the plaintiff's declaration. He averred, however, that the date thereof and the name of Dismorr were on erasures; that he (defendant) had originally executed a charter-party to one Mackay, in November, 1810, but that the owners of the *Emma*, having subsequently quarrelled with Mackay, erased his name and inserted that of Dismorr, substituting also the date of December, *1810, for November, 1810. And that defendant [*172] never re-executed the charter-party after the alterations were made.

It was clear, however, that he had acted on it; and, in the course of the protracted litigation since 1815, he had never disclosed these facts to the plaintiff.

Under these circumstances,

Wilde, Serjt., obtained a rule nisi to amend, by striking out the count upon the charter-party, and declaring for freight not upon the charter-party; the defendant having been the occasion of the delay, and having, by the allegations in his bill in chancery in 1816, misled the plaintiff as to the effect of the charter-party.

Aitcherley, Serjt., and *Henderson*, who showed cause, contended that what was prayed was not an amendment, but the substitution of a different cause and different form of action, by which the defendant's answer to the original claim might be unfairly rendered unavailing. Such an application had never been

made, except in *Billing v. Flight*, 6 Taunt. 419, on very peculiar grounds. But at all events, the plaintiff should have applied earlier: *Green v. Mitton*, 4 B. & Adol. 369; *Steel v. Sowerby*, 6 T. R. 171.

Wilde observed that the defence on the merits would remain as before; and there was no affidavit that the defendant had lost any witness in the time that had elapsed.

TINDAL, C. J., after recapitulating the facts, said, the case stood on its own peculiar grounds, and would form no precedent for any other not exactly similar; [*173] but that, the defendant having been virtually the cause *of the delay, the amendment ought to be allowed on payment of costs, the defendant having leave to plead *de novo*.

The rest of the Court concurring, the rule was made

Absolute.

GILBERT and Others v. TOWNS. June 12.

Notwithstanding an endowment of 1874, conferring all small tithes on a vicar, the Court refused to set aside a verdict finding the right to potatoes grown in fields to be in the rector, evidence having been adduced from which it might be presumed that, on good consideration, an alteration had been made in the endowment previously to the restraining statute of 18 Eliz.

THIS was an action of debt on the statute of 2 & 3 Ed. 6, c. 13, for not setting out tithe of potatoes, and was tried at the last Kingston assizes before Lord LYNCHURST, when a verdict was given for the plaintiffs for 18*l.*, being treble the agreed single value of the tithes.

The plaintiffs were mortgagees in fee, in possession of the rectory of Kingston-upon-Thames; the defendant was an occupier of lands in that division of the parish which is called Norbiton; and in the year 1833 grew about ten acres of potatoes in fields.

He contended that the tithe of potatoes, being a small tithe, was payable to the vicar of Kingston-upon-Thames, and not to the rector.

The evidence adduced by the plaintiffs at the trial was,

1. Grants under the great seal of the 19th of May, 1609, and 15th of December, 1640, of the rectory of Kingston-upon-Thames, and all manner of tithes and other profits to the rectory belonging; in the first of which grants the rectory was described to have been parcel of the possessions of the late monastery or priory of Merton.

2. The plaintiffs' title deeds, the earliest of which was dated the 9th of July, 1377.

[*174] *The deed of 16th of December, 1738, contained the following description of the premises, which was copied in all the subsequent title deeds: "All and singular the tithes of corn, grain, wheat, rye, barley, beans, peas, *potatoes*, tares, oats, French wheat, hay, wool, and lamb, and all and all manner of tithes of what nature or kind soever to the rectory of Kingston-upon-Thames aforesaid belonging or in anywise appertaining, coming, growing, renewing, happening, or increasing, and which at any time or times hereafter shall or may be coming, growing, renewing, happening, or increasing in Norbiton, Surbiton, Comb, Hache, Ham, Kew, otherwise Kayho, Petersham, Sheen, otherwise Richmond, or elsewhere within the said parish of Kingston-upon-Thames, to the said rectory belonging or in anywise appertaining."

3. An extract from the Valor Ecclesiasticus of 26 Hen. 8, of so much as related to the vicarage of Kingston-upon-Thames, in the county of Surrey: "It values in tithes of geese, 4*s.*; pigs, 16*s.*; doves, 10*d.*; eggs, 3*s.* 4*d.*; hemp, 1*s.* 4*d.*; fruits, 2*s.*; gardens, 8*s.*; woods, 13*s.* 4*d.*; tiles, 4*s.*; personal tithes, otherwise privy tithes, 9*l.* 5*s.* 9*d.*; cows, 26*s.* 8*d.*; calves, 10*s.*; honey and wax, 2*s.*; osiers, 1*s.* 4*d.*; chickens, 1*l.* 4*d.*:" the total value amounted to 54*l.* 13*s.* 3*d.*

4. A copy from the court rolls of the first fruits in the Court of Exchequer at Westminster, of Michaelmas term, 8 Eliz., which showed that the vicar, instead of receiving 54*l.* 13*s.* 3*d.* from his vicarage, received only 25*l.* 5*s.* 10*d.*, and judgment of diminution was accordingly given.

5. An extract from the records of the First Fruits' Office of the return made by the bishop of Winchester, in pursuance of the act of 5 Ann. for discharging small livings from their first fruits and tenths, and all arrears thereof: from that return, which was dated the 28th of *March, 7 Ann. (1707), it appeared that the clear improved yearly value of the vicarage of King- [*175] ston amounted to 34*l.* 7*s.*, and no more.

The plaintiffs then proceeded to prove, by oral testimony, that as far back as living memory extended, the tithes of potatoes grown in *fields* had uniformly been paid to the rector, and the tithe of potatoes, and everything else grown in *gardens*, to the vicar. The reputation in the parish was, that the rector followed the plough, and the vicar the spade.

The defendant relied on an endowment of the vicarage of Kingston in 1374, by which the vicar was endowed of all the small tithes, except what were specially reserved to the prior and convent. "Also the said vicars may take the tithes of cows, calves, goats, kids, pigs, rabbits, and other wild animals of what kind soever; of fowls, doves, swans, peacocks, geese, ducks, and of other fowls of whatsoever kind; also of cheese, milk, and things made of milk; of bees, honey, wax, and eggs." "Also the said vicars may take the tithe of flax, hemp, and warrens wheresoever and whatsoever, arising through the whole parish of the church and chapels aforesaid; and of corn in gardens or curtilages of the said parish of the said church and chapels aforesaid, dug or hereafter to be dug with the foot; of herbs also, and of all other things growing in the same, which were not of the manors of the aforesaid prior and convent. And if it shall happen in time to come, that any gardens of the said parish shall be turned up or levelled, and the lands thereof tilled by the plough, then the said prior and convent shall wholly take and have the tithes of corn (*bladorum*) of such gardens and lands so ploughed up. And if it shall happen hereafter, that any arable lands which are not of the manors of the said prior and convent, shall be reduced to gardens, and dug with the foot, *then the aforesaid vicars [*176] shall take and have the tithes of corn arising from such gardens for the time in which they shall be dug and tilled with the foot. Also the said vicars may take the tithes of feedings, pastures, and agistments of animals; of pannage, willows, and osiers; and of fallen wood for fire whatsoever, and of vines, and of the fruit of trees of every kind, wheresoever arising within the parish of the church aforesaid and the chapels aforesaid, except from the manors aforesaid. Also the said vicar may take all tithes whatsoever of lambs, wool, and hides, to the chapels of Dytton, Mulesey, and Shene arising, except from the animals of the said prior and convent at Mulesey; and except from the animals of the farmers of the same religious as aforesaid."—"Also the said vicars may take the small tithes whatsoever of custom or of right due throughout the whole parish of the church of Kingston and the chapels aforesaid, by any manner arising, and by whatsoever name distinguished, those only excepted which are specially reserved to the said prior and convent."—"And the religious men, brother Robert Wyndesore, the now prior, and his successors the priors and convent aforesaid, shall for ever take and have the great tithes of sheaves arising without the said gardens, and of hay, and living mortuaries, and the tithe of wool, and lambs, and hides, of the village of Kingston and Norbilton, Sorbelton, Combe, Hertynghdon, Hatche, Hamme, Petersham, and La Hake and Berewell, and all other tithes and profits, and ecclesiastical emoluments within the said parish arising, or to the said church and chapels belonging, as well those above reserved to the same religious men as whatsoever other things to the aforesaid now vicar, for him and his successors, vicars, and for his vicarage aforesaid, and for their portion in this behalf, are not above assigned, nor by

[*177] the tenor of these presents are in any manner soever ordained, not *containing the same portion or appointment to the now vicar, and his successors, vicars of the aforesaid vicarage as aforesaid assigned or made."

The vicar's collector produced his collecting book, which was put in. The only items contained in that book were fruits, gardens, woods, cows, and osiers; all of which were named in the Valor Ecclesiasticus.

A verdict having been found for the plaintiff,

Spankie, Serjt., moved to set it aside as contrary to evidence, relying on the unqualified language of the endowment, which gave the vicar all small tithes whatever, and contending that no legal alteration of this endowment could have taken place subsequently to the restraining statute of the 13 Eliz., and that potatoes, which are clearly small tithe, were not introduced into England till after that period.

Wilde, Serjt., and *Platt*, who showed cause, argued from the discrepancies between the Valor Ecclesiasticus of 1535, and the endowment, that some alteration had taken place in the endowment before the 26 Henry 8; and from the rolls of the first fruits, that the vicar's receipts had diminished before the 3 Eliz. From these circumstances; from the fact that the rector had always enjoyed the tithe of potatoes in fields; from the provision in the endowment, that when gardens were subverted and cultivated by the plough, the prior should receive the tithes of the blades of gardens so ploughed; and from the reputation in the parish that the rector followed the plough, and the vicar the spade; it might be presumed, that, previously to the reign of Elizabeth, an agreement had been come to, on sufficient consideration, that all roots and vegetables, grown in open fields, when cultivated by the plough, should go to the rector.

**Spankie* and *Comyn* in support of the rule.

[*178] The enjoyment by the rector may have proceeded from mistake, as potatoes were long thought, erroneously, to be great tithes. If there were any such agreement as the plaintiffs have supposed, it is incumbent on them to establish their case by producing it. The clear grant in the endowment to the vicar is not to be superseded by vague presumption, or by accidental discrepancies between the endowment and the Valor Ecclesiasticus.

(*Smith v. Wyatt*, 2 Eagle & Younge, 91; *Clarke v. Stapler*, 2 Eagle & Younge, 212; *Dorman v. Currey*, 3 Eagle & Younge, 817, were incidentally referred to.) *Cur. adv. vult.*

TINDAL, C. J. The plaintiffs in this case declared in debt upon the stat. 2 & 3 Ed. 6, as proprietors of the tithes of potatoes within the parish of Kingston, against the defendant, an occupier of lands within the parish, for not setting out the tithes of potatoes grown by him within the parish. The jury found their verdict for the plaintiffs, and a rule has been obtained for setting aside the verdict, as against the evidence in the cause. The question at the trial was, whether potatoes grown in a field, which field was under the plough, were rectorial or vicarial tithes, in the parish of Kingston: for if such tithes were rectorial, the plaintiffs, as proprietors of the rectorial tithes, were entitled to recover.

On the part of the defendant it was contended, that such tithes were vicarial, and the endowment of the vicar, made in the year 1374, by the prior and convent of Merton, was produced in evidence, by which, after a specific enumeration of the tithe of various articles with which the vicar is endowed, he "is endowed generally with all small tithes whatever due by custom or right, arising

[*179] through the whole parish of the church of *Kingston, and of the chapelries aforesaid, except those only which are specially reserved to the prior and convent aforesaid;" and it was urged on the part of the defendant, that as potatoes, whether sown in great or small quantities, whether in fields or gardens, are small tithes, the tithes of potatoes by the very terms of this endowment must belong to the vicar, not to the rector. Such is undoubtedly the construction of this instrument of endowment: but it is well established, that

the original endowment may have been altered by a new and subsequent endowment made by all parties whose concurrence is necessary, before the restraining statutes. And again, that long and constant perception of tithes by the vicar not mentioned in the endowment, or the non-perception of any species of tithes which are mentioned therein, with evidence of their perception by the rector, will afford a sufficient ground for presumption by a jury, that such augmentation or alteration of the endowment has been made by some ancient and lawful or voluntary agreement. The law is so well known on this head, that it is unnecessary to cite any cases: the result being this; that such an alteration may be valid in point of law, but that the burden of proving that it has taken place, in point of fact, in any particular case, is thrown upon the rector.

Now, it is argued by the defendants, that no such agreement can be presumed, in point of law, in the present case; because such alteration, in order to be valid, must have taken place before the restraining act, 13 Eliz.; and it is generally allowed, that potatoes were not known in England, or, at all events, not cultivated in open fields, prior to that time. To which objection, the answer that has been given, and which appears to me to be a sufficient answer, is, that although it may be reasonably admitted that such was the case, and consequently that no specific agreement relating to potatoes, *by name, could have [*180] taken place before the statute of Elizabeth, still that such an agreement may have been made as to the class of tithe to which potatoes belong, as would include and govern the tithe of potatoes, when they were afterwards introduced. As, for instance, supposing an agreement took place before the statute of Elizabeth, upon sufficient consideration, that all roots and vegetables grown in open fields, when cultivated by the plough, should go to the rector, and when cultivated by the spade, should go to the vicar, such an agreement would be valid in law, and would clearly comprehend potatoes when they came into general use. The question, therefore, in the present case is, whether there was such a body of evidence laid before the jury at the trial, as to justify them in making the presumption which they have done, upon the very question submitted to them for their consideration. There is undoubtedly evidence on both sides; and perhaps if the verdict had gone the other way, we should not have interfered to disturb it: but undoubtedly there is so much evidence on the part of the rector, as to bring this case within the general principle upon which the Court acts, viz., not to disturb a verdict, unless it sees clearly that the verdict is wrong.

That *some* variation had taken place, and some alteration been made in the terms of the original endowment, in the interval between the date of the deed of endowment, and the passing of the restraining statute, is evident. The Valor Ecclesiasticus, which was made in the 26 Hen. 8 (1535), enumerates the various sources of profit to which the vicar of Kingston was entitled at the time of such value being taken; and upon comparing them with the enumeration in the endowment, there is a considerable difference between the two. To advert to no other than two instances: the endowment gives to the vicar the tithe "*Sylvæ cædusæ*;" the Valor omits it, and *gives him the tithe [*181] "*Boscorum*;" the former tithable of common right, the latter by custom only: again, by the endowment, the vicar was endowed with the tithe of wool, and lamb, and skins, in the chapels of Ditton, Molesey, and Shene; in the Valor, there is no mention of any such tithe as due to the vicar, in any part of the parish. *Some* alteration, therefore, though to what extent may be uncertain, must have taken place in the interval between the time of granting the original endowment, and the time of taking the Valor.

But there is one provision in the endowment well worthy of observation:— "That, if it should happen in future that any gardens of the said parish should be subverted or levelled, and that the land of the same should be cultivated by the plough, then that the said prior and convent should receive and take all the tithes of the blades of whatever gardens and lands were so ploughed." Again, "that if it should happen afterwards, that any plough-lands (not being of the

manors of the said prior and convent) should be reduced to gardens, and dug by the foot, then the said vicar should have and take the tithes of blade arising from such gardens, during such times as they should be dug and cultivated by the foot." The word "bladum" appears clearly by another part of the endowment to comprehend rye, wheat, and mislen. This provision seems to point to a distinction between the tithe of the same article, when growing in fields under the plough, and when growing in gardens under the spade: that in the first case, it should belong to the rector; in the second, to the vicar; and when this is coupled with the reputation in the parish, that the rector followed the plough, and the vicar the spade, we think it furnishes a fair ground of support to the presumption which has been made by the jury in favor of the plaintiffs.

[*182] Lastly, it was proved that the tithe of potatoes is *mentioned in the deeds by which the great tithes have been conveyed from one rector to another, so early, at least, as the year 1738; and that such tithe has been included in leases of the tithes, under which leases the rent reserved by the lease has been paid. This fact is evidence of enjoyment on the part of the rector, whilst there is a total absence of any such evidence on the part of the vicar.

Upon this state of the evidence we cannot think ourselves warranted in sending the cause down to a new trial. The learned Judge has expressed no dissatisfaction with the verdict; and it cannot but be observed, that this decision will not bind the vicar as to the rest of the parish, if he thinks proper to try his right as to other lands within the same.

Rule discharged.

HAWORTH v. HARDCASTLE and Others. June 12.

In case for invading plaintiff's patent right to certain machinery for drying calicoes, &c., where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceed to state that it might be taken up again by the same machinery; a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the Court refused to set aside the verdict for the plaintiff and enter a nonsuit.

CASE for invading the plaintiff's patent right in "certain machinery or apparatus adapted to facilitate the operation of drying calicoes, muslins, linens, or other similar fabrics."

At the trial before TINDAL, C. J., it appeared that the method in which that operation was performed previously to 1823, when the patent was granted and in which it is now commonly performed by those who have not obtained leave to [*183] use the patent machinery, or *who are not infringing the right, is as follows, viz.: men are employed to pull down the wet calico into looped folds, which hang down from beneath the spaces between horizontal parallel cross rails (called staves), which staves are fixed in rows side by side across the interior of a building called a drying-house or stove, so as to form a horizontal plane or platform, like a floor, extending throughout such building. The building is usually made high enough to contain three such platforms, or floors, or rows of horizontal parallel cross rails, situated at such heights, one above another, that a man standing on one floor can readily reach up through the spaces between the staves above his head, in order to take hold of the two selvages of the wet calico which he has previously extended horizontally over and across the staves above his head; from these staves the wet calico is hung in looped folds, in order that it may be dried by the heat which is kept up within the building. The looped folds are formed by pulling down the calico from the staves overhead by repeatedly taking hold of the two selvages and pulling them down nearly to the next floor of staves below, on which the man stands: during the act of thus pulling down the wet calico, it is all necessarily dragged across the staves upon which it has been placed: and by this mode a man can only hang up one piece of calico at a time, though the staves are

usually made long enough for three or four pieces of calico to be hung side by side on the same stave: the length of the loops, too, which can be formed, is restricted to the height to which a full-grown man can reach when standing on one floor to take hold of the calico extended on the staves above his head.

The patentee's specification described his method as follows:—"My invention consists in the application of certain machinery or apparatus adapted to perform the operation of hanging or suspending damp or wet *calicoes, [*184] linens, or other similar fabrics (over a series of rails, or staves, situated in a stove or drying-house), for the purpose of drying the same: the said machinery being also adapted to perform the operation of taking down or removing the said calicoes, muslins, linens, or other similar fabrics (from off the said rails or staves), after they have been sufficiently dried: by means of which invention a considerable saving of labor and expense may be effected in the operation of drying. I construct the stove or drying-house in a manner nearly similar to that at present in use; and I arrange the rails or staves (over which the cloth or fabric is intended to be hung or suspended) near to the upper part of the stove or drying-house: I then construct a frame or carriage in such a manner as to be capable of moving freely upon guides or supports from one end of the drying-house to the other, the said carriage being situated immediately above the range of rails or staves, but so as not to bear upon them; this carriage is furnished with proper supports for receiving certain rollers or boxes, upon the circumference of which rollers or boxes the wet cloth or fabric has been previously wound. The carriage is also furnished with certain cylinders or drums, which are caused to revolve in such a manner as to draw or wind the wet cloth or fabric from off the aforesaid rollers or boxes in a regular manner: thus, if the frame or carriage, with its appendages, be slowly moved along upon its guides above the rails or staves at the same time that the wet cloth or fabric is in the act of being drawn off the circumference of the rollers or boxes by the operation of the revolving cylinders or drums before mentioned, the wet cloth or fabric will descend in the vacancies between the rails or staves, and will hang down in loops or folds, so as effectually to expose its surface to the action of the dry or heated air, and in order to suit the depth or height of the stove *or drying-house. The depth or length of the said loops or folds may [*185] be regulated or determined by the length of cloth or fabric which would be given out by the revolving cylinders or drums during the passage of the frame or carriage from one stave to the next. When the cloth or fabric has been hanging a sufficient length of time to become dry, it may be taken up again, or drawn off the rails or staves, and wound again upon the circumference of the rollers or boxes. This operation I perform by simply causing the frame or carriage, with its appendages of rollers and cylinders, to traverse slowly along the drying-house in the contrary direction to what it moved during the operation of hanging the cloth, at the same time that the cylinders or drums are caused to revolve in a suitable direction for taking or winding up the cloth or fabric upon the circumference of the rollers or boxes: by this means the dry cloth may be wound evenly upon the circumference of the rollers or boxes, and removed from the machine. In some situations I find it advisable to vary the mode of arrangement, by causing the rails or staves (over which the cloth or fabric is intended to be hung) to be connected together with chains or ropes, somewhat in the manner of a rope ladder, being connected by endless chains or ropes, with a train or wheels, or other well known machinery, so as to be moved slowly along upon guides from one end of the stove or drying-house to the other: in this last-mentioned arrangement the frame or carriage containing the revolving cylinders or drums for giving out and taking up the cloth remains stationary at one part of the stove or drying-house. The operation of this machinery would be similar to the one before described with the traversing carriage, for as the cylinders or drums are caused to revolve and give out the cloth or fabric at the same time that the chain or rails or staves were moving slowly beneath the cylinder

[*186] or drum, *the cloth or fabric would descend between the staves, and hang down in loops or folds, in a manner similar to the machine with the moving carriage."

This was followed by a detailed explanation of drawings and plans which accompanied the specification; and the specification concluded thus:—"I have now described fully one mode of carrying my invention into effect, and I do hereby declare, that I consider my claim of invention to extend to application of the machinery or apparatus as hereinbefore described, for the purpose of facilitating the operation of drying calicoes, muslins, or other similar fabrics; which machinery or apparatus is adapted by means of a revolving and traversing cylinder or cylinders, situated over a series of stationary rails or staves arranged in a stove or drying-house, in such a manner that the pieces of calico, muslins, linen, or other similar fabrics may be previously wound upon the circumference, and by the revolving and traversing motion of the aforesaid cylinder or cylinders over the stationary rails or staves, or otherwise by the revolving motion of the cylinder or cylinders, and the traversing movement of the rails or staves themselves, may be caused to descend in the spaces between the said rails or staves, and hang down in long loops or folds, in order to spread the pieces quickly and expose their surfaces, so as to facilitate the operation of drying the same; the said machinery or apparatus being also adapted to perform the operation of taking up or removing the said calicoes, muslins, linens, or other similar fabrics from off the said rails or staves, and winding or rolling them upon the circumference of a roller or rollers, so that they may be removed from the machine after being sufficiently dried; at the same time I must observe, that the form and proportion of the different parts may be varied according to [*187] the situation or discretion of the workman employed in constructing *the same; the materials of which the same may be made may also be varied according to the circumstances of the case, without departing from the intent and object of my invention as above described and set forth."

With respect to the novelty of the invention, the evidence was in some measure conflicting, and it appeared that the machine failed in taking up certain cloths stiffened with clay for deceptive purposes.

The learned Judge left it to the jury to say, whether the invention was new, and sufficiently described in the specification; whether the machine could take cloth up for any useful purpose; and whether the defendant had been guilty of any infringement on the patent.

The jury found that the invention was new, and useful upon the whole; that the specification was sufficient for a mechanic, properly instructed, to make a machine from; that there had been an infringement on the patent; but that the machine was not useful in some cases for taking up goods.

Upon this finding, a verdict was entered for the plaintiff, with leave for the defendants to move to set it aside and enter a nonsuit instead, on the ground that the jury had, by their special finding, negatived the usefulness of the invention to the full extent which the patent and specification held out; and that the patentee had claimed in his specification the invention of the rails or bars over which the cloths were hung, or, at all events, the placing them in tiers, notwithstanding the use of such rails was common before. Accordingly,

Stephen, Serjt., in Hilary term, moved to enter a nonsuit on those grounds, or to have a new trial on the ground that the verdict was against evidence, and that the jury had been misdirected on the point of the capability of the machine to take up cloth. They should have been directed to consider, whether it would [*188] take *cloth up according to the description in the patent, not whether it would take up for any useful purpose. *Felton v. Greaves*, 3 Carr. & P. 611; *Turner v. Winter*, 1 T. R. 602; *Bloxam v. Elsee*, 6 B. & C. 169; *Brunton v. Hawkes*, 4 B. & Ald. 541; *Rex v. Elsee*, 11 East, 109, n.; *Bovill v. Moore*, 2 Marsh. 211; *Campion v. Benyon*, 3 B. & B. 5; and *Macfarlane v. Price*, 1 Starkie, N. P. C. 199, were cited.

A rule nisi was granted on the first three grounds, and refused as to the alleged misdirection.

Wilde and Coleridge, Serjts., who showed cause, after examining the sufficiency of the evidence as to the novelty of the plaintiff's invention, and the infraction of his patent by the defendants, contended that the taking up cloths after the drying was not an essential part of the patent, which was for machinery adapted to facilitate the operation of drying only. But, even if it were an essential part of the patent, the finding of the jury was sufficient to sustain the verdict for the plaintiff; for it might be inferred from the qualified expression that the machine was not useful for taking up in some cases, that it was useful for taking up in general; and a failure in a few instances would not vitiate the patent: *Crossley v. Beverley*, 3 Carr. & P. 513; *Jones v. Pearce*, Godson on Patents, supplement, p. 10. Besides, the validity of a patent did not altogether depend upon its immediate usefulness; for the profitable application of a mechanical discovery was often subsequent to invention: *Lewis v. Marling*, 10 B. & C. 22.

And, upon a reasonable construction of the specification, the plaintiff did not, as the defendants alleged, claim the rails as part of his invention; for, in the *language of the specification, "he constructs the drying-house in a manner nearly similar to those at present in use, and arranges the rails [*189] near the upper part of the said drying-house:" meaning, the rails at present in use.

Stephen, in support of the rule, after enforcing his original objections, urged further that the patent was taken out for machinery, whereas the specification was for the application of machinery, or for a method only; but, upon this point, the Court gave no opinion. *Cur. adv. vult.*

TINDAL, C. J. This case has been brought before us upon a motion for a rule either to enter a nonsuit upon leave given for that purpose by the Judge at the trial, or for a new trial, on the ground of misdirection of the learned Judge who tried the cause, and also that the verdict of the jury had been given against the weight of the evidence. Upon the discussion which took place upon the original motion, the Court were satisfied that the direction of the learned Judge was right, and the rule was consequently granted upon the two remaining grounds only.

The motion for entering a nonsuit was grounded on two points: first, that the jury had, by their special finding, negatived the usefulness of the invention to the full extent of what the patent and specification had held out to the public; secondly, that the patentee had claimed, in his specification, the invention of the rails or staves over which the cloths were hung, or, at all events, the placing them in a tier at the upper part of the drying-room.

As to the finding of the jury, it was in these words:—"The jury find the invention is new, and useful upon the whole, and that the specification is sufficient for a *mechanic, properly instructed, to make a machine, and that there has been an infringement of the patent; but they also find that [*190] the machine is not useful in some cases for taking up goods."

The specification must be admitted, as it appears to us, to describe the invention to be adapted to perform the operation of removing the calicoes and other cloths from off the rails or staves after they have been sufficiently dried. But we think we are not warranted in drawing so strict a conclusion from this finding of the jury as to hold that they have intended to negative, or that they have thereby negatived, that the machine was not useful, in the generality of the cases which occur for that purpose. After stating that the machine was useful on the whole, the expression that, in some cases, it is not useful to take up the cloths, appears to us to lead rather to the inference that, in the generality of cases, it is found useful. And if the jury think it useful in the general, because some cases occur in which it does not answer, we think it would be much too strong a conclusion to hold the patent void. How many cases occur,

what proportion they bear to those in which the machine is useful, whether the instances in which it is found not to answer are to be referred to the species of cloth which are hung out, to the mode of dressing the cloths, to the thickness of them, or to any other cause distinct and different from the defective structure, or want of power in the machine, this finding of the jury gives us no information whatever. Upon such a finding, therefore, in a case where the jury have given their general verdict for the plaintiff, we think that we should act with great hazard and precipitation if we were to hold that the plaintiff ought to be nonsuited, upon the ground that his machine was altogether useless for one of the purposes described in his specification.

[*191] As to the second ground upon which the motion for *a nonsuit proceeded, we think, upon the fair construction of the specification itself, the patentee does not claim as part of his invention, either the rails or staves over which the calicoes and other cloths are to be hung, or the placing them at the upper part of the building. The use of rails and staves for this purpose was proved to have been so general before the granting of this patent, that it would be almost impossible, *a priori*, to suppose that the patentee intended to claim what he could not but know would have avoided his patent; and the express statement that he makes, "that he constructs the stove or drying-house in a manner nearly similar to those which are at present in use, and that he arranges the rails or staves on which the cloth or fabric is intended to be hung or suspended, near to the upper part of the said stove or drying-house," shows clearly that he is speaking of those rails or staves as of things then known and in common use, for he begins with describing the drying-house as nearly similar to those in common use; he gives no dimensions of the rails or staves; no exact position of them, nor any particular description by reference, as he invariably does when he comes to that part of the machinery which is peculiarly his own invention. There can be no rule of law which requires the Court to make any forced construction of the specification, so as to extend the claim of the patentee to a wider range than the facts would warrant; on the contrary, such construction ought to be made as will, consistently with the fair import of the language used, make this claim of invention co-extensive with the new discovery of the grantee of the patent. And we see no reason to believe that he intended under this specification to claim either the staves, or the position of the staves as to their height in the drying-house, as a part of his own new invention.

[*192] As to that part of the rule which relates to the granting *of a new trial on the ground of the former verdict being against evidence, this case comes before us under such peculiar circumstances, that unless we were thoroughly satisfied that the verdict was wrong, we hold that we ought not to interfere. The trial took place before a special jury; it occupied two days of close and laborious investigation; the questions whether the invention was new, and whether there was any infringement, were specifically and pointedly left to the jury; the jury found their verdict for the plaintiff, which verdict, we are authorized to say, was entirely to the satisfaction of the learned Judge who presided at the trial. These circumstances alone would be sufficient in ordinary cases to induce the Court to refuse to interfere. But in addition to these strong grounds for the course we take on this occasion, it should be observed, that this is the case of a patent granted in the year 1823, having therefore now only three years longer to remain in force; and further, the defendants, or some other persons have, since this action has been tried, procured a *scire facias* to be filed to avoid the patent. As this is a mode of trial in which the precise objections to the patent may be raised by the pleadings, and the questions made on the former trial may be carried by a writ of error to a higher tribunal, we do not feel ourselves called upon, unless upon a much stronger case than the present, to take away from the plaintiff the benefit of the verdict which the jury have given him. If this further proceeding by *scire facias* had not been instituted

and now pending, we might have felt ourselves called upon to discuss and consider one objection advanced by the learned counsel for the defendants; namely, that the patent is taken out for machinery, whereas the specification is made for the application of machinery, or for a method only. But as this objection, as well as the others, can receive a more solemn decision upon the occasion to which we have *adverted, we shall offer no opinion on it now; which we think [*193] we are the less called upon to do, on this occasion, as it was not an objection taken upon the trial of the cause before the jury, but for the first time raised when the defendants were heard in support of their rule.

Rule discharged.

END OF TRINITY TERM.

*TRINITY VACATION.

[*194]

IN THE HOUSE OF LORDS.

SOLARTE and Others v. PALMER and Another. *June 17.*

A letter from the holder to the endorser of a bill threatening legal measures unless the bill be paid, does not amount to notice of dishonor of the bill by the acceptor.

THIS was an action by the holders against the endorsers of a bill of exchange for 683*l.*, drawn the 25th of April, 1825, by Joseph Keats on, and accepted by, Daniel, Jones, and Co., payable at Williams, Burgess, and Co.'s, eight months after date.

Payment having been refused by the acceptors when the bill became due, the attorneys of the holders wrote to Palmer and Bouch, the endorsers, as follows:—

"Gentlemen,—A bill for 683*l.*, drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones, and Co., and bearing your endorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to, gentlemen, your obedient servants,
J. and S. PEARCE."

At the trial of the cause before Lord TENTERDEN, the only question was, whether this letter amounted to notice of the dishonor of the bill, without which notice the endorser would not be responsible. Upon that point Lord TENTERDEN felt himself bound at *Nisi Prius* by the decision in *Hartley v. Case*, 4 B & C. 339; where it was held that a notice of the dishonor of a bill of exchange must contain an intimation that payment of the bill had been refused by the acceptor, and, therefore, that a letter merely containing a demand of payment was not a sufficient notice. However, observing that the sum was large, and the question of importance, he suggested that the *defendant might [*195] tender a bill of exceptions, as the readiest mode of obtaining the opinion of the highest tribunal.

A bill of exceptions was tendered and sealed accordingly, and argued in the Court of Exchequer Chamber, when that Court unanimously confirmed the authority of *Hartley v. Case*, and held that a letter demanding payment and threatening proceedings at law did not amount to notice of the dishonor of a bill. See 7 Bingh. 530.

From this decision an appeal was made to the House of Lords; and, the Judges being summoned to hear the argument,

F. Pollock and *R. V. Richards*, for the plaintiff, contended that too much

weight had been ascribed in the Exchequer Chamber to the authority of *Hartley v. Case*, a decision which was at variance with the opinions and practice of all commercial men. There was no settled form prescribed for giving notice of the dishonor of a bill; and, when the holder threatened to proceed at law against the endorser unless the bill were paid, it was a necessary inference that the bill had been dishonored. In *Tindal v. Brown*, 1 T. R. 167, *BULLER, J.*, said that a notice of this sort "must import that the holder considers the endorser as liable, and expects payment from him." Such was the import of the plaintiff's notice; and it was, therefore, a sufficient notice of dishonor: *Bayley on Bills*, 4th edit., 206.

Whateley, for the defendants, was stopped; and

PARK, J., declared the unanimous opinion of the Judges present,¹ that the [*196] letter of the plaintiff's attorneys did not amount to notice of the dishonor of the bill, as such a notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonored. The following day,

Lord BROUGHAM, C., said the judgment of the Court below must be affirmed with costs not exceeding 350*l.*, on the ground that, after the decision of *Hartley v. Case*, and the sanction given to the authority of that decision by the unanimous judgment of the Court of Exchequer Chamber and the fifth edition of *Bayley on Bills*, the present case was too clear for an appeal. Judgment affirmed.

¹ *WILLIAMS, B., BOLLAND, B., ALDERSON, B., PATTESON, J., TAUNTON, J., LITLEDALM, J. VAUGHAN, J., GASELER, J., PARK, J.*,

IN THE HOUSE OF LORDS.

RICKETS v. LEWIS. June 17.

The House of Lords will not receive from the agent of the plaintiff in error, a petition to refer to the Judges the legal points in the case.

In this case the Attorney-General appeared for the defendant in error, when

The agent for the plaintiff in error offered to present to the House a petition of the plaintiff in error, that the House would refer it to the Judges, to consider the legal points in the case; but,

The Clerk of the House declaring that this petition was unprecedented,

On the prayer of the Attorney-General, Judgment was affirmed.

[*197] *IN THE HOUSE OF LORDS.

In the Matter of the LONDON and WESTMINSTER Bank. *June 20.*

The Judges declined to answer a question proposed to them by the House of Lords, in terms which rendered it doubtful whether it did not extend to the construction of a bill before the House.

THE Judges being this day assembled in the House of Lords, pursuant to the following order of June 16th:—

"Ordered by the lords spiritual and temporal, in parliament assembled, that the bill entitled 'An Act to enable the Company called the London and Westminster Bank to sue and be sued in the Name of one of the Directors of the Trustees, or any of them, or of the Manager or Managers, or any of them, of the said Company,' be taken into the consideration of the learned Judges on Friday next, on this

question, 'Are the provisions of this bill inconsistent with the Bank of England's rights, as secured to it under the following acts:—5 W. & M. c. 20, 8 & 9 W. & M. c. 20, 6 Ann. c. 22, 15 G. 2, c. 13, 21 G. 3 c. 60, 39 & 40 G. 3, c. 28, and 3 & 4 W. 4, c. 98?' "

Harrison, while arguing on the part of the Bank of England, was stopped by Lord WYNFORD, in the chair, the learned Judges having requested permission to retire for the purpose of conferring and considering whether they could with propriety answer the question put to them.

The Judges then retired; and, after an absence of about three-quarters of an hour, returned, when

*TINDAL, C. J., said:—His Majesty's Judges, after considering the question which has been proposed to them, find it proposed in terms which [*198] render it doubtful whether it is a question confined to the strict legal construction of existing acts of parliament; and they therefore, with great deference and respect to your Lordships, request to be excused from giving an answer.

The further consideration of the bill was then adjourned.

¹ The Judges present were TINDAL, C. J., PARK, J., VAUGHAN, J., LITLEDAL, J., J. PARKER, J., TAUNTON, J., PATTERSON, J., ALDERSON, B., BOLLARD, B., WILLIAMS, B.

IN THE HOUSE OF LORDS.

MARSH and Others, Plaintiffs in Error, v. KEATING, Defendant in Error.
June 25.

A stockholder, whose stock has been sold without his knowledge under a forged power of attorney, may sustain an action for money had and received against the party who holds the proceeds of the sale.

THIS action was brought in pursuance of an order of the Lord Chancellor, for the purpose of trying the question, whether the defendants below and Henry Fauntleroy were, at and before the date and issuing forth of the commissions of bankruptcy against them, and still are, indebted to the plaintiff below in any and what sum of money. And by the order it was directed that an action should be brought by or in the name of Ann Keating, against William Marsh, Josias Henry Stracey, and George Edward Graham, in his Majesty's Court of King's Bench, for money had and received by the said bankrupts to and for the use of the said Ann Keating; and that a special verdict should be taken in such action by consent on a statement of facts to be settled in manner therein mentioned. And that the defendants in the said action should consent to judgment being entered up in the said Court, and in the court of error, for the said plaintiff, for the purpose of the same *being carried by writ of error before the House [*199] of Lords.

The question raised was, the right of Mrs. Keating to prove against the bankrupt estate of Marsh & Co., a sum of money received by them on the sale of stock belonging to her, which stock was transferred by Henry Fauntleroy, one of the bankrupts, under a forged power of attorney.

By the special verdict it was found that on the 10th of October, 1819, there was standing in the books of the Governor and Company of the Bank of England, in the name of the plaintiff, the sum of 12,000*l.* interest or share in the joint stock called reduced 3 per cent. annuities, transferable at the said Bank of England. That the accounts of the proprietors of the said stock are kept in certain books of the Governor and Company of the Bank of England called ledgers; that accounts are entered in the form of debtor and creditor accounts in the said ledgers of the whole amount of the said stock, in which accounts the

sums either subscribed or transferred to individuals are stated as items to their credit on the one side of the account, and on the other side of the account they are debited with all sums transferred from their names; and that certain other books are kept by the Governor and Company of the Bank of England, in which are entered transfers of the said stock, from time to time, purporting to be signed by the parties transferring the same, or their attorney, lawfully authorized. That upon production of the transfer books, the clerks of the Governor and Company of the Bank of England, who keep the ledgers, enter the sums transferred to the credit of the persons to whom the transfers are made in the ledgers, by adding those sums to their accounts, if they already have any, or by opening new accounts with such persons, if they have not already any accounts in such [*200] ledgers. That no entries *in the ledgers are made without the authority of the entries which are made in the transfer books; but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further inquiry as to the genuineness thereof. And that any person on whose account any sum of stock appears in such ledger, is permitted at any time, on application at the Bank of England, to transfer the same, or any part thereof, at his discretion. That the accounts are balanced twice a year, for the purpose of making out dividends; that the aggregate amount of the balances form the aggregate of the said stock; that such aggregate amount is transmitted half yearly to the Audit Office of the Exchequer, for the purpose of ascertaining the amount which will be wanted for dividends; and that the dividends are calculated on the balance so ascertained. That an account is also once a year transmitted to the Audit Office of the Exchequer, which contains the names of all persons who appear by the books kept at the Bank as aforesaid to be the proprietors of any part of the said annuities. That the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers in the names of the persons who appear by the ledgers to be entitled thereto.

That the within-named William Marsh received the dividends which became due in respect of the said sum of 12,000*l.* in the said stock, in the month of October, 1819, under and by virtue of a power of attorney dated the 7th of June, 1803, from the within-named plaintiff to the said William Marsh, Sir James Sibbald, Baronet, Josias Henry Stracey, and William Fautleroy, being the persons at the date thereof composing the firm of Marsh, Sibbald & Co., and paid them to the house of Marsh & Co., bankers in Berners Street, to the account of the plaintiff, who had a banking account with the said house.

[*201] *That on the 29th of December, 1819, an entry was made in one of the transfer books of the Governor and Company of the Bank of England, purporting to be a transfer,—under a power of attorney purporting to be granted by the plaintiff to the said William Marsh, Josias Henry Stracey, George Edward Graham, and Henry Fautleroy, the persons, who, at the date thereof, composed the firm of Marsh & Co., jointly, and each of them severally,—of 9000*l.* of the plaintiff's interest or share in the said stock, unto William Brackstone Tarbutt, of the Stock Exchange, gentleman, his executors, administrators, or assigns.

That the power of attorney under which the said entry was made was not executed by the plaintiff, but that the signature to the said power of attorney, purporting to be the signature of the plaintiff, was forged by the said H. Fautleroy; that the said H. Fautleroy had not any authority from the plaintiff to make any such transfer; and that the plaintiff did not even authorize or request the Governor and Company to make any transfer of the said sum of 9000*l.* in the said stock, or any part thereof.

That in consequence of such entry in the transfer-book, an entry was made in one of the ledgers of the Governor and Company of the Bank of England, by which the plaintiff was debited with the said sum of 9000*l.* reduced 3 per cent. annuities, and credit was given to the said W. B. Tarbutt for the sum of 9000*l.*

in the said stock; and that from that time the plaintiff ceased to have credit for the said sum of reduced 3 per cent. annuities in the said ledger.

That on or about the 11th of January, 1820, the said Marsh & Co. purchased for the plaintiff the sum of 3000*l.* reduced 3 per cent. annuities, and caused the same to be transferred to the plaintiff, whereby there appeared the sum of 6000*l.* to the credit of the plaintiff *in the said ledgers kept at the Bank of England, and no more. That the said W. Marsh attended at the Bank [*202] of England in the month of April, 1820, and duly received the dividend which became due on the said sum of 6000*l.* 3 per cent. reduced annuities, on the 5th of April, 1820, and signed a receipt for the same, as the attorney of the plaintiff.

That since the 29th of December, 1819, very numerous transfers of reduced 3 per cent. annuities, of sums both great and small, had been made to and by the said W. B. Tarbutt, which had been debited and credited to him; and that in the books kept by the said Governor and Company the said sum of 9000*l.* reduced 3 per cent. annuities had become blended and mixed with other stocks standing in the said ledgers in the said W. B. Tarbutt's name, and in the said books appeared to have been transferred and assigned by him; that it was not possible to distinguish the account to the credit of which the said 9000*l.* reduced 3 per cent. annuities stood, which were so carried to the credit of the said W. B. Tarbutt, and debited to the plaintiff as aforesaid; and that no dividend warrant had at any time since the said 29th of December, 1819, been made out for or in respect of the dividends on the said 9000*l.* reduced 3 per cent. annuities in favor of the plaintiff, either together with or apart from any other sum of stock, but that the dividend thereon had been ever since paid to other persons appearing on the said books to be the transferees thereof.

That the plaintiff did not consent to, and had not any knowledge of the above entries or entry having been made in the books of the within-named Governor and Company.

That upon the 10th of September, 1824, the said H. Fauntleroy was apprehended on a charge of forging letters of attorney for the transfer of certain other annuities in the Bank of England; and that the *Governor and Company of the Bank of England undertook to prosecute the said H. [*203] Fauntleroy. That the plaintiff informed the Governor and Company of the Bank of England of the forgery so committed as soon as the same came to her knowledge. That the said Governor and Company caused several indictments to be prepared against the said H. Fauntleroy, for forging letters of attorney for transfer of parts of the annuities transferable at the Bank of England; and that the said H. Fauntleroy was tried and convicted upon one of such indictments upon the 30th of October, 1824, and executed on the 30th of November, in the same year; but that neither the plaintiff nor the said Governor and Company preferred any indictment against the said H. Fauntleroy, in respect of forgery of the power of attorney hereinbefore referred to.

That Marsh and Co. kept an account with Martin, Stone, and Co., bankers in the city of London, in the usual way of a banker's account: and that a pass-book went from one house to the other from time to time, according to the usual practice between bankers. That Marsh and Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made; and that, in the due course of business, the pass-book and the housebook of Marsh and Co. ought to have corresponded. That the house-book was in constant use in the banking-house of Marsh and Co., and that the pass-book was frequently brought thither from the house of Martin and Co.; but that when it was at the banking-house of Marsh and Co., the said H. Fauntleroy kept the same generally locked up in his own desk. That the said H. Fauntleroy was permitted by the other bankers to conduct the greater part of the business of the said banking-house without their interference; that they reposed great confidence in the said H. Fauntleroy; and that *the said H. Fauntleroy [*204] made very many false entries and omissions in the house-book, so that

the same did not correspond with the pass-book in many instances. That the said H. Fauntleroy paid into the hands of Martin and Co., and drew out of their hands, considerable sums for his own individual use, which appear respectively in the pass-book, but not in the house-book, and also made very many false entries in the other books of the firm, without the knowledge and in fraud of his partners to a large amount.

That on the 29th of December, 1819, the said H. Fauntleroy ordered one Thomas Butterfield Simpson, a stock-broker, to sell out the sum of 9000*l.* reduced 3 per cent. annuities, described as standing in the books of the said Governor and Company of the Bank of England in the name of the plaintiff; and that the said T. B. Simpson sold the same to the said W. B. Tarbutt for the sum of 6018*l.* 15*s.*, which sum he received from the said W. B. Tarbutt. That according to the course of business between the said T. B. Simpson and the said Marsh, Stracey, and Co., the said T. B. Simpson allowed the said Marsh, Stracey, and Co. one-half of the usual commission when employed by them to effect sales; that upon the said sale he allowed one-half of the commission; and that the said T. B. Simpson paid the sum of 6018*l.* 2*s.* 6*d.*, being the amount of the sum so received by him from the said W. B. Tarbutt, deducting one-half of the usual commission, by a check payable to the said Marsh and Co., into the hands of Messrs. Martin and Co., to the account of Marsh and Co.; and the same was entered by them in their pass-book as "Cash per Fauntleroy," the name of Fauntleroy denoting the name of the individual by or on whose behalf the payment was made. That no entry was made, at any time, of the said sum of 6018*l.* 2*s.* 6*d.*, in the house-book, or any other [*205] books of Marsh and Co., but only in the *pass-book of that firm with Martin and Co.; that it was the business of the said H. Fauntleroy, as between himself and his co-partners, to have entered the said sum in the house-book, if it had been intended by him for the account of Marsh and Co. That among the books kept by the said Marsh and Co., there was, besides the said house-book, a daily balancing-book, purporting to contain a daily record of the amount of cash left in the drawers in Berners Street, and the amount of cash at Martin & Co.'s, as shown by the house-book, after the conclusion of each day's transactions, accompanied by a proof of the correctness of such balance. That the said H. Fauntleroy in general made up such daily balances in the said balancing-book, and the said sum of 6018*l.* 2*s.* 6*d.* was not entered in the house-book, nor in the daily balancing-book, on the said 29th of December, 1819, or at any other time, nor did the same ever come into the yearly balances of the said house of Marsh & Co., or in any other manner into their books.

That no individual partner of the house of Marsh & Co. could draw moneys out of the said account of Martin, Stone, & Co. but by drafts signed in the partnership name or firm; but that the said H. Fauntleroy paid in, and by means of such drafts drew out, large sums of money for his own individual purposes; and that the account between the said Marsh & Co. and Martin & Co. was repeatedly balanced between the said 29th of December, 1819, and the bankruptcy of Marsh & Co.

That on the 13th of September, in the year 1824, in consequence of the discovery of the forgeries of the said H. Fauntleroy, the said William Marsh, Josias Henry Stracey, and George Edward Graham, became bankrupts; and a commission of bankruptcy, bearing date the 16th of the same month, was duly [*206] awarded and issued against them, under which they were duly *found and declared bankrupts; and on the 26th of October following, the said H. Fauntleroy also became bankrupt, and a commission of bankruptcy, bearing date the 29th of the same month, was duly awarded and issued against the said H. Fauntleroy, under which he was on the same day duly found and declared bankrupt.

That, in the month of April, 1820, credit was given to the plaintiff by the said house of Marsh & Co. in the banking account kept by the plaintiff with the

said house, for the dividend on the sum of 15,000*l.* reduced 3 per cent. annuities, 9000*l.* stock, parcel thereof, being the 9000*l.* reduced annuities before mentioned, the entries respecting the said dividends being made by the said H. Fauntleroy, or under his immediate direction; and that from the month of April, 1820, up to the date of the said bankruptcy, entries were made in the books of Marsh & Co., by which the plaintiff's account was credited with a sum of money as the dividends on the reduced 3 per cent. annuities then in her name, including in such account the dividends on the said 9000*l.* reduced 3 per cent. annuities, as if those dividends had been regularly received from time to time, such entries respecting the said dividends having likewise been made by the said H. Fauntleroy, or under his immediate directions; and that until after the apprehension of the said H. Fauntleroy before mentioned, the said William Marsh, Josias Henry Stracey, and George Edward Graham, and each of them were wholly ignorant of the said forgery hereinbefore mentioned.

That after the bankruptcy the plaintiff made application to the Governor and Company of the Bank of England, respecting the said sum of 9000*l.* interest, or share in the said stock called reduced 3 per cent. annuities, and that thereupon the following letter was *written by the attorneys of the Governor and Company of the Bank of England to the within-named plaintiff:—[*207]

“New Bank Buildings, 4th Dec., 1824.

“The Governor and Directors of the Bank of England have had under their consideration your claim to have 9000*l.* reduced three per cent. annuities, which formerly stood in your name, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your name by one of the partners of the late firm of Marsh, Stracey & Co., and that the produce of the stock was paid into the funds of Messrs. Marsh, Stracey & Co.; you have, therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs. Marsh, Stracey & Co.'s commission. And we are directed by the Governor and Directors to request that such proof may be tendered and enforced by petition, if it should not be admitted by the commissioners; after which the bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. Marsh, Stracey & Co., will also be paid to you.

“We beg to add, that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.

“Mrs. KEATING.

FRESHFIELD AND KAYE.”

That on the 1st of August, 1825, the Governor and Company of the Bank of England paid the plaintiff the sum of 270*l.*, on her signing and entering into the following receipt and agreement:

“August 1, 1825. Received of the Governor and Company of the Bank of England the sum of 270*l.*, being the amount which would have been payable to me by way of dividend on 9000*l.*, reduced 3 per cent. annuities, [*208] *heretofore standing in my name, for the two half years ending the 10th day of October and 5th day of April last, if that stock had not been transferred, as I allege it to have been, without any legal authority from me.

“I say, received the same, without prejudice to any right I may have to prove for the produce of the said stock under Marsh & Co.'s commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I do hereby engage (in case the said debts should be decided by a court of law to be provable against the said bankrupt's estate), when required by the said Governor and Company, and at their expense, to tender or cause to be tendered a proof to the commissioners under the bankruptcy of Marsh & Co., in respect of the produce of such stocks so sold out by them; and in case such proof shall be rejected, to permit my name to be used in a petition to be presented by and at the expense of the said Governor and Company to the Court

of Chancery, for the purpose of enforcing their acceptance of such proof as a debt against the said bankrupt's estate, on being indemnified by the said Governor and Company from all costs, charges, and expenses which I may sustain or be put to in respect thereof, without prejudice to my right to claim, notwithstanding such proof, to have the said stock replaced in my name by them.

ANN KEATING."

That the plaintiff being examined before the commissioners of bankrupt under the commission awarded and issued against the said Marsh & Co., entered into and signed, by her agent thereunto lawfully authorized, the admission following, that is to say:

"In the Matter of Marsh and Co., Ex parte Ann Keating.

"The said Ann Keating hereby admits that the paper writing, bearing date the 22d of December, 1819, *and purporting to be a power of attorney from [*209] her to William Marsh, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham, referred to in the examination of James Fenn before the commissioners on the 18th of September last, and the 4th of June instant, and exhibited to the commissioners, was not executed by her, or by her authority, but is forged and fraudulent. That she discovered such forgery at or about the time of the apprehension of Henry Fauntleroy in September, 1824, and gave information thereof to the Governor and Company of the Bank of England, but did not institute any criminal proceedings against any person in respect of such forgery; and further, that she the said Ann Keating has demanded from the said Governor and Company the full amount of stock in respect of which the present claim is made, and all dividends thereon, and that she intends to insist upon such demand, and to enforce the same by law, if necessary, and that 185*l.* is the amount of the half-yearly payment of the said annuity, and that she has received the said sum of 185*l.* half-yearly from the Bank of England, from the time of Marsh & Co.'s bankruptcy down to the present time, upon signing a receipt and undertaking (as above set out).

"And the said Ann Keating further admits that this claim is prosecuted by, and for the benefit, and at the expense of the Bank of England; and that whether the same shall fail or be established, she insists upon her demand against the Bank of England, as above stated."

In Easter term, 1832, judgment was entered up in the Court of King's Bench, without argument, for the plaintiff, and a writ of error being thereupon brought into the Court of Exchequer Chamber, the judgment of the King's Bench was also, without argument, affirmed in that Court, the object of the parties being [*210] to bring *the matter in issue before the ultimate court of appeal without delay; and thereupon the defendants below accordingly brought their writ of error in parliament, and assigned general errors. The plaintiff below joined in the errors.

The defendants below contended, that the judgment of the Court of King's Bench, and the judgment of affirmance by the Court of Exchequer Chamber, ought to be reversed.

First, Because Mrs. Keating was still the proprietor of the 9000*l.* stock. She could not be deprived of her property in the stock by the wrongful acts of other persons, without her knowledge or consent. The statutes which create and define the nature of the stock also prescribe the only mode in which it can be legally transferred, and that mode had not, in the present case, been adopted; Mrs. Keating's rights were therefore untouched, and her property in the stock was not divested. No fraud or mistake of the government, or its agents, could change the right of a stockholder, from a right to a parliamentary annuity into an action for damages against the government, or the bank, or any other party whatsoever.

Secondly, If it should be contended that Mrs. Keating might elect to affirm the act of transfer, by subsequent recognition, although it was originally done without her authority, the answer was, that no such affirmance had taken place.

To entitle her to rely on a subsequent recognition, that fact should have been found. And although she might affirm an act done in her name but without her authority, as against the party doing the act, no such right could be exercised against third persons. A lease under a power, void for non-observance of the conditions of the power, or a lease under the enabling statutes, void for non-observance of the requisites of those statutes, could not be set up or [*211] *confirmed by any act of the lessor. The felonious act of Fauntleroy could not be made valid by affirmation against parties innocent and not cognizant of the felony: nor was it competent for the plaintiff below to maintain any action, either against Fauntleroy or any person deriving through him, for restitution of the property divested by the felony, or any compensation or damages in respect of the felonious act, without having prosecuted the felon.

Thirdly, This action being for money had and received, could not be maintained against Marsh and Co., who never did, in fact, receive the money, nor was there any constructive receipt of it by any entry in their books, or acknowledgment to the party claiming it. Besides, Mrs. Keating by her agreement with the Bank of England had disaffirmed the sale of the stock, and could not now set it up as a valid sale. Further, this was an equitable action, and the Bank of England, being the real claimants, could not enforce against Marsh and Co. a claim which arose only by means of their own negligence; no negligence was found in Marsh and Co., but even if there were negligence on both sides, the parties were *in pari delicto*, and the rule, *potior est conditio possidentis*, applied.

For the plaintiff below it was contended, that whatever might be the abstract right of proprietors of interests in the public funds to continue such till they should have assigned those interests; yet, in the present case, Mrs. Keating's title in the bank books had been destroyed, and her stock had been so dealt with by means of entries in those books, the public records of title, not only that other persons had got into possession of the dividends, but that it could not now be ascertained to whose account the same had been placed, so that it had become impossible to restore it to her in specie; and though *she [*212] might possibly be entitled to maintain an action against the Bank of England, that would not give her her stock, but damages. Neither the bank nor the government could create stock. If, therefore, the stock of a public creditor was transferred from his name, and was so dealt with that it could not be ascertained in whose name or names the various portions of the specified stock now stood, no means existed to recover that which could no longer be identified. *Stone v. Marsh*, 6 B. & C. 551; *Ex parte Bolland in re Marsh and Others*, 1 Montagu & M. 315; *Stracey v. The Bank of England*, 6 Bingh. 754.

And the stock in question having been sold by order of one of the partners of the house of Marsh and Co., who were Mrs. Keating's bankers, and her agents in regard to that stock, and the produce having been paid to the said house, they were liable in an action for money had and received to account to her for the sum so received.

PARK, J., now delivered the opinion of the Judges as follows:—

The question which your Lordships have been pleased to propose for the opinion of His Majesty's Judges amounts in substance to this: whether the produce of stock formerly standing in the name of Mrs. Ann Keating, the plaintiff below, but transferred out of her name on the 29th of December, 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the defendants below, the bankers of Mrs. Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by *the surviving partners to the use of the plaintiff below, [*213] and be recovered by her in that form of action. And after hearing the argument at your Lordships' bar, and consideration of the facts stated in the special verdict, all the Judges who were present at the argument, including the

Lord Chief Justice of the Common Pleas, who is absent at Nisi Prius, and Mr. Baron BAYLEY, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

The first objection raised against the plaintiff's right to recover, and upon which great reliance has been placed at your Lordships' bar, is an objection which, if allowed to prevail, would be equally strong against the plaintiff's right to recover damages in any form of action, and against any person. It is objected that the plaintiff below has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only, viz., "by entries in the transfer-books kept at the bank," which entry, it is enacted, "shall be signed by the parties making such transfers, or their attorneys, authorized by writing under their hand and seal," and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer-book kept at the bank not having been signed by the party making the transfer, nor by any attorney authorized by writing under her hand and seal, it is contended that it is altogether inoperative; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of Davis [*214] v. The *Governor and Company of the Bank of England, 2 Bingh. 393, is cited and relied upon as an authority directly in point in support of such proposition. But we hold it to be altogether unnecessary, on the present occasion, to discuss the proposition above advanced, or the authority of the case cited in support of it; for although the proposition may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty, still, under the circumstances stated in the special verdict, we are of opinion that the plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or, more properly, impracticability, under which Mrs. Keating would be placed, if, as matters now remain, she should elect either to receive the dividends or to sell her stock: it is sufficient to observe, that the special verdict finds, "that when stock is sold, an entry of the transfer is made in the bank books, and the name of the purchaser substituted for that of the seller. The dividend warrants are thenceforth made out in the purchaser's name, who receives the dividend, and the seller's name is no further noticed." Now it is obvious that a transfer, under a forged power, or by an impostor, has all the appearance, and, unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer: the transferee's name is entered in the bank books as the stockholder; the dividend warrants are made [*215] out in his name; and he, as holder of the warrant, has the right to insist upon the payment of the dividends; and in this particular case, the special verdict finds, "that it is not possible to distinguish the accounts, to the credit of which the plaintiff's stock so sold under the power of attorney now stands." If the plaintiff below, therefore, were to apply to receive payment of the dividends, or to sell the stock, she would be met with a difficulty, insuperable in fact: although the stock may, in contemplation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock, until she had first compelled the bank to purchase, de novo, in her name, an equal quantity of the same stock.

Is she compelled to adopt this circuitous process, or is she at liberty to abandon all further concern with her stock, and to consider the price which was paid by the purchaser for that which was her stock, to be her money, and to follow it into the hands of the present defendants below?

This, as before stated, appears to us to be the question reserved for our consideration: and, upon this question, we think her at liberty to give up the pursuit of the stock itself, and to have recourse to the price received for it, unless any of the objections which have been urged at your Lordships' bar should be allowed to be available under the particular circumstances of this case.

The general proposition, that where a party who has been injured has different remedies against different persons, he may elect which of them he will pursue, is not called in question. If the goods of A. are wrongfully taken and sold, it is not disputed that the owners may bring trover against the wrong-doer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price; but it is objected, that such general rule [*216] will not apply to the present case, on various grounds of objection which have been advanced on the part of the defendants in the action.

Those objections appear to resolve themselves substantially into four: first, it has been urged that the transfer in this case being an act, not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it: secondly, that, at all events, in this case such election is taken away, upon grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would, in effect, be to affirm a sale completed through a felony, and would give the plaintiff a right of action, arising immediately out of the felony itself: thirdly, that it does not appear, from the facts found in the special verdict, that the money produced by the sale of the stock came to the hands of the present defendants under such circumstances as would constitute it money had and received by the defendants below to the use of the plaintiff: and, lastly, that by the subsequent transactions between the plaintiff and the Bank of England, she has lost any right of action against the defendants, if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It is urged at the bar, that a lease under a power being void, on account of a non-compliance with the terms of the power, or a lease under the enabling statutes being void, on account of the non-observance of the requisites contained in those acts, such void lease cannot be set up or confirmed by any act of the lessor; but these instances only prove that acts done to confirm the lease itself are nugatory, and that the estate of the lessee remains precisely the same as before [*217] such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her, whether the right of the transferee to hold the stock is strengthened or not. She is looking only to the right of recovering the purchase-money; and if, in seeking to recover that, she does not, by her election, make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened, that, after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning, in any manner, the title of the purchaser of the stock.

As to the second objection it may be admitted, that the civil remedy is, in all cases, suspended by a felony, where the act complained of, which would otherwise have given a right of action to the plaintiff, is a felonious act. Upon this ground, Mrs. Keating would have lost any right of action, which she could otherwise have had against Fauntleroy for the wrongful sale of her stock, without her authority, by reason of the felony committed by him as the means of selling the stock. But this principle does not apply to the present case, upon two grounds:—first, none of the present defendants had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them, in which the civil right arising against them, supposing it to exist, can merge or be suspended;

they are innocent third persons. And, secondly, Fauntleroy, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought, not indeed for the commission of this particular forgery, but of [*218] another of the same nature; and the present *plaintiff having given to the bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar, *Dawkes v. Coveleigh*, *Style's Rep.* 347, and *Crosby v. Leng*, 12 East, 409. As to the argument, that to affirm this sale is to affirm a felony, that point may be considered to have been decided in the cause of *Stone and Another v. Marsh and Others*, 6 B. & C. 551, with which decision we entirely concur. Lord TENTERDEN, in giving the judgment of the Court of King's Bench in that case, puts the question, in page 565 of that report, in so clear a point of view, that it will be better to transcribe his words:—"It was contended that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or felonious act, and that here the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incorrect in fact; the plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made." We think, therefore, upon the reasons above given, that this second objection falls to the ground.

*But it is objected, thirdly, that the proceeds of the sale of the stock [*219] never came into the hands of the defendants, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions:—First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy. As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum of 6013*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt (deducting one-half of the usual commission), by a check payable to Marsh & Co., into the hands of Martin & Co., to the account of Marsh & Co., at the precise time of such payment; therefore there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the balance into their own hands: if the same money had been paid into Martin & Co.'s as the produce of the plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as "Cash per Fauntleroy," or because it never appeared in the house-book, or any other books of Marsh & Co., but only in the pass-book of that firm with Martin & Co., or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one [*220] of the partners, deceived the others, by preventing the money *from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at Martin & Co.'s.

It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above-mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the plaintiff's right to recover, it is argued, that by the agreement into which she entered with the bank, and under which she has received, from the time of the sale, the dividends which would have become due, she has disaffirmed the sale, with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale.

But it appears to us, that it is sufficient to look at the terms of such agreement to give an answer to the objection. *That agreement expressly reserves to Mrs. Keating the right to have recourse, either to the bank [*221] or the present defendants for her remedy, as she may be advised. It therefore leaves the question, whether the sale is affirmed or not, completely in uncertainty, until she makes her election to have recourse to the one or the other; and the agreement is one which causes no disadvantage to the rights of the defendants, who, if liable, can only be liable once to the payment of the money actually received, whether the bank have in the mean time advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your lordships, A. has the right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires to have it expressly understood that he fully concurs in the opinion now delivered.

Judgment affirmed, without costs.

*IN THE HOUSE OF LORDS.

[*222]

The Mayor and Burgesses of LYME REGIS v. HENLEY. *June 25.*

Where the crown granted a borough in fee farm to a corporation, and acquitted them of a part of the rent, willing that they should repair the banks, mounds, sea-shores, and pier within the same: Held, that an action lay against the corporation at the suit of an individual, whose house had been injured by the sea in consequence of the neglect of the corporation to repair the sea-shore and mounds.

THIS action was brought by Henley, the plaintiff below, against the defendants below, for the non-performance of certain repairs directed by their charter, whereby special damage had been incurred from the sea; and the declaration in the first count stated that

Whereas heretofore, and before the committing of the grievances by the said defendants, as hereinafter next mentioned, to wit, on the 20th of June, in the 10th year of the reign of our late sovereign Charles I., to wit, at the parish of

Lyme Regis, in the county of Dorset, our said late sovereign lord, by his certain letters patent, duly sealed in that behalf, after reciting as therein is recited, did for himself, his heirs, and successors (amongst other things) give, grant, and confirm to the mayor and burgesses of Lyme Regis aforesaid, and their successors, the borough or town of Lyme Regis, and also all that the building called the pier-quay or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the said pier-quay or cob, in any wise howsoever belonging or appertaining; to have, hold, and enjoy the aforesaid borough or town, and also all that the building aforesaid, called the pier-quay or cob of Lyme Regis, with all and singular the liberties, franchises, privileges, and immunities, to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, to the only and proper use and behoof of the said mayor and burgesses of the borough aforesaid, and their successors, *in fee farm for ever, yielding of fee farm to our said late sovereign lord Charles I., his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned: And our said late sovereign lord Charles I. did further, for himself, his heirs, and successors, pardon, remise, and release to the same mayor and burgesses of the borough or town aforesaid, and their successors for ever, twenty-seven marks, parcel of thirty-two marks of the farm of the same borough and the liberties thereof, anciently by letters patent, or in any other manner due to our said late lord King Charles I.; willing not that the same mayor and burgesses of the borough of Lyme Regis aforesaid, in the county of Dorset aforesaid, or their successors, or either or any of them, should be charged of the further portion of the aforesaid farm of thirty-two marks, besides the aforesaid five marks, by our said late lord King Charles I., or by his heirs, justices, sheriffs, escheators, clerks of the market, or bailiffs or ministers of him, the late King Charles I., his heirs or successors whomsoever, or of the arrears thereof; but that they and their successors, against our said late King Charles I., his heirs and successors, should be thereafter acquitted, and from time to time for ever discharged of the aforesaid yearly twenty-seven marks, parcel of the aforesaid yearly thirty-two marks, any statute, act, ordinance, provision, or any charters or letters patent theretofore made, by any of our said late King Charles I.'s progenitors to the same mayor and burgesses, or their predecessors, to the contrary thereof in any wise notwithstanding: And that the aforesaid mayor and burgesses of the borough of Lyme aforesaid, and their successors, all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid

[*223] borough in any wise belonging or *appertaining, or situate between the same borough and the sea, and also the said building there called the pier-quay or the cob, at their own costs and expenses thenceforth, from time to time for ever, should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient: And further, our said late King Charles I., by the said letters patent, for himself, his heirs and successors, did grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the same borough for the time being for ever thereafter should be clerk of the market within the borough or town aforesaid, and the liberties and precincts of the same; and that the mayor of the borough aforesaid for the time being should do and execute, and might and should be able to do and execute there for ever, all that to the office of clerk of the market of our said late King Charles I.'s household there pertained to be done and performed; so, nevertheless, that the clerk of the market of our said late King Charles I.'s household for the time being, together with the aforesaid mayor for the time being, might exercise the office abovesaid, and intromit, when he would to do anything which pertained to the office of clerk of the market there, in the borough aforesaid, and the liberties and precincts of the same: And further, our said late King Charles I., for himself and his heirs and successors, did, by

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the said letters patent, give, and grant to the said mayor and burgesses of the said borough and town aforesaid and their successors, all and singular the fines, amerciaments, and sums of money before the said clerk of the market of the town or borough aforesaid, or the clerk of the market of the said late King Charles I., or his deputy, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters patent, forfeited, or thereafter to be forfeited *and assessed in the same borough; to have [*225] and enjoy to the same mayor and burgesses of the borough aforesaid, and their successors, to the use of the aforesaid mayor and burgesses, and their successors for ever, of the said late King Charles I.'s gift, without account, or any other thing for the same to our said late King Charles I., his heirs or successors, in any wise howsoever to be rendered or paid, and to be levied by their own servants and ministers, without estreats thereof to be sent to the Exchequer of the said late King Charles I.: And, moreover, the said late King Charles I. did will, and by the said letters patent did for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, full power, authority, and license from time to time for ever to dig stones and rocks in any places whatsoever, within the borough and parish of the town aforesaid, out of the sea and on the sea-shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier-quay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid: And the said late King Charles I. did also, by the said letters patent, will and grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the same mayor and burgesses and their successors should have, hold, use, and enjoy, and might and should be able fully, freely, and entirely to have, hold, use, and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances, and licenses aforesaid, according to the tenor and effect of the said letters patent, without the let or impediment of the said late King Charles I., his heirs or successors whomsoever, our said late King Charles I. willing not *that the same mayor and burgesses and inhabitants of the borough or town aforesaid, or either or any of them, by reason of the [*226] premises, or either or any of them, should be thereof hindered, molested, aggrieved, or vexed, or in anything disturbed by him, the said late King Charles I., or by his heirs, or his or their justices, sheriffs, escheators, or other the bailiffs or ministers of the said late King Charles I., his heirs or successors whomsoever:

Which said letters patent the mayor and burgesses of the borough aforesaid, afterwards, to wit, on the same day and year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, duly accepted, and the same thence hitherto have been, and still are, one of the governing charters of the said borough, to wit, at the parish aforesaid, in the county aforesaid. And the said plaintiff further says that the said mayor and burgesses, from the time of their acceptance of the said letters patent, hitherto, have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by such letters patent as aforesaid.

And whereas, also, before and at the time of the committing of the grievances by the said defendants, as hereinafter next mentioned, the said plaintiff was lawfully possessed of and in divers messuages, buildings, and closes of land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid: And whereas, also, before and at the time of the committing of the grievances by the said defendants, as hereinafter next mentioned, divers other messuages, buildings, and closes of other land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid, were in the possession and occupation of divers persons, as tenants thereof respectively to the said plaintiff, the *reversion thereof then and still belonging to [*227] the said plaintiff, to wit, at the parish aforesaid, in the county afore-

said, all which said several messuages, cottages, buildings, and closes of land, with the appurtenances, before and at the times of the committing of the several grievances by the said defendants, as hereinafter next mentioned, were abutting on or near the sea-shore there, to wit, at the parish aforesaid, in the county aforesaid; and whereas, also, before and at the time of sealing of the said letters patent, and acceptance thereof, as aforesaid, by the said mayor and burgesses, and also at the time of the committing of the several grievances by the said defendants, as hereinafter next mentioned, divers buildings, banks, sea-shores, and mounds, had been, and were then respectively standing and being within the borough of Lyme Regis aforesaid; and divers other buildings, other banks, other sea-shores, and other mounds, had been and were respectively were belonging and appertaining to the said borough; and divers other buildings, other banks, other sea-shores, and other mounds, had been and were at those times respectively standing and being and situate between the said borough and the sea, to wit, in the borough aforesaid; all which said buildings, banks, sea-shores, and mounds respectively, at the times of the committing of the several grievances by the said defendants, as hereinafter next mentioned, were near to, and then and there constituted and formed, and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, buildings, and closes of land, with the appurtenances aforesaid, and then and there hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or [*228] flowing in, upon, against, or over the said several messuages, *buildings, and closes of land aforesaid; and all which buildings, banks, sea-shores, and mounds, the said defendants, at the times of the committing of the several grievances by them, as hereinafter next mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof, as aforesaid, liable, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained and supported, and still are liable, and ought, at their own proper costs and charges, well and sufficiently to repair, maintain, and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, buildings, and closes of the said plaintiff, by the sea, or the waves or waters thereof, to wit, at the parish aforesaid, in the county aforesaid:

Yet the said defendants, well knowing the premises, and not regarding the said letters patent, nor their duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure, prejudice, and aggrieve the said plaintiff, and to deprive him of the use and benefit of his several messuages, buildings, and closes in this count first above-mentioned, and also to injure, prejudice, and aggrieve him, the said plaintiff, in his reversionary interest of and in the said messuages, buildings, and closes, in this count secondly above-mentioned, so being in the possession and occupation of the said persons, as tenants thereof to him, the said plaintiff, as aforesaid, and in which he, the said plaintiff, was so interested, as aforesaid, heretofore, to wit, on the 1st of January, 1821, and from thence for a long space of time, to wit, continually, until the commencement of this suit, to wit, at the parish aforesaid, in the county aforesaid, wrongfully and [*229] unjustly suffered and permitted the *said buildings, banks, sea-shores, and mounds, to be and continue, and the same, during all the time aforesaid, were ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper, and necessary repairing, maintaining, and supporting of the same, to wit, at the parish aforesaid, in the county aforesaid: by means of which said several premises, the sea, and the waves and waters thereof, afterwards, to wit, on the same 1st of January, 1821, and on divers other days and times between that day and the commencement of this suit, to wit, at the parish aforesaid, in the county aforesaid, ran and flowed with great force and violence in, upon, under, over, and against the said several

messuages, buildings, and closes of the said plaintiff, and in which he was so interested, as aforesaid, and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages and buildings, and the materials of the same messuages and buildings, together with divers cart-loads of the earth and soil, and divers acres of the said several closes, were washed and carried away, to wit, at the parish aforesaid, in the county aforesaid : by means of which said several premises, the said plaintiff not only lost and was deprived of the use, benefit, and enjoyment, of his said messuages, buildings, and closes in this count first above-mentioned, but was also thereby then and there greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said several messuages, buildings, and closes in this count secondly above-mentioned, so being in the possession and occupation of the said persons, as tenants thereof to the said plaintiff as aforesaid, and in which the said plaintiff was so interested as aforesaid : And the said plaintiff hath been and is, by means of the premises aforesaid, *otherwise greatly injured and damnified, to wit, at [230] the parish aforesaid, in the county aforesaid.

There were other counts stating a liability to the same repairs by prescription ; and others, stating it by reason of the possession of certain closes. The defendants below pleaded the general issue.

The cause came on to be tried before LITLEDALE, J., at the spring assizes for the county of Dorset, in 1828, when the jury found a verdict for the plaintiff below, on the first count of the declaration, with 100*l.* damages, and were discharged from giving any verdict upon the other counts.

In Easter term, 1828, a motion in arrest of judgment was made in the Court of Common Pleas, but judgment was given for the plaintiff below. See 5 Bingh. 91.

The defendants below thereupon brought a writ of error in the Court of King's Bench, where the judgment of the Court of Common Pleas was affirmed. See 3 B. & Adol. 77.

Upon that judgment the present writ of error was brought ; on the ground,

1. That no liability, by reason of tenure, was created by the charter of Charles I., nor is any alleged in the pleading : *Rex v. Kerrison*, 1 M. & S. 435.

2. That there is no authority for the liability here claimed ; the cases cited by the Court of King's Bench, in giving judgment in this case, relating to liabilities by reason of prescription : *Paine v. Patrich*, Carth. 191 ; or of tenure : 12 Hen. 7, fol. 18 ; or of acts of parliament : *Rex v. Inhabitants of Kent*, 13 East, 220 ; *Rex v. Inhabitants of Lindsey*, 14 East, 317 ; *Rex v. Kerrison*, 3 M. & S. 526 ; or of nuisances to public rights : *Rex v. Stoughton*, 2 Saund. 157 ; and not to any liability arising from the acceptance of a grant from the king.

*3. That the remedies for the non-performance of such repairs as are directed by the charter of Charles I. are pointed out by the act of 43 [231] Eliz. c. 4, and by numerous authorities, to be either a suit in the Court of Chancery, to compel a proper application of the funds granted, or a proceeding on the part of the king for a forfeiture of the franchise. 4 Viner, 476, and the cases there collected ; Com. Dig. Franchises, Y. 3.

4. That the occupier of lands abutting on the sea are primarily liable to protect them from the sea ; and the liability of the defendants below to protect the plaintiff below from the sea, if any such exists, arises from the agreement implied from their acceptance of the charter of Charles I. But no agreement to become liable to do that for which others are primarily liable will subject a party to an indictment, though the party be a corporation aggregate, and though a sufficient consideration for the agreement be shown, and though the public interest is concerned : *Rex v. Mayor of Liverpool*, 3 East, 86 ; nor will such agreement release those in whom such primary liability exists : *Regina v. Duchess of Buccleuch*, 1 Salk. 358. The liability of the defendants below to an indictment for non-performance of the repairs in question, is assumed, in the judgment of

the Court of King's Bench, as the ground on which the right of action for special damage rests.

5. That it appears by the statute 1 G. 4, c. 99, for improving and maintaining the harbor pier or cob at the port and borough of Lyme Regis, that the funds granted by the charter are inadequate to the repairs directed: it seems, therefore, absurd to suppose that any private prosecutor or plaintiff should be able to compel the application of the funds granted by the king for public purposes, to repairs beneficial to himself *individually, while repairs required for the [*232] general protection of the town and port are left undone. If the remedies mentioned in the third reason were adopted, the application of the funds granted according to the intention of the king in granting them, would be a defence.

For the plaintiff below it was contended, that every breach of public duty or neglect of what the party is bound to perform, working wrong or loss to another, is injurious and actionable; *Sutton v. Johnstone*, 1 T. R. 493; *Russell v. Men of Devon*, 2 T. R. 667.

On this principle is founded the right of action against sheriffs, justices, constables, &c.; against a keeper of records: *Herbert v. Paget*, 1 Lev. Rep. 64; against a ferryman, for neglecting to keep his boat: *Payne v. Partridge*, Show. 255, Carth. 191; *Churchman v. Tunstal*, Hardres, 162; and against a corporation for not repairing a creek of the sea: *Mayor of Lynn v. Turner*, Cowp. Rep. 86. By the charter granted to the defendants below, the king wills that the plaintiffs shall repair the sea walls; they accept the charter, and by their acceptance the words of the king enure as a covenant by the defendants below: *Bret's case*, Cro. Jac. 399. They neglect their duty, by which the plaintiff below sustains serious loss, and this gives him a right of action against them.

The duty imposed on the defendants below affects the public interest, and the charter is granted in exercise of the royal prerogative, and is not like the indenture of subjects.

The defendants below are also liable by reasons of their tenure of the town or borough: *Callis*, p. 117.

*They are also liable by reason of their possession of the walls themselves: *Callis*, p. 115. [*233]

The declaration sufficiently alleges both these liabilities, and does not aver an obligation more extensive than the duty required by the charter.

The opinion of the Judges was now delivered by

PARK, J. The question proposed by your Lordships for the opinion of the Judges is as follows:

The declaration in an action on the case against a corporation states, that before the committing of the grievances by the defendants, the king, by his letters patent duly sealed, did give, grant, and confirm to the corporation and their successors, the borough or town of Lyme Regis, also all that the building called the pier-quay or cob of Lyme Regis, with the liberties, franchises, privileges and immunities to the same town, pier-quay or cob, in anywise belonging, to the only proper use and behoof of the corporation, in fee farm for ever, yielding of fee farm to the king, as in the letters patent mentioned; and that the king thereby released to the corporation part of an ancient farm of a sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier-quay, or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient. That the king also by the same charter granted fines and amerciements before the clerk of the market without account, and a license [*234] to dig stones within the borough *and parish of the town, out of the sea and on the sea-shore, for the reparation and amendment of the port, and

the said pier-quay or cob, and other necessary reparations and common works of the said town and borough, and belonging and appertaining to the buildings aforesaid. The declaration then avers that the charter was duly accepted, and from thence hath been and still is a governing charter of the borough, and that the corporation from the time of that acceptance hitherto have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by the said letters patent. It then proceeds to state that the plaintiff was, at the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit, in the said borough, which were before and at those times abutting on or near the sea-shore. That a building, bank, and sea-shore within the borough, a building, bank, or sea-shore belonging and appertaining to the borough, and a building, bank, or sea-shore situate between the borough and sea, all which were there at the time of the sealing and acceptance of the letters patent, and at the time of the committing of the grievances, and at the last-mentioned time, were near to, and constituted and formed, and were a protection and safeguard, and still of right ought to be so, to the plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon and over that messuage and land; and which buildings, banks, sea-shores, and mounds, the defendants were at those times, by virtue of the said letters patent and acceptance, liable to repair at their own proper costs and charges, as often as it might be necessary or expedient to do so.

A breach is then assigned that the corporation wrongfully permitted the said buildings, banks, sea-shores, and mounds, to be out of repair, for want of due, proper, and necessary repairing of the same, by means of which *the [235] plaintiff's house and land was inundated and injured.

After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the plaintiff against the corporation?

In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair.

The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict.

The doubt in this case arises upon the first and second requisites. With regard to the first, it is argued that the corporation have not by acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the king's will that they shall repair.

Looking at the words of the charter, as stated in this declaration, we are of opinion that it does cast upon the corporation an obligation to repair; which they, by accepting the charter, have adopted. The king grants and confirms to the corporation the town or borough and pier, with the liberties, franchises, privileges, and immunities to the same belonging, in fee farm for ever, yielding of fee farm to the king as therein mentioned; and the king remits part of an ancient rent, willing that the corporation should be thereof acquitted; and then the charter goes on in these words, "And that the *corporation and their [236] successors, all and singular, of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier-quay or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient."

Now these words are undoubtedly an expression of the king's will that the

corporation should repair; but they are not the less a condition on that account: on the contrary, they show the consideration for the grant, the motive inducing the king to make the grant, and consequently the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another it is not necessary to determine: such a grant between subjects is matter of contract and bargain, strictly so speaking; but a grant from the king to a subject is matter of favor, and the language used will be found to vary accordingly. Independently of authorities we should have come to this conclusion, but the case of *Bret v. Cumberland*, Cro. Jac. 521, seems to us to be decisive of the question. That was an action of covenant by the assignee of King James I. against the executors of the lessee of a mill under letters patent of Queen Elizabeth, sealed with her seal only, and containing these words:—"Et prædictus Willielmus executores et assignati sui prædictum molendinum et domus et ædificia inde sufficienter reparabunt." The first question was, whether these words in the letters patent, to which the queen's seal [*237] only was affixed, shall enure as a *covenant to bind the lessee and his assigns; and it was resolved "that it should, for the lessee takes thereby, because it is matter of record: although in show they are the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact, and shall bind him as strongly as if it had been a covenant by indenture." So in the charter in question, the words are in show the words of the king only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

The second requisite is, in truth, that upon which this case wholly turns, viz., that the obligation must be matter of so general and public concern that an indictment will lie for the breach of it. Now this depends principally upon the construction which ought to be put upon the words of the charter. They are undoubtedly of a very general nature,—“All and singular the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough belonging, or situate between the said borough and the sea.” It is asked, do these words embrace every little ditch or bank within the limits of the borough, whether public or private; and, if not; where is the limit? The answer is, that they embrace only such buildings, banks, sea-shores, mounds, and ditches within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguard of the borough against the encroachments of the sea. This may be gathered from the context, from the word “sea-shores,” from the expression “situate between the borough and the sea,” from the obvious intention and scope of the charter, as stated in the declaration. It seems to us that such construction and limita- [*238] tion of the words is necessary in order to give this part of the *charter any meaning, and that no violence is done, either to the grammatical or reasonable sense of the words by such construction.

If so, the next question which arises is, whether the keeping up the sea defences of a town or borough is matter of general and public concern. It is said that the repair of a highway or a bridge is matter of public concern, because all the king's subjects may have occasion to use it. And why may not all the king's subjects have occasion to reside in, or to pass through, the town and borough of Lyme? It may be difficult to define precisely over what quantity of land, or to how large a district, any benefit must be extended in order to render such benefit a matter of general and public concern; but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extend to a whole town or borough. But it is said that, even if the repair of the sea defences of a town or borough be matter of general and public concern, yet that the declaration in this case does not show that the particular “buildings, banks, sea-shores, mounds, or ditches,” alleged to be out of repair, are part of the sea defences of the borough, nor is it expressly averred that the public had

any interest in them. The answer is, that the buildings, banks, sea-shores, mounds, or ditches in question, are described in the declaration in the very words used in the charter, as set out in the declaration, and are expressly averred to have been in existence at the time when the charter was granted and accepted; and it is also expressly averred that the corporation were liable under the charter to repair them. Now these words in the averment of the declaration must be understood in the same sense as the same words in the charter; and as we are of opinion that the true construction of them in the charter is to understand them as limited to the sea defences of the borough, so *we think that [*239] they are to be taken to have the same meaning in the declaration, and to have the same effect as if the buildings, banks, sea-shores, mounds, or ditches in question, were expressly averred to be part of the defences and safeguards of the borough and town against the encroachments of the sea.

And this opinion is further strengthened by the circumstance that the present objection arises after verdict. The effect of a verdict in curing defects in the pleadings at common law is stated correctly in one of the last cases on the subject, viz., that of *Jackson v. Pesked*, 1 M. & S. 234. There Lord ELLENBOROUGH said:—"Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided that it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after a verdict, that it was so restrained at the trial; but, unless the allegation is of such a nature that it would have been doing violence to the terms, as applied to the subject-matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restraint merely because, in the extreme latitude of the terms, such a sense might be affixed to them." Here we think that the allegations of the declaration, as applied to the subject-matter, do by reasonable intendment show that the buildings banks, mounds, and ditches in question were part of the defences and safeguards of the town and borough against the *encroachments of the [*240] sea, and particularly of that part of the town and borough in which the plaintiff's property is situated. The declaration, therefore, shows a charter casting an obligation on the corporation to do repairs of general and public concern, and avers that they have omitted to do such repairs, and that the plaintiff has thereby sustained special damage. It is not, indeed, shown that the plaintiff's house existed at the time when the charter was granted; neither can this be necessary; for if the obligation to repair be of a public nature concerning the whole borough, the whole borough has a right to be protected, and it is immaterial whether the inundation affects the lands, or houses at any time erected on those lands.

It is however, further urged, that whatever engagement the corporation may be under as between them and the crown, so as to render them liable either to a forfeiture of their charter, or any other proceeding by the crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in *The Mayor, &c., of Lynn v. Turner*, Cowp. 86, *Churchman v. Tunstal*, Hardr. 162, *Payne v. Partridge*, Show. 255, Carth. 191, and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction between a liability by prescription, and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it

[*241] necessarily implies *some legal origin, and charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now, after a great lapse of time? Certainly not. If, then, the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A. and B. nor even of a charter granted by the King, where no matter of general and public concern is involved; but where that is the case, and the king, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action. If it were otherwise, many inconveniences would follow. Among them, in the case in question, is this: that as the duty and the right to repair the sea defences of the town and borough is cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessary, or, at all events, not until the corporation had been called upon, and neglected to do them: *The Earl of Lonsdale v. Nelson*, 2 B. & C. 302; and it is doubtful, whether he would be justified even then, the proper remedy being, as there stated, by indictment or action; for nuisances of omission cannot in general be abated.

Two of the Judges have entertained considerable doubts whether the declaration contains sufficient words in this case to show that the mounds or banks [*242] were of such public benefit as that an indictment would lie for not *repairing them; but agreeing in the general view of the law, they, as well as the rest of the Judges who heard the argument, are of opinion that the question proposed by your Lordships must be answered in the affirmative, and that the declaration is sufficient. Judgment affirmed.

REGULÆ GENERALES.

IT IS ORDERED, That from and after the last day of this term, where such parts of the affidavit, verifying the certificate of acknowledgment, taken in pursuance of the late act of parliament, respecting fines and recoveries, as state "the deponent's knowledge of the party making the acknowledgment, and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

AND IT IS FURTHER ORDERED, That where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken, shall be taken for the first acknowledgment only.

And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees, and so also, where the same married woman shall at the same time acknowledge more than one deed respecting the same property.

[*243] And where, in either of the above cases, there shall be *more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

N. C. TINDAL.
J. A. PARK.
J. GASELEE.
J. B. BOSANQUET.

MEMORANDUM.

On the 7th of July, *Frederic Thesiger*, of the Inner Temple, Esquire, was appointed his Majesty's counsel; and *Matthew Davenport Hill*, of Lincoln's Inn, Esquire, received a patent of precedence, to rank next after Mr. Thesiger. Also, on the same day, *William Erle*, of the Inner Temple, Esquire, was appointed his Majesty's counsel.

On the 2d of August, *Cresswell Cresswell*, of the Inner Temple, Esquire, was also appointed one of his Majesty's counsel.

END OF TRINITY VACATION.

NEW CASES
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

Michaelmas Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were,

TINDAL, C. J.,
GASELEE, J.,

VAUGHAN, J.,
BOSANQUET, J.

POCOCK v. MASON. Nov. 4.

Omission of the words "the" and "by" in the copy of the writ of capias prescribed by the schedule 2 W. 4, c. 89, Held, not to invalidate an arrest.

R. V. Richards moved to discharge the defendant from custody on entering a common appearance, because the copy of the capias served upon him at the time of the arrest, did not correspond with the form prescribed for that writ in the schedule of 2 W. 4, c. 89, but omitted the article "the" and the preposition "by" in the mandate to the sheriff touching the return.

The copy ran, "after execution hereof," instead of "after the execution hereof;" and, "by order of the said court, or any judge thereof," instead of "by order of the said court, or by any judge thereof." [TINDAL, C. J. The expressions are equivalent; there is no *alteration in the meaning.] [*246] To ascertain whether or not an unfaithful copy produces any alteration in the meaning, supposes an exertion of intellect which it may be inconvenient to require at the hands of those who serve the copy. It was to obviate this inconvenience, that the legislature has given a form, and required that it should be pursued. Nothing but ordinary care is necessary for taking the copy; and to relax the rule will encourage looseness, and open a door to endless discussion. Accordingly the courts have hitherto required a literal compliance with the form: see *Lindredge v. Roe*, antè, p. 6, and *Price v. Huxley*, 2 Cr. & Mee. 211. But

The Court held, that this was, in substance, a copy; and *Richards*
Took nothing.

BAKER and Wife, Executrix of HUTCHINS, v. GOSTLING. Nov. 7.

Plaintiff, a leaseholder, in consideration of 100*l.*, and a yearly sum of 75*l.* payable quarterly, by indenture under-demised and leased to defendant certain premises for a
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longer term than plaintiff had in them himself: Held, that a counterpart of this indenture, executed by defendant only, and bearing only a 80s. stamp, was not admissible in evidence to support an allegation of assignment, on which defendant had taken issue.

THE plaintiffs declared, amongst other things, that the testator Hutchins, being possessed of a messuage for the residue of a term of thirty-one years, commencing on the 25th of December, 1823, by an indenture of the 17th of December, 1825, between himself and the defendant, in consideration of 100*l.*, and the yearly sum and covenants mentioned in the indenture, assigned the *messuage [*247] to the defendant for the residue of the term of years then to come.

Upon this allegation of assignment, the defendant took issue.

At the trial before VAUGHAN, J., the plaintiffs, to prove the assignment, gave in evidence, first, an indenture of the 1st of August, 1824, between Sir Richard Sutton of the one part, and the testator Hutchins of the other, by which Sir R. Sutton demised the premises in question to Hutchins for thirty-one years from the 25th of December, 1823, at the yearly rent of 35*l.*

They then put in the counterpart of the indenture of the 17th of December, 1825, between Hutchins of the one part, and the defendant of the other. By that indenture, in consideration of 100*l.*, and the yearly rent or sum and covenants therein-mentioned, Hutchins under-demised and leased to the defendant the premises in question, to hold from the 29th of September, 1825, for thirty years, yielding and paying the yearly rent or sum of 75*l.* by equal quarterly payments. The counterpart was stamped with one stamp of 30*s.* and two of 20*s.* each, conformable to its length, and signed by the defendant only.

The defendant's entry was admitted.

On the part of the defendant, it was objected that, if the deed between Hutchins and the defendant were, as it purported to be, a lease, it did not prove the alleged assignment; if it were an assignment, it was not admissible, as not having an *ad valorem* assignment stamp charged upon the whole consideration expressed for the assignment; viz., the 100*l.* paid down, and the improved rent reserved. The deed, however, was received in evidence; and a verdict was found for the plaintiffs, with leave for the defendant to move to set it aside, and enter a nonsuit on the above objection.

* Coleridge, Serjt., having obtained a rule nisi accordingly, [*248]

Stephen, Serjt., and George, showed cause. The deed was properly received in evidence, not as being in itself an assignment or conclusive proof of an assignment, but as being in connexion with the original lease from Sutton, and the entry of the defendant, evidentiary of an assignment. Each of the deeds was on the face of it a lease, and was therefore properly stamped with a lease stamp; the joint effect of the two was to show an assignment; but they could not, with propriety, have borne any stamp but such as the language of each, taken by itself, would warrant. In *Price v. Thomas*, 2 B. & Adol. 218, by indenture in the form, and containing the usual covenants of a lease, A. demised premises to B., and B. and C. covenanted to pay the rent; but C. was not otherwise referred to in the instrument. In an action against C., on the covenant to pay rent, it was held that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary.

Secondly, even if the legal effect of the deed of December, 1825, executed by Hutchins, was, of itself, to operate as an assignment, there was no inconsistency in styling it, for the technical purposes of pleading, an assignment; and at the same time treating it, for fiscal purposes, as merely a lease. In affixing the charge under the stamp act, the Court looks to the express language, and not the legal effect of the instrument: *Doe d. Kettle v. Lewis*, 10 B. & C. 673; and upon this principle it was declared, at the stamp office, with respect to this identical deed, that a more proper stamp than the present could not be affixed.¹

¹ This was stated in an affidavit.

[*249] If the instrument be once correctly stamped *for fiscal purposes, the object of the stamp act is attained, and the instrument is in a condition to be exhibited for legal purposes, under whatever circumstances may arise.

Again, assuming the deed of December, 1825, executed by *Hutchins*, to be an assignment, and to require an assignment stamp, the deed executed by the defendant was the counterpart of the assignment, and, as such, was properly stamped. For all the parts of a deed constitute but one deed; Com. Dig. Fairs, D. 1, 2, 3; 2 Bl. Com.; and 30s. was a sufficient stamp for the assignment; the purchase or consideration-money expressed, being under 150*l*. If the improved rent for thirty years were to be deemed part of the consideration-money for the purposes of the stamp act, the stamp on the transfer of this small property would amount to 25*l*.; and if the counterpart of the assignment were to be classed under the head in the schedule, "Deeds not otherwise charged," the stamp on the counterpart would be 1*l*. 15s., when the stamp on the original assignment was only 30s., which could never have been intended by the legislature. The Courts put a mitigated, and not a strained construction, on the stamp act. *Boase v. Jackson*, 3 B. & B. 185; *Robinson v. Macdonnell*, 5 M. & S. 228; *Blandy v. Herbert*, 9 B. & C. 396; *Duck v. Braddyll*, 13 Price, 455; *Paul v. Meek*, 2 Y. & J. 106; *Burleigh v. Stibbs*, 5 T. R. 465; *Roe v. Davis*, 7 East, 363; *Mayor of Carlisle v. Blamire*, 8 East, 487; *Boone v. Michel*, 1 B. & C. 18.

Coleridge, in support of the double ad valorem charge upon such a deed as the present, referred to the schedule, 55 G. 3, c. 184.

[*250] "Lease, or tack of any lands, hereditaments, or *heritable subjects, granted in consideration of a sum of money by way of fine, premium, or grassum, and also of a yearly rent amounting to 20*l*. or upwards (save and except the leases and tacks hereinbefore exempted):—Both the ad valorem duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount:—"

But contended that, at all events, there being no charge in the stamp act for a counterpart of an assignment, the deed must fall under the head, "Deed not otherwise charged;" in which case the stamp would be 1*l*. 15s. instead of 1*l*. 10s., independently of the two 20s. stamps for additional length.

TINDAL, C. J. The plaintiff and his wife, as executrix of *Hutchins*, state, in the declaration, that *Hutchins*, being possessed of a messuage, &c., for the residue of a term of thirty-one years, commencing from the 25th of December, 1823, by an indenture of the 17th of December, 1825, between himself and the defendant, in consideration of 100*l*., and the yearly sum and covenants mentioned in the latter indenture, assigned the messuage to the defendant for the residue of the term of years then to come. The defendant puts in issue the fact of assignment; and, at the trial of the cause, the deed in question is given in evidence to prove the affirmative of that issue. The deed appears to be executed by the defendant only, and contains a demise of the premises in question from *Hutchins* to the defendant, in consideration of 100*l*., to hold for thirty years, from the 29th of September 1825, yielding and paying the rent or yearly sum of 75*l*. by equal quarterly payments.

It is then objected, on the part of the defendant, that the deed is improperly stamped. It bears a stamp of 1*l*. 10s., and the question is, whether this is the

[*251] stamp required for such a deed by the provisions of the *stamp act. The deed cannot be considered as an assignment, because it is not executed by *Hutchins* himself. It is useless, therefore, to consider what would be the proper stamp if the deed were an assignment. The defendant contends that, at all events, it comes under the head in the stamp act of "Deed not otherwise charged," and that the stamp should have been 1*l*. 15s. We must, therefore, consider whether the deed could have been otherwise charged. The plaintiffs say it might have been charged either as a counterpart of an assignment or a counterpart of a lease. But we think we are not at liberty to call it a counterpart of an assignment, because, under the head CONVEYANCE, in the schedule

of the stamp act, which specifies assignment among other forms of conveyance, there is no mention of any counterpart of assignment, whereas, under the head LEASE, it is expressly provided that the counterpart shall be charged in the manner there pointed out. When we see, therefore, that the charge for a counterpart is provided for in the instance of a lease, and is omitted in the instance of an assignment, we cannot think that there was any intention in the legislature to charge such an instrument as the present as a counterpart of an assignment. Is it, then, a counterpart of a lease? I have no hesitation in calling it such; but the plaintiffs, in their declaration, have called it an assignment: issue has been taken on the fact of assignment; and this deed has been put in to prove that issue. When the party himself has treated it as an assignment; I do not see how the objection is to be got over, because, if he calls it a lease, he has not proved his issue. I regret the decision to which we are obliged to come, but we must adhere to the uniform construction of the stamp act.

GASELEE, J. As the party himself has treated the instrument as an assignment, the objection must prevail. *The instrument, without an assignment stamp, is no proof of an assignment. [*252]

VAUGHAN, J. I am reluctantly constrained to concur; for as no fraud was intended, the hardship on the party is great. But the issue has not been proved by the production of a deed with the proper stamp.

BOSANQUET, J. I am of the same opinion. It is a matter of regret, when we are bound to decide on a stamp law contrary to the justice of the case. But here, the plaintiffs have declared on an assignment of the residue of a term; the defendant denies any such assignment, and the parties come to trial to settle that point. In order to prove the issue, a deed is put in which is not an assignment. It is said, it is the counterpart of an assignment. If so, it requires some stamp, and the stamp act imposes on deeds not otherwise charged, a stamp of 1*l.* 15*s.* It cannot be said that there is any charge of 1*l.* 10*s.* for such a deed as this; for although the act specifies a counterpart of a lease, there is no mention of any such deed as a counterpart of an assignment. The circumstance, that by such a construction of the act a higher charge is imposed on the counterpart than on the original, is by no means conclusive against the charge, as the result of the schedule in all its details might not have been foreseen.

Rule absolute for a nonsuit, the plaintiffs not to be liable to costs.

*DOE dem. ASHMAN v. ROE. Nov. 7. [*253]

A declaration in ejectment need not be entitled of a term, or of a particular day as of a term. It is sufficient if it be entitled of a particular day.

THE declaration was entitled, "In the Common Pleas, June 12th, 1834."

The notice to the tenant was to appear within the first four days of next Michaelmas term: it bore date on the 15th of October, and was served on the 17th.

T. D. Whalley now moving for judgment against the casual ejector,

The officer of the Court, conceiving that the rules of Michaelmas 3 W. 4, did not apply to the action of ejectment, objected, that the declaration should have been entitled of some term, or if of a particular day, as of some term. But

The Court held the declaration to be sufficiently entitled, and granted the rule prayed for.

FINCH v. BROOK. Nov. 12.

On a plea of tender of 1*l.* 12*s.* 5*d.* the jury found specially, that defendant's attorney called on plaintiff, and said, "I come to pay you 1*l.* 12*s.* 5*d.* which defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; that plaintiff said, "I can't take it, the matter is now in the hands of my attorney;" Held, upon writ of false judgment, that such finding did not warrant a judgment for defendant.

THIS was a writ of false judgment from the county court of Cambridgeshire,

where, to debt for goods sold, the defendant pleaded nil debet, except as to 1*l.* 12*s.* 5*d.*, parcel of the demand; and as to that sum, that, after the time when the said sum of 1*l.* 12*s.* 5*d.*, *parcel, &c., became due and payable, and [*254] before the exhibiting of the bill of the plaintiff in that behalf, to wit, on, &c., at, &c., and within the jurisdiction aforesaid, the defendant was ready and willing, and then and there tendered and offered to the plaintiff, to pay the plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., to receive which of the defendant the plaintiff then and there wholly refused. Upon which, issue being joined, the jury found,

That the defendant did not owe any part of the money demanded, except as to the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c.; and as to the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., that *Richard Tabram*, the attorney of the defendant, by the direction and on the behalf of the defendant, on the 25th of May, 1833, and before the levying of the said plaint by the plaintiff, called at the plaintiff's shop in Cambridge, to pay the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., and had the money in his pocket for that purpose. That *Tabram* then and there saw the plaintiff in his shop, and addressed him, and said that he, *Tabram*, had called on the plaintiff to pay him a debt of 1*l.* 12*s.* 5*d.*, which the defendant owed to him; that *Tabram* mentioned that precise sum to the plaintiff, and that *Tabram*, at the same time, put his hand in his pocket for the purpose of taking out the said money, but did not actually produce the same: whereupon the plaintiff, in answer, said, "I can't take it (meaning the said 1*l.* 12*s.* 5*d.*), the matter is now in the hands of Mr. Cooper;" who, the plaintiff stated, was the clerk of Mr. *Cannon*, his attorney. That *Tabram* promised to see Cooper, and went away for that purpose; but having met and conversed with another person, he forgot to do so, and did not see Cooper. But whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, [*255] the defendant did tender and offer to pay to the plaintiff the said sum of *1*l.* 12*s.* 5*d.*, parcel, &c., in manner and form as the defendant had above in his plea alleged, the jurors were altogether ignorant, and therefore prayed the advice of the Court.

The Court below gave judgment for the defendant.

Stephen, Serjt., for the plaintiff. The finding of the jury does not support the plea of tender; and the judgment below must be reversed. The money should have been actually produced, or it should have been found that the plaintiff dispensed with its actual production; and in that case, such dispensation should have been specially pleaded. *Dickinson v. Shee*, 4 Esp. 68, is in point. There, to prove the tender, the defendant gave in evidence, that he and a friend had gone to the chambers of the attorney for the plaintiff, and said, that he was come to settle with him the account of the plaintiff: that he produced a paper containing a statement of the account, in which he made the balance 5*l.* 5*s.*, which he said he was ready to pay; but he produced no money or notes. The plaintiff's attorney said he could not take that sum, as his client's demand was above 8*l.* And Lord KENYON said, "That when there was a dispute as to the amount of the demand, the plaintiff, by objecting to the quantum, might dispense with the tender of the actual, or of any specific sum: there should, however, be an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money, as he would not accept it; for, though the plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept of it." To the same effect are *Leatherdale v. Sweepstone*, 3 Carr. & P. 342, *Thomas v. Evans*, 10 East, 101, *Firth v. Purvis*, 5 T. R. 432, *Suckling v. *Coney*, Noy. [*256] 74, and Com. Dig. Pleader, 2 W. 28. In *Douglas v. Patrick*, 3 T. R. 683, the defendant pleaded, and established, that he was discharged by one of the plaintiffs from making the tender. In *Read v. Goldring*, 2 M. & S. 86, the defendant's agent pulled out his pocket-book, but the plaintiff refused to adjourn to a neighboring house to receive the money. In *Kraus v. Arnold*, 7 B. M. 59, there was nothing that approached a legal tender.

Butt, contra. The facts found by the jury, establish a dispensation of the production of the money. The rigor of the old cases has led to great injustice, and is relaxed by later decisions. In *Read v. Goldring*, the plaintiff's refusal to adjourn when the agent pulled out his pocket-book, was held to constitute a dispensation of the actual exhibition of the money, and to make the tender sufficient. That case is not, in substance, distinguishable from the present. Proof of tender of 20*l.* 9*s.* 6*d.* has been held to support a plea of tender of 20*l.*: *Dean v. James*, 4 B. & Adol. 546; and in *Polglass v. Oliver*, 2 Cro. & Jar. 17, BAYLEY, B., said, "The party to whom a tender is made, may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced: *Lockyer v. Jones*, Peake, N. P. 239, n. There is reason and good faith in this decision; for if you objected expressly on the ground of the quality of the tender, it would have given the party an opportunity of getting other money, and making a good and valid tender."

TINDAL, C. J. The ground on which I put my judgment is very short. All the cases agree that, in order to constitute a sufficient tender, there must be an actual production of the money, or a dispensation of such production. Here, there was no actual production. Was there any actual or implied dispensation? Upon that point the jury are silent; and the case is before us on the finding of the jury only. Now, the jury, if they were satisfied that there had been impliedly a dispensation, might have found generally for the defendant; for, according to Comyn's Digest, S. 8, "the jury may find a general verdict for the plaintiff, where the special matter found would be against him; as, in trover, on proof of a demand and refusal, they may find for the plaintiff: but if it be found specially, it will be adjudged no conversion: vide *Action upon the Case upon Trover* (E). On proof of a voluntary feoffment to a son, the jury may find it fraudulent as to creditors, &c.; but if it be found specially, it will not be judged so." But, here, they have stated the special matter without finding any actual or implied dispensation. The judgment of the Court below, therefore, must be reversed.

GASELEE, J. I am of the same opinion. The jury, upon these facts, might have found for the defendant on the ground of a dispensation, as in trover they may find a conversion from the circumstances of demand and refusal: and had they found a dispensation, the Court would not have interfered. But no such fact being found, and no money having been produced, the judgment must be reversed.

VAUGHAN, J. I regret that I feel myself bound to come to the same conclusion. The cases cited for the plaintiff were nearly all considered in *Lockyer v. Jones*; and it was said by MANSFIELD, C. J., in a later case, that great importance was attached to the production of the money, as the sight of it might tempt the creditor to yield.

BOSANQUET, J. I agree with the rest of the Court, on the ground that this objection arises on the finding in the special verdict, although I am not prepared to say the circumstances might not have warranted the jury in finding for the defendant.

Judgment reversed.

WELSH v. LYWOOD. Nov. 13.

An affidavit in justification of bail, omitting to disclose their residence, is insufficient, notwithstanding the plaintiff does not appear to oppose.

THE bail in this case were not opposed; but the officer of the Court refused to pass them, because the affidavit of justification did not disclose, as required by the new rules, their place of residence during the last six months.

Archbold, for the defendant, contended, that as the plaintiff would have waived the irregularity by excepting to the bail, *Bigg v. Dick*, 1 Taunt, 17, & fortiori, he waived it by not excepting. But

The Court held the affidavit to be nevertheless insufficient, and gave time to amend.

[*259] *MARY SLATTER, Widow, Demandant; GEORGE SLATTER, Tenant. Nov. 14.

In dower, the tenant pleaded, in May, 1833, that demandant had elected to receive an annuity in satisfaction of dower: Held, that the plea was not supported by showing the demandant's receipt of dividends in September, 1833.

Held, also, that an order made in a suit in Chancery between the demandant, tenant, and others, was admissible in evidence for the demandant in dower, to show the circumstances under which the dividends were received.

IN this cause, by a special case, it was stated that John Slatter died on the 21st of October, 1832, intestate, and without issue, leaving Mary Slatter, his widow, George Slatter the elder, his father, and George Slatter the younger, his brother and heir-at-law, the tenant in this action, him surviving.

That the intestate died seised as of fee of a freehold messuage or dwelling-house.

That the intestate also died possessed of considerable personal estate, consisting of stock in trade, &c., together with 6000*l.* Bank 3 per cent. annuities standing in the joint names of the intestate, and of Charles Druce the younger, John Druce, and George Nugent, which said last-mentioned sum of 6000*l.* was left upon the trusts contained in a certain indenture of January, 1831.

That the demandant employed T. A. Lock, as her attorney and solicitor, to assert her claims at law and in equity upon the real and personal estates of her late husband, the intestate.

That George Slatter the elder, and George Slatter the younger, employed the same attorney at law and in equity.

That the demandant, on the 22d of October, 1832, came, accompanied by one Kitching, to the freehold house in question, and declared she came to claim such rights as she was entitled to as the widow of the intestate; and continued therein until the 31st of that month, when the tenant turned her out by force; and at that time Kitching, in her presence, and by her assent, declared that she [*260] was entitled to remain in the *house for forty days after the decease of intestate. In November, 1832, the demandant caused a notice in writing to be served on George Slatter the younger, by which she required him to assign her dower out of a freehold dwelling-house of the intestate's, of which he had taken possession. She commenced the present action in January, 1833; to which action the tenant appeared by his said attorney; and on the 24th of May following, pleaded,

1st, That the intestate was never seised of any estate whereof he could endow the demandant.

2dly, That the demandant, after marriage, by a separation deed of January, 1831, agreed to execute a deed releasing her right of dower.

3dly, That after the death of her husband, she elected to receive an annuity of 180*l.* in recompense and satisfaction of dower, and actually received 90*l.* of the annuity for one-half year.

The demandant demurred to the second plea, and took issue on the first and third, on the 15th of June, 1833. The demurrer came on to be argued in November last, when the tenant not appearing, the Court ordered that judgment should be entered for the demandant; on the following day, judgment was signed accordingly, and notice of trial was, on the same day, given for the sittings after last Michaelmas term upon the issue joined upon the first and third pleas.

On the 5th of June, 1833, the demandant filed her bill in the Court of Exchequer against George Slatter the elder, the administrator of the intestate, and others, in respect of her claims upon the intestate's personal estate.

The said George Slatter the elder, on the 9th of August, 1833, obtained, by consent, an order in the said last-mentioned cause, by which it was directed that the Druces and Nugent should receive the dividends of the 6000*l.* 3 per cent. consols, standing in the joint names *of themselves and the intestate, [*261] and pay the same to the demandant until the further order of the Court, and that such payment should be without prejudice to any claim the demandant might have on the intestate's real estate.

The demandant, on the 9th of September following, for the first time since the death of the intestate, received the sum of 180*l.*, being two half-year's dividends on 6000*l.* 3 per cent. bank annuities, which accrued due subsequent to the intestate's decease. After the making of the said order of 9th of August, 1833, the tenant also commenced and now carries on the trade or business of the intestate in his aforesaid dwelling-house.

In November last, the tenant filed his bill in Chancery against the demandant, setting up the said deed of separation in bar of dower, and alleging that the demandant had, since the death of the intestate, elected to take the annuity, and prayed an injunction against the proceedings in this action; an injunction was obtained in January, 1834, and dissolved in the February following by the Vice-Chancellor.

This cause came on to be tried in December, 1833, before TINDAL, C. J., when the tenant, without pleading puis darrein continuance, offered in evidence, on the third plea, the deed of separation of January, 1831,—a certain power of attorney from John Slatter, the intestate, Charles Druce the younger, John Druce, and George Nugent, to Mary Slatter, the demandant, authorizing and empowering her to receive the dividends on 6000*l.* 3 per cent. bank annuities,—and the dividend warrants for two half-year's dividends accrued on such stock, signed by the said Mary Slatter as such attorney, and both bearing date the 9th of September last. Whereupon, the demandant put in the said order of the Court of Exchequer of the 9th of August last.

*A verdict was found for the demandant, subject to this special case, in [*262] which the question for the consideration of the Court was, whether the evidence given of the receipt of the 180*l.* on the 9th of September, 1833, was sufficient to support the issue on the third plea of election in bar of dower; and whether the order of the 9th of August, 1833, was admissible to show under what circumstances the 180*l.* was so received.

Merewether for the demandant. The receipts were not admissible in evidence to show that the demandant had elected to take the annuity in satisfaction of dower; for they were not given till the 9th of September, and the plea averring her acceptance of the annuity was pleaded on the 24th of May. Nor could they lead to an inference of such acceptance *ex consequenti*; for under the order of the Court of Chancery, the money was expressly taken without prejudice to the present claim.

And the order was properly admitted in evidence; for, though it were made in a suit to which others were parties besides the present demandant and tenant, yet it was not produced to prove the decree between the parties to the Chancery suit, but to show the circumstances under which the demandant consented to receive the dividends on the 9th of September.

At all events, the acceptance of the dividends was no legal bar to the wife's claim of dower. Co. Lit. 34, b. "An assignment of other land whereof she is not dowerable, or of a rent issuing out of the same, is no barre of her dower."

W. H. Watson, *contra*. The receipts were admissible in evidence, not to show an election after plea pleaded, but as evidentiary, in connexion with other circumstances, of an election previously made; just as demand *and refusal [*263] are, in trover, evidentiary of a conversion: *Wilton v. Girdlestone*, 5 B.

& Ald. 847. And the decree in Chancery being *res inter alios gesta*, could for no purpose be admissible between these parties.

As to the annuity being a legal bar to the claim of dower, the authorities are certainly against it, but the passage in Co. Lit. applies to an assignment of dower by the sheriff; while, here, the receipt of the annuity is an act in pais, which operates as a satisfaction of the demandant's claim. Even an assignment of dower by the sheriff, not made according to law, would, if accepted, be considered at common law as accepted in lieu of dower.

TINDAL, C. J. I am of opinion that the evidence offered in proof of the plea that the demandant elected to receive an annuity of 180*l.* in recompense and satisfaction of dower, was not sufficient, even if admitted, to support that issue. The writ of dower was sued out in January, 1833, and the receipt afforded in support of the plea was not given till nine months after. The latest time in respect of which evidence of satisfaction would have been admissible, was the time of plea pleaded; but at that time it is not pretended that anything had been received, and there is no reason why this single act of subsequent receipt should have relation back, like an admission made after action brought; for the fact that the demandant refused the first half-year's dividend, and only received it with the second, under protest, is sufficient to show that she had not elected to abandon her claim. It is not necessary to decide the question on the admissibility of the order in Chancery, although I am clearly of opinion that it [*264] did not fall within the rule of *res inter alios gesta*, but was admissible as one of the surrounding circumstances, to show *quo animo* the demandant received the dividend in question.

GASELEE, J. I think it clear that the receipt was not admissible in evidence, because it was given subsequently to the time of plea pleaded. It is unnecessary to decide the question as to the order in Chancery; but there can be no doubt it was admissible to show the state of the demandant's mind when she received the dividend.

VAUGHAN, J. I am of the same opinion. The receipt, if it had been admitted—and it was the only proof offered in support of the issue—would not have established the election alleged to have been made by the demandant. But the order in Chancery was admissible to show under what circumstances the dividend had been received.

BOSANQUET, J. I am of the same opinion. The receipt, being so long subsequent to the time of plea pleaded, was not sufficient of itself to support the issue that the demandant had elected to receive an annuity of 180*l.*, in recompense and satisfaction of dower; and the order in Chancery was properly admitted, not to show the adjudication between the parties to that suit, but the circumstances operating on the demandant at the time of the receipt.

Judgment for demandant.

[*265] *In the Matter of SARAH LUKE, an Infant, Wife of GEORGE LUKE. Nov. 14.

Practice. Certificate of cognizance of infant feme trustee.

Mrs. LUKE, an infant trustee, had, before she was married, received an order from the Duchy of Lancaster Court of Chancery to convey the trust estate to other trustees, pursuant to 11 G. 4, c. 60, s. 6.

Before the conveyance could be drawn up, and while she was still an infant, she married, and it became necessary that the conveyance should be by fine.

But the commissioners for taking the cognizances of married women being required by stat. 3 & 4 W. 4, c. 74, s. 84, to certify that the cognizor is of full age, "subject to any alteration in the form of the certificate to be made by order of the Court of Common Pleas,"

Adams, Serjt., prayed that, under the circumstances of the present case, the Court would make an order authorizing the commissioners to take the cognizance of *Mrs. Luke* without certifying that she was of full age.

This was acceded to by the Court, and an order was directed to be made out to that effect, reciting the previous order of the Court of Chancery. *Fiat*.

**TRIEBNERR v. DUERR.* Nov. 15.

[*266]

A defendant may plead to the same demand, first, the general issue; and, secondly, that the demand accrued for carrying into effect illegal wagers.

To debt for work and labor and for money paid to the use of the defendant, *Channell* obtained a rule nisi to plead, first, the general issue; secondly, as to 98l. 13s. 7d. parcel, &c., that the work was done and the money paid by the plaintiff in making and carrying into effect illegal wagers as to the price of tallow.

Cleasby opposed the motion, on the ground that pleas so inconsistent could scarcely have been pleaded to the same demand, under the old practice, and under the new rules were inadmissible together.

TINDAL, C. J. There is nothing unreasonable in allowing the defendant to plead the general issue, and that part of the work was done in furtherance of an illegal contract.

The word *inconsistent* does not appear in the new rules, and pleas are authorized which on the face of them do not appear consistent; as, "pleas of payment, and of accord and satisfaction, or of release;"—"pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D.;"—"pleas of soil and freehold of the defendant in the locus in quo, and of the defendant's right to an easement there."

The object of those rules was, to prevent the record from being loaded with unnecessary repetitions of pleas which were the same in effect, and addressed only to *one ground of defence; not, to prevent a party from putting [*267] in distinct answers to the same claim.

GASELEE, J., and *VAUGHAN*, J., concurred.

BOSANQUET, J. This application does not rest on the new rules, but on the statute of Anne, by which the Court, at its discretion, may regulate the number of the defendant's pleas.

The object of the new rules was to prevent the same defence from being repeated under several different forms. Here the defences are not the same. The first turns on matter of fact, that there was no contract between the parties; the second on matter of law, that the contract, if any existed, was illegal.

Rule absolute.

LOW v. CHIFNEY. Nov. 15.

To a declaration by endorsee against acceptor, defendant pleaded that the bill was accepted without consideration from the drawer: Held ill, and that under the rule of Hil. 4 W. 4, plaintiff might demur.

To a declaration on a bill of exchange for 250l., drawn by *Thomas Teed* on the defendant the 8th of October, 1833, payable nine months after date; accepted by the defendant; and by *Teed* endorsed to the plaintiff,

The defendant pleaded, that the said bill of exchange was accepted by the defendant without any consideration passing from the said *Thomas Teed* to the defendant for accepting the same.

Demurrer and joinder.

Bompas, Serjt., appeared in support of the demurrer, but the Court called on **Alexander* to support the plea. In *Heath v. Sansom*, 2 B. & Adol. [*268] 291, it was held, *PARKER*, J., dissentiente, that in all cases, where, from

defects of consideration, the original payees could not recover on the note or bill, the endorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior endorsee, though he might have had no notice that such proof would be called for. And by the general rules of Hil. 4 W. 4 (Assumpsit, 3), the defendant is obliged to plead what he would formerly have been allowed to prove under the general issue, particularly illegality of consideration by accepting bills by way of accommodation. The defendant being so obliged to plead such matter, and having by his plea cast suspicion on the plaintiff's claim, the plaintiff should, instead of demurring, have replied, what, before the new rules, he must have proved at the trial in order to rebut the suspicion affecting his title.

TINDAL, C. J. The distinction between *Heath v. Sansom* and the present case is this, that in *Heath v. Sansom* the question arose at the trial under the general issue, and suspicion was cast upon the plaintiff's claim by his own evidence: here the question arises upon a plea which professes to be an answer to the action. In *Heath v. Sansom*, it appeared, upon the plaintiff's showing, that Sansom, being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees endorsed it over, and the endorsee sued Sansom and his partner in the second firm. Suspicion being cast upon the transaction, it was properly held that that note was made in fraud of Sansom's partner in the [*269] second firm, and could not be enforced against him by *the payees; and that, at least under those circumstances of suspicion, the endorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. Here, it is only stated that the acceptor of the bill received no consideration from the drawer: consistently with that, the endorsee might be suing on the fairest case. No suspicion is thrown on the transaction, and endorsement *prima facie* imports consideration.

GASELEE, J. In *Heath v. Sansom* the question arose on the general issue, and a suspicion was thrown on the plaintiff's title by his own evidence, which it became necessary for him to rebut. The plea here does not affect the plaintiff, and is no answer to the action.

VAUGHAN, J. Our judgment must be for the plaintiff. How was he to know what had passed between the drawer and acceptor?

BOSANQUET, J. *Heath v. Sansom* does not apply to the present case, having merely established that, when under the general issue suspicion is, at the trial, cast on the plaintiff's claim, it becomes necessary for him to clear it up in order to recover on a bill of exchange; but what is stated in a plea ought to be an answer to the action, and inconsistent with the plaintiff's legal demand.

Judgment for the plaintiff.

[*270]

*M'ANDREW v. ADAM. Nov. 15.

If a rule is drawn up in the alternative, the party who fails on the substantial question is not entitled to the costs of the rule, although he succeeds upon the alternative.

THE plaintiff had obtained a verdict for 254*l.*; upon which the defendant obtained a rule, calling on the plaintiff to show cause why the verdict should not be set aside, and a nonsuit be entered instead, or why the verdict should not be entered for nominal damages only.

The plaintiff showed cause against the rule, which was made absolute for reducing the verdict to nominal damages.

Upon the taxation of costs in the cause, the prothonotary having declined to allow the plaintiff his costs of opposing the above rule,

W. H. Watson, in order to obtain these costs, obtained a rule nisi on behalf of the plaintiff for a review of the taxation.

Wilde, Serjt., who showed cause, relied on *Spitta v. Woodman*, 3 Taunt. 406,

where it was held that, if the plaintiff recovered a verdict for a loss on a policy, and endeavored unsuccessfully, on a rule nisi being obtained for a nonsuit, to support his verdict to the full extent, he was not entitled to the costs of the rule, although he was held to be entitled to the premium. At all events, the plaintiff here came too late; for the motion in question was disposed of in Trinity term, and the costs should have been asked for when the rule was under discussion.

**Watson*. These are costs in the cause generally; and it was not necessary to ask for them on the particular motion. *Spitta v. Wood*. [*271] man is a case of doubtful authority; for the objection alleged to have been made by *Shepherd*, Serjt., in the report, 3 Taunt. 406, is inconsistent with the state of the cause as set forth in 2 Taunt. 416. And *HEATH, J.*, puts the decision on the ground that the parties were *in pari conditione*, which could not have been the case if, as appears in the report in 2 Taunt., the plaintiff had a verdict. Here, if the rule had not been in the alternative, for a nonsuit or a reduction of damages, the plaintiff might have consented to the reduction of damages. As it was, he was obliged to appear on the rule in order to protect his verdict, and having succeeded to that extent, he ought to have his costs on the rule. In the Court of King's Bench it is the practice, in such a case, to allow the costs of the rule.

TINDAL, C. J. The point for our consideration is in substance this, whether the plaintiff, upon a rule in this Court, which substantially is found against him, is entitled to obtain the costs of such rule as costs in the cause.

It is said that, because the rule was drawn up with an alternative, the plaintiff was, at all events, obliged to appear and show cause.

If there were any distinction, as to costs, between a rule in the alternative and other rules, there might be some weight in the argument.

But the expense is the same, whether a party comes to oppose a rule on one point or two.

When the rule was served in the alternative, if the plaintiff meant to call for the costs of it as costs in the cause, he ought to have given notice to his opponent *that he abandoned his resistance on that point, which ultimately [*272] proved untenable.

As he omitted to do this, and cast on his opponent the onus of supporting the entire rule, it is precisely a case in which neither party is entitled to costs.

The rest of the Court concurring, the rule was

Discharged.

SIMONS and Another v. FARREN. Nov. 17.

To covenant for rent, plea that defendant, with the consent of lessor, carried on the business of a retail brewer and retailer of beer, whereupon a forfeiture was incurred, and he was evicted by B. C. having good right and title to the premises as heir of C., with whom defendant's lessor had covenanted not to carry on the business of a retailer of beer without the consent of C., Held ill.

COVENANT for rent due under an indenture of demise of the 9th of July, 1830, between plaintiff and defendant, in which, among other things, defendant had covenanted not to carry on upon the premises demised the business of a retailer of beer, ale, or spirituous liquors, without first obtaining the plaintiffs' leave in writing.

The defendant pleaded, that one Chantrell and his wife, being seised in fee of the premises, by indenture of August, 1820, demised them to one Ponder for twenty-one years, and that Ponder, for himself and his assigns, covenanted not to carry on upon the premises the business of a *common brewer or retailer of beer or spirituous liquors*, without first obtaining the leave of Chantrell and his wife in writing; and that it was provided that the term granted to him should determine and be void, and that the Chantrells should be entitled to re-enter, upon his failing to keep his covenant:

That the plaintiffs, after making the indenture of July, 1830, by license in

writing, authorized the defendant to exercise on the premises the trade of retail brewer, that is to say, the business of brewer and of a retailer of beer :¹

[*273] That the defendant *after such consent*, and before the rent claimed in the declaration became due, entered on the premises and there carried on the trade of a retail brewer, and of a retailer of beer :¹

And that whilst he was in possession of the premises, and so carrying on in them the trade of a retailer of beer,¹

On the ground that he was so carrying on upon the premises the business of a retailer of beer,¹ and that a forfeiture of the lease of August, 1820, was occasioned thereby,

One R. D. Chantrell, having good right and title to the premises as eldest son and heir to the said Chantrell and wife, before the rent claimed in the declaration became due, delivered a declaration in ejectment to the defendant, upon which judgment was afterwards entered up, and a writ of possession issued against the defendant, and thereupon,

Before the rent claimed in the declaration became due, the defendant was by force of that writ put out, amoved, and evicted from the said demised premises.

Replication, That the said supposed license or consent in writing, in the said plea of the defendant mentioned, was and still is subject to a certain proviso therein mentioned, in the words and figures following, that is to say, "We do hereby authorize and permit Mr. James Farren to use and exercise his trade of a retail brewer upon the premises comprised in a certain indenture of lease of even date herewith; and we undertake not to molest or disturb the said

[*274] James Farren, his under-tenants or assigns, in his or their *possession, notwithstanding any such occupation of the said premises may be contrary to the proviso in such lease contained. Provided always, nevertheless, that this authority is not to exempt, or be construed to exempt, the said James Farren, or his executors or administrators, from any liability under his covenant contained in the said indenture of lease, in case the original lessor or his assigns should commence any proceedings for the breach of any such covenant or proviso as contained in the original lease: as witness our hands this 9th day of July, 1830.—JOHN SIMONS, RICHARD BATTLE.

Demurrer and joinder.

W. H. Watson in support of the demurrer. The replication is ill, for it neither denies nor confesses and avoids the plea. And the plaintiffs having themselves authorized the defendant to carry on the business of a retail brewer, subject to his liability to forfeit the term, must abide by the consequences of the forfeiture. One of those consequences is, that the lease is avoided, and the rent extinguished; so that, if the plaintiffs have any claim whatever on the defendant, at all events they cannot sue on the covenant in a void lease: Bac. Abr. Rent (L), Vin. Abr. Rent (Z): not even for an apportionment of the rent that might have been accruing at the time of the eviction. In like manner, where freight reserved by a charter-party is to accrue on the ship's arrival at B., the shipowner cannot sue *pro ratâ itineris* if the ship be lost before arrival: Cooke v. Jennings, 7 T. R. 381; or for a substituted voyage: Thompson v. Brown, 7 Taunt. 656; White v. Parkin, 12 East, 578.

And, without going into the particulars, the plea discloses a sufficient eviction

[*275] by alleging that *R. D. Chantrell having right and title entered. Jordan v. Twells, Cas. Temp. Hardw. 171, which decided that a defendant who relies on an eviction should show, in his plea, that the party evicting had a title inconsistent with the plaintiff's, is, in effect, overruled by Foster v. Pierson, 4 T. R. 617, and Hodgson v. The East India Company, 8 T. R. 278, in which it was held, that a plaintiff who sues for breach of a covenant for quiet enjoyment, may state generally that the party evicting had right and title to enter, without setting forth the particulars of such title. If carrying on the business of a retail brewer was not a ground of forfeiture under the covenant in the deed of 1820, the plaintiff might have replied to that effect.

¹ The words in italic were inserted upon amendment. See ante, p. 126.

Barstow, contra. The plea is ill. For assuming that it might have been sufficient if it had alleged simply that R. D. Chantrell, having good right and title, evicted the defendant, yet, as the defendant has proceeded to assign the grounds on which R. D. Chantrell entered, if those grounds be insufficient, the plea cannot be sustained. And it clearly appears upon this plea that no forfeiture had been incurred. For, assuming the trade of a retail brewer to fall within the meaning of the covenant against carrying on the trade of a retailer of beer, still the covenant in the lease of 1820 was a covenant not to carry on the trade of a retailer of beer without the consent in writing of the Chantrells; and though the plea alleges that the defendant carried on the trade in question, it does not allege that he carried it on without the consent of the Chantrells. The defendant, therefore, having omitted to negative the Chantrells' consent, it must be taken, on his own showing, that there was no forfeiture. [The Court here offered to permit **Watson* to amend the plea by inserting the requisite negative; but he refused.] And a strict construction always prevails in [*276] cases of forfeiture: *Jones v. Thorne*, 1 B. & C. 715; *Doe d. Spencer v. Godwin*, 4 M. & S. 265.

But the trade of a retail brewer is not within the covenant. For the lease of 1820 provides against the only trades of the sort that was carried on at that time: common brewer, retailer of beer, and of spirituous liquors; the trade of retail brewer derived its existence from the statute 4 G. 4, c. 51, which was not passed till 1824 (see 2 Chitty's *Burn's Justice*, 311, 246), and the parties could not have intended to prohibit a trade which did not exist when they executed the lease.

Watson. Taking the whole plea together, it is sufficiently shown that the defendant carried on the prohibited business without the consent of the Chantrells; for it is alleged, that a forfeiture was incurred by the carrying on the business, which would not have been the case if it had been carried on with the consent of the Chantrells; and the plaintiffs might have replied such consent if it had been given; and though on special demurrer the objection might have prevailed, on general demurrer the court will look to the effect of the entire pleading. *Charnley v. Winstanley*, 5 East, 266. The defect, if any, is covered by pleading over. But the whole of the allegation touching the forfeiture may be rejected as surplusage; for the plea avers that R. D. Chantrell, having good right and title to the premises, evicted the defendant, and that averment was held in *Foster v. Pierson*, confirmed by *Hodgson v. East India Company*, a sufficient allegation of a breach of covenant for quiet enjoyment. In the latter case, Lord KENYON says, "We have, since the argument, *looked into the case of *Foster v. Pierson*, which was relied upon as an authority in support of this declaration, and in which all the former cases were considered; and we are of opinion, that the breaches here are properly assigned. If they were not, it would impose insuperable difficulties on the plaintiff; for I do not know how it was possible for him to set forth the particulars of the titles of the persons who entered upon him; such knowledge could only be acquired by an inspection of title deeds, to which he could have no access."

TINDAL, C. J. The ground on which my judgment is formed, renders it unnecessary for me to make any observation on much that has been urged in argument. For the question is reduced to a single point, whether or not on these pleadings an eviction has been properly pleaded. The plaintiffs declare in covenant for rent arrears. The defendant has pleaded, that the premises were originally demised by Chantrell and his wife to the plaintiffs, for a term which is not yet expired, under a covenant that the business of a retailer of beer should not be carried on upon the premises without the consent of Chantrell and his wife; that before the rent claimed became due, the defendant, with the consent of the plaintiffs, carried on that business on the premises; and that on the ground that thereby a forfeiture of the Chantrells' lease was occasioned, one R. D. Chantrell, having good right and title to the premises as eldest son and heir of

Chantrell and wife, evicted the defendant;—and the question is, whether this eviction is well pleaded or not.

Certainly, in *Jordan v. Twells*, where, to debt on a covenant for rent, the defendant pleaded an eviction by K. P., having a prior and better right and title than the plaintiff on demurrer, because the defendant did not set forth what right or title K. P. had, the Court allowed the objection, on the ground that [*278] the defendant ought *to have alleged a title in K. P., inconsistent with the plaintiff's title; and Lord HARDWICKE said, "the defendant ought to have shown that K. P. had a title to enter; for possibly she had no right of entry, though she had a right to recover in a real action."

It is contended, however, that this decision is in effect overruled by *Foster v. Pierson*, and *Hodgson v. East India Company*; but I do not think that those cases can be said to have that effect. In those cases the actions were brought against the grantor by the grantee, who had been evicted, and who had no means of setting forth the particulars of the titles of those who had entered on him: here, the grantee, in answer to a claim for rent by the grantor, relies upon an entry by a third person on grounds with which by his plea he has shown himself to be acquainted; and, generally speaking, more strictness is required in a plea than in a declaration. But it is not necessary to decide the case on this ground; for there is a manifest distinction between setting forth the particulars of the title of the party who enters, and setting forth simply the ground of entry; and I am not struck with the argument of hardship in this case; for if the defendant had stood his ground in the ejectment, he would at all events have learned on what authority the entry was made. We come round then to the question, whether upon this plea the eviction is properly pleaded.

The covenant for the breach of which the entry was made, was a covenant not to carry on, upon the premises, the business of a retailer of beer without the consent of Chantrell and his wife; and the defendant has pleaded that a forfeiture was incurred by the fact that the business of a retailer of beer had been carried on; and that R. D. Chantrell, having good right and title as eldest son and heir of Chantrell and wife, evicted the defendant before the rent claimed in the declaration became due.

[*279] *First, is this a breach of the covenant at law? and if not, is there any sufficient general allegation that the party entering had good title to the premises?

Now, the covenant for the breach of which the grantors or their heir would be authorized to re-enter, was not simply a covenant against carrying on a particular trade, but a covenant against carrying it on without the consent of the grantors: the covenant therefore was not broken by simply carrying on the trade: it should have been averred and proved that it was carried on without the consent of the Chantrells: for it is a rule of pleading, well known ever since the case in *Lord Raymond, Thorpe v. Thorpe*,? 1 *Ld. Raymd.* 662, that where any stipulation in the nature of a condition precedent accompanies a covenant, particularly where it forms a member of the same clause, the covenant is not shown to have been broken without showing a breach of the accompanying stipulation also. As, in covenant to pay 5s. per day, after notice that he would not act any more: proviso, that no notice shall be given but in an acting week; breach, that he gave notice *sec. formam articulorum*, was not sufficient, but he ought say expressly that it was in an acting week; for the proviso is part of the covenant itself: *Com. Dig. Pleader (C)*, 47.

But here, it is said, the preceding part of the plea may be rejected as surplusage, and the defendant may rely on the general words, that R. D. Chantrell, having good right and title as eldest son and heir to Chantrell and wife, entered and evicted. That, however, would be putting a forced construction on the language of the plea, which does not assert his title generally, but merely that the claim of Chantrell and wife, having descended on him as heir, he was entitled, as such, to take advantage of the alleged forfeiture.

On the broad ground, therefore, that it does not *contain any general [*280] allegation that the defendant was evicted by one having title to the premises, nor any such special statement of facts as discloses a title by forfeiture, I think this plea affords no answer to the action, and that it is not cured by the plaintiffs' pleading over, the claim set out being insufficient to justify the entry.

GASELEE, J. His Lordship having gone so fully into the question, I need only add, that I concur in the opinion he has expressed. But I cannot see that any trade prohibited by the original lease has been carried on on the premises. For a retail brewer is not what was meant by a common brewer; and though it is alleged, that the under-lessee carried on the business of a retail brewer, "that is to say, of a retailer of beer," by the license of the plaintiffs, yet, in the license set out by the replication, the business of a retailer of beer is not mentioned.

VAUGHAN, J. It is with much diffidence that I pronounce an opinion at variance with that of the rest of the Court, particularly on a point of pleading with which those from whom I differ are well acquainted. But unless there be a distinction between plea and declaration, I should have thought this plea sufficient, under the authority of *Foster v. Pierson*, where it was held, that in assigning a breach of covenant for quiet enjoyment, it was sufficient to allege that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such lawful right and title, entered, &c., and evicted him, &c., without showing what title A. B. had; or that he evicted plaintiff by legal process, &c. And Lord KENYON said, "If the declaration be certain to a common intent, that is sufficient. Now, it states that J. B. Pierson, at the time of the lease made to the plaintiff, and at the time of the *eviction, [*281] had lawful right and title to the premises; and having such lawful right and title, entered, &c. I think it would be doing violence to these words to say, that the lawful right and title, which it is stated he had, did not legalise his entry; the fair import of the words is, that he had lawful right and title to do that which he did." ASHHURST, J., said, "The breach, though not accurately drawn, implies that the plaintiff was lawfully evicted, so as to bring the case within the meaning of the covenant. For, in substance it is this, that the person who entered had a better title than the defendant, and having such title, entered upon the premises." And BULLER, J., said, "In assigning a breach of covenant, it is sufficient if it be certain to a general intent, and I think this is sufficiently certain; for when it is said, that 'the party having a lawful right and title entered,' it is the same thing as saying, 'he entered by lawful right and title.'" GROSE, J., referred to 1 Mod. 294, where TWISDEN, J., said, "It is sufficient to say that the party had a prior title; not a prior title to enter." And in 1 Mod. 101, Lord HALE said, "having title at the time" was sufficient.

BOSANQUET, J. I am of opinion that our judgment must be for the plaintiffs. If the defendant has been legally evicted, the plaintiffs' claim is defeated; but it appears to me that no legal eviction is shown upon this plea. The defendant has pleaded that a forfeiture was incurred by the fact that the business of a retailer of beer had been carried on; and that R. D. Chantrell, having good right and title as eldest son and heir of Chantrell and wife, evicted the defendant before the rent claimed in the declaration became due. Now, the mere carrying on the trade of a retailer of beer is not prohibited by the covenant, but the carrying it on without the Chantrells' consent in writing; and in order to establish a forfeiture, it should have been averred and proved that *the [*282] trade was carried on without such consent. The prohibition, and the provision which narrows it, are found together in the same clause; and the case falls within the general rule of pleading, which requires, that where a covenant with an exception is contained in the same clause, an assignment of breaches must comprehend the exception as well as the covenant. It has been contended,

however, that, at all events, the allegation of forfeiture may be rejected as surplusage, and that the general allegation, that R. D. Chantrell, having good title as heir, entered, is sufficient. But where the cause of forfeiture is expressly set out, and appears to be insufficient, no general words can cure the defect: and here, the general words that the party entered, having right as heir of the Chantrells, show no other title than a right to stand in the place of the Chantrells. Then, it is alleged that the Chantrells had a right to enter, because the business of a retailer of beer was carried on upon the premises, which is insufficient to show a right of entry, without adding that it was carried on without their consent. It must be observed, too, that this defective allegation is found in a plea, while the cases cited from the Term Reports are decisions upon a declaration for breach of a covenant for quiet enjoyment. By the general rules of pleading, greater certainty is required in a plea than in a declaration, and more than ordinary precision is required in a plea which goes to defeat an estate. The cases, therefore, in the Term Reports are not necessarily to be considered as overruling *Jordan v. Twells*, which was a decision upon demurrer to a plea alleging eviction.

However, it is unnecessary to determine that point: my judgment turns upon the specific ground, that here the defendant has set up a cause of forfeiture which on the face of the plea was not such as to warrant an eviction.

Judgment for plaintiffs.

[*283] *GIBBENS and Others v. BUISSON and Another. Nov. 17.

Plaintiffs agreed with defendants to convey a cargo to Oporto, and if the river was in possession of an enemy, to unload at F., outside the harbor. The freight was to be 475*l.*; or, if the vessel could enter Oporto, discharge, and reload there, 800*l.* only: twenty-five days were allowed for unloading. Plaintiffs arrived at F. June the 2d, and, an enemy being in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of defendants, and partly by bad weather, till August 25th, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered Oporto, where she discharged the remaining eighth of her cargo. In July, the defendants' agent at Oporto gave plaintiffs a bill for the larger freight. In September, the vessel obtained, at Oporto, a full cargo for England. Held, that plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June.

THIS was an action of assumpsit, brought to recover the sum of 248*l.*, claimed by the plaintiffs under a charter-party, for demurrage of the ship *Lusitania*. The declaration also contained counts for the carriage and conveyance of passengers, stock, and merchandise; for the use and hire, and for the detention of the ship; and the common money counts.

The parties, by consent, and by order of the Chief Justice, submitted, in pursuance of the statute in that case made and provided, the following case for the opinion of the Court:—

The plaintiffs were owners of the *Lusitania*, and on the 2d of May, 1833, a charter-party was duly signed by them and the defendants to the following effect:—"It is this day mutually agreed between the owners and master of the *Lusitania*, of 175 tons, now in the port of London, and Messrs. Buisson and Morlett, of London, merchants, that the said ship, being tight, &c., shall receive on board a full and complete cargo of merchandise, and proceed therewith to Vigo, and there further receive on board as much live stock as she can with safety to the vessel take on deck; and being so loaded, shall therewith proceed to Oporto:

[*284] and should the master think it possible to enter the port without *risk from the batteries, he agrees to discharge the cargo there; but if not, he binds himself to proceed off the castle of the Fox, or to some other point near the bar, where the vessel can lie in safety, and there discharge into boats, which the freighters bind themselves to send alongside the vessel. To be paid freight, in full for the voyage, the sum of 475*l.* Or, if the vessel can enter Oporto,

On the broad ground, therefore, that it does not *contain any general allegation that the defendant was evicted by one having title to the premises, nor any such special statement of facts as discloses a title by forfeiture, I think this plea affords no answer to the action, and that it is not cured by the plaintiffs' pleading over, the claim set out being insufficient to justify the entry.

GASELEE, J. His Lordship having gone so fully into the question, I need only add, that I concur in the opinion he has expressed. But I cannot see that any trade prohibited by the original lease has been carried on on the premises. For a retail brewer is not what was meant by a common brewer; and though it is alleged, that the under-lessee carried on the business of a retail brewer, "that is to say, of a retailer of beer," by the license of the plaintiffs, yet, in the license set out by the replication, the business of a retailer of beer is not mentioned.

VAUGHAN, J. It is with much diffidence that I pronounce an opinion at variance with that of the rest of the Court, particularly on a point of pleading with which those from whom I differ are well acquainted. But unless there be a distinction between plea and declaration, I should have thought this plea sufficient, under the authority of *Foster v. Pierson*, where it was held, that in assigning a breach of covenant for quiet enjoyment, it was sufficient to allege that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such lawful right and title, entered, &c., and evicted him, &c., without showing what title A. B. had; or that he evicted plaintiff by legal process, &c. And Lord KENYON said, "If the declaration be certain to a common intent, that is sufficient. Now, it states that J. B. Pierson, at the time of the lease made to the plaintiff, and at the time of the *eviction, [*281] had lawful right and title to the premises; and having such lawful right and title, entered, &c. I think it would be doing violence to these words to say, that the lawful right and title, which it is stated he had, did not legalise his entry; the fair import of the words is, that he had lawful right and title to do that which he did." ASHHURST, J., said, "The breach, though not accurately drawn, implies that the plaintiff was lawfully evicted, so as to bring the case within the meaning of the covenant. For, in substance it is this, that the person who entered had a better title than the defendant, and having such title, entered upon the premises." And BULLER, J., said, "In assigning a breach of covenant, it is sufficient if it be certain to a general intent, and I think this is sufficiently certain; for when it is said, that 'the party having a lawful right and title entered,' it is the same thing as saying, 'he entered by lawful right and title.'" GROSE, J., referred to 1 Mod. 294, where TWISDEN, J., said, "It is sufficient to say that the party had a prior title; not a prior title to enter." And in 1 Mod. 101, Lord HALE said, "having title at the time" was sufficient.

BOSANQUET, J. I am of opinion that our judgment must be for the plaintiffs. If the defendant has been legally evicted, the plaintiffs' claim is defeated; but it appears to me that no legal eviction is shown upon this plea. The defendant has pleaded that a forfeiture was incurred by the fact that the business of a retailer of beer had been carried on; and that R. D. Chantrell, having good right and title as eldest son and heir of Chantrell and wife, evicted the defendant before the rent claimed in the declaration became due. Now, the mere carrying on the trade of a retailer of beer is not prohibited by the covenant, but the carrying it on without the Chantrells' consent in writing; and in order to establish a forfeiture, it should have been averred and proved that *the [*282] trade was carried on without such consent. The prohibition, and the provision which narrows it, are found together in the same clause; and the case falls within the general rule of pleading, which requires, that where a covenant with an exception is contained in the same clause, an assignment of breaches must comprehend the exception as well as the covenant. It has been contended,

however, that, at all events, the allegation of forfeiture may be rejected as surplusage, and that the general allegation, that R. D. Chantrell, having good title as heir, entered, is sufficient. But where the cause of forfeiture is expressly set out, and appears to be insufficient, no general words can cure the defect: and here, the general words that the party entered, having right as heir of the Chantrells, show no other title than a right to stand in the place of the Chantrells. Then, it is alleged that the Chantrells had a right to enter, because the business of a retailer of beer was carried on upon the premises, which is insufficient to show a right of entry, without adding that it was carried on without their consent. It must be observed, too, that this defective allegation is found in a plea, while the cases cited from the Term Reports are decisions upon a declaration for breach of a covenant for quiet enjoyment. By the general rules of pleading, greater certainty is required in a plea than in a declaration, and more than ordinary precision is required in a plea which goes to defeat an estate. The cases, therefore, in the Term Reports are not necessarily to be considered as overruling *Jordan v. Twells*, which was a decision upon demurrer to a plea alleging eviction.

However, it is unnecessary to determine that point: my judgment turns upon the specific ground, that here the defendant has set up a cause of forfeiture which on the face of the plea was not such as to warrant an eviction.

Judgment for plaintiffs.

[*283] *GIBBENS and Others v. BUISSON and Another. Nov. 17.

Plaintiffs agreed with defendants to convey a cargo to Oporto, and if the river was in possession of an enemy, to unload at F., outside the harbor. The freight was to be 475*l.*; or, if the vessel could enter Oporto, discharge, and reload there, 800*l.* only: twenty-five days were allowed for unloading. Plaintiffs arrived at F. June the 2d, and, an enemy being in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of defendants, and partly by bad weather, till August 25th, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered Oporto, where she discharged the remaining eighth of her cargo. In July, the defendants' agent at Oporto gave plaintiffs a bill for the larger freight. In September, the vessel obtained, at Oporto, a full cargo for England. Held, that plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June.

THIS was an action of assumpsit, brought to recover the sum of 248*l.*, claimed by the plaintiffs under a charter-party, for demurrage of the ship *Lusitania*. The declaration also contained counts for the carriage and conveyance of passengers, stock, and merchandise; for the use and hire, and for the detention of the ship; and the common money counts.

The parties, by consent, and by order of the Chief Justice, submitted, in pursuance of the statute in that case made and provided, the following case for the opinion of the Court:—

The plaintiffs were owners of the *Lusitania*, and on the 2d of May, 1833, a charter-party was duly signed by them and the defendants to the following effect:—"It is this day mutually agreed between the owners and master of the *Lusitania*, of 175 tons, now in the port of London, and Messrs. Buisson and Morlett, of London, merchants, that the said ship, being tight, &c., shall receive on board a full and complete cargo of merchandise, and proceed therewith to Vigo, and there further receive on board as much live stock as she can with safety to the vessel take on deck; and being so loaded, shall therewith proceed to Oporto:

[*284] and should the master think it possible to enter the port without *risk from the batteries, he agrees to discharge the cargo there; but if not, he binds himself to proceed off the castle of the Foz, or to some other point near the bar, where the vessel can lie in safety, and there discharge into boats, which the freighters bind themselves to send alongside the vessel. To be paid freight, in full for the voyage, the sum of 475*l.* Or, if the vessel can enter Oporto,

discharge and reload there, then, in lieu thereof, the sum of 300*l.* only. The port and pilotage charges at Vigo to be paid by the freighters. The act of God, the king's enemies, restraint and detention of princes and rulers, fire, and all and every the other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, during the said voyage, always mutually excepted. The freight to be paid in cash in London, upon production of receipts for right and true delivery of the cargo. Twenty-five working days are to be allowed the said merchants (if the ship is not sooner despatched) for unloading the cargo. Lay days to commence when the ship is off the castle of the Fox, or other point where she is to be discharged; continue, whilst there; cease, if blown off the coast by stress of weather, and recommence, when again at anchor at her station: 4*l.* per day demurrage for every day over and above the said laying days. Penalty for non-performance of this agreement, 600*l.* The master to sign bills of lading in the usual manner, and, if required, for more or less freight than above stipulated, without prejudice to this charter-party. The vessel to be consigned to the freighters, or their agents, at the ports of loading and unloading. Five clear days are to be allowed the freighters for taking in the live stock at Vigo; and 4*l.* per day demurrage to be paid for every day she is kept longer. Should there be an absolute impossibility of landing the cargo off Oporto, it shall be lawful for the master and the freighters' agents to enter into a fresh agreement, without prejudice to this charter-party."

*On the 12th of May, 1833, the ship sailed from London on the voyage mentioned in the charter-party, with a cargo, chiefly of provisions, shipped by or on account of the defendants, and arrived at Vigo on the 28th of the same month, where some oxen, &c., were also taken on board: the ship sailed from Vigo on the 2d of June, and arrived off the bar of Oporto on the next day. The harbor of Oporto is about two or three miles up the river Douro: when the ship so arrived, the Miguelites were in possession of batteries on each side of the entrance of that river; and it was not then possible for her to enter the port without great risk and danger; she was accordingly brought up in the roads off the castle of the Fox, just beyond the range of the Miguelites' batteries. In pursuance of instructions from the plaintiffs, the captain made a private signal to inform Signor Dourado, of Oporto, to whom the cargo was consigned by the defendants, of the arrival of the ship; and the same day received a letter from Dourado, requesting him to unload into boats, sent by Dourado, the oxen, &c., taken on board at Vigo; and, if there were room, a portion of the flour, which formed part of the ship's cargo.

The ship remained at anchor in the roads, and delivered part of the cargo from time to time, as it was sent for by Dourado: but the occupation of the batteries by the Miguelites made it difficult and dangerous to discharge the cargo, as the boats had to pass up the river between the batteries, and generally came to the ship during the night. They also came on Sundays, and portions of the cargo were delivered to them accordingly, on Sunday the 9th and Sunday the 16th of June. The ship remained at her anchorage, as before stated, without any interruption, from the 3d of June until the 14th of August, when there were very strong gales and squally weather. The captain was obliged to slip his cable for the preservation of the ship; but he brought her up *again to the same anchorage on the next morning, and remained there until the 18th of August, when, it blowing hard, he sustained some damage from the impact of another ship, and stood out to sea in order to avoid further danger, having on board about one-eighth of the cargo undischarged. The gale continued for several days, and the *Lusitania* was beating off and on the coast, and could not return to her former anchorage until the 25th of August. The Miguelites had then abandoned the batteries, and the river was open, but there was not sufficient wind and tide to enable the ship to cross the bar. The next day there was sufficient water; the *Lusitania* proceeded up the river, and came to anchor in the harbor of Oporto, where the residue of the cargo was delivered to the order of Dourado.

On the 26th of June the captain received from Dourado a letter, in which he said, "I approve of the expenses you have been at with feeding the men employed in unloading and bringing over your cargo, which I beg you to continue doing until we can settle accounts. In spite of my best endeavors, it has not been possible to hurry on, more than has been done, the unloading. I shall continue with my utmost exertions, towards its conclusion."

Only a small part of the outward cargo was discharged by the 29th of June; the ship had continued to lie in the roads, at the request of Dourado, and to discharge her cargo from time to time as it was sent for by him; and on the 15th of July he wrote to the captain in the following terms:—"We have avoided unloading your vessel, owing to the low prices of the articles, and our warehouses being full; however, we send these boats to bring all the barrels of beef they can, and nothing else but these; but if it is absolutely necessary to take out some barrels of flour, then let the lesser possible quantity come."

[*287] The sum of 100*l*. was paid by the defendants to the *plaintiffs on the 9th of May, 1833, in part of the freight of the ship. On the 24th of July the captain, on behalf of the plaintiffs, claimed the payment of the balance of freight for the ship, as having previously become due according to the terms of the charter-party; and Dourado then gave him a bill of exchange upon the defendants for the sum of 375*l*., which was expressed to be for the "balance of the freight per Lusitania."

At the time Dourado gave this bill of exchange, he admitted that the ship had been upon demurrage for some time past; and said, that the cargo had come to a bad market, and that the expense of getting the cargo on shore was so heavy that he thought he should keep the Lusitania a little longer.

The bill of exchange was remitted to the captain's agent in London, who received the amount thereof from the defendants.

On the 16th of August the captain exhorted Dourado to discharge the ship; when Dourado said, the prices were so low that he did not wish to pay the extra expenses of the boats. Dourado was then informed by the captain, that the ship had been on demurrage ever since the 28th of June, which he admitted; and the demurrage due was calculated by Dourado and the captain.

When the ship entered the harbor she had only about one-eighth of her cargo left on board, and the whole of that, except as after mentioned, was delivered in the harbor between the 26th and 29th of August inclusive.

One hundred and eighty ores, which had been sent out in the ship by the defendants, could not be disposed of at Oporto; at the request of Dourado, the captain agreed to take them back to England without any charge; but it was necessary, in order to clear the ship at the custom-house of Oporto, that these ores should be landed, which was done by order from Dourado on the 30th of August; and a barrel of flour, which had before escaped notice, was also landed [*288] on the same day; the ship was *then cleared at the custom-house, and the ores were afterwards again taken on board.

After the delivery of the cargo, Dourado was applied to by the captain to give a certificate of the time the ship had been employed; and he then signed the following memorandum on the back of a copy of the charter: "Arrived off the bar on the 3d of June; the time of contract expired on the 28th of June; entered the river on the 26th of August, and was cleared on the 30th of August."

The Lusitania afterwards obtained a full cargo at Oporto for England, which she began to take in on the 19th of September, and sailed therewith on the 6th of October.

In the declaration, which was to be considered as part of the case, the plaintiffs, after setting out the substance of the charter-party, and averring that the ship being tight, &c., received the cargo on board, stated, that she proceeded therewith to Vigo, and there received live stock, &c., and afterwards proceeded on her voyage; that afterwards she arrived at her destination; that the plain-

tiffs afterwards discharged the cargo, according to the true intent and meaning of the charter-party, which was then and there accepted by the defendants; and that the vessel could not enter Oporto, discharge and reload there, according to the true intent and meaning of the charter-party.

The defendants pleaded the general issue, and paid 73*l.* into Court on the count for the use and hire of the ship.

The question for the opinion of the Court was, whether the plaintiffs were entitled under the circumstances stated in this case, to recover any and what sum from the defendants, and upon what count or counts; the defendants being at liberty to object to the admissibility of the evidence of Dourado's acts, declarations, and letters stated in the case. The Court was to be at liberty to give judgment for the plaintiffs, if they thought there was sufficient evidence to support the plaintiff's case, exclusive of any evidence which they [*289] thought ought not to have been received. The defendants were only to take such objections to the declaration as they might have taken at nisi prius, or in arrest of judgment. And the Court were to be at liberty to make any amendment which they might think the Judge at nisi prius would have allowed.

R. V. Richards, for the plaintiffs, contended that, within the meaning of the charter-party, the vessel was discharged at the castle of the Foz; and that the plaintiffs were, therefore, entitled to the larger freight, and to demurrage from the 28th of June. But for the directions of the defendant's agent Dourado, who delayed the unloading because the prices at Oporto were low and the markets full, the vessel might have been entirely discharged before she entered the port: and the retainer and discharge of one-eighth of the cargo at a later period, for the convenience of the defendants, did not entitle the defendants to say the vessel was discharged at Oporto within the meaning of the charter-party. The reloading at Oporto would not exonerate the defendants from the larger freight, unless the plaintiffs had also been enabled to discharge there.

And the conduct of the plaintiff's agent, in giving a bill of exchange for the balance of the larger freight, and in admitting that the ship was lying on demurrage, precluded the defendants from setting up any other construction of the charter-party.

Wightman, for the defendants. The plaintiffs are entitled only to the lesser freight. The larger freight was only to be paid in case the vessel discharged entirely without entering the port. But her entering the port, and thereby obtaining the chance of a new freight homewards, was the consideration on which the plaintiffs agreed to accept the lower freight. [*290] They did finally discharge in the port, and did obtain there a homeward cargo: the defendants, therefore, ought to pay only the lesser freight. If the discharge of seven-eighths of the cargo outside the port was sufficient to entitle them to the higher freight, notwithstanding they had had the advantage of a homeward cargo, where was the line to be drawn? Would the delivery of a single parcel at the castle of the Foz have entitied them to the larger freight, if all the rest of the cargo had been discharged at Oporto? The lay days were to commence only at the place of discharge; and if Oporto were the place, the plaintiff's claim for sixty-two days demurrage was at an end. At all events, a deduction must be made for the Sundays. [BOSANQUET, J. The contract is made with reference to the usage of foreign countries.] No usage is stated; and the bill of exchange given by Dourado does not affect the case, for the freight was to be paid in cash in London upon production of receipts for the delivery of the cargo: the bill, therefore, was given by mistake.

Richards. The extreme case of the plaintiffs being entitled to the higher freight upon the delivery of a single package outside the port, may be met by the supposition of the defendants claiming to pay only the lower freight if a single package were delivered within the port, although the bulk of the cargo were discharged outside. The question is, where was the substantial discharge? The intention was, that the defendants should pay the lower freight only upon

the ship being substantially discharged within the port, and reloading there within a reasonable time. But she was kept outside an unreasonable time, for [291] the benefit of the defendants; *and the inconvenience occasioned to the plaintiffs by that delay precluded the defendants from claiming any advantage on account of the subsequent reloading.

TINDAL, C. J. This is a case of some importance, being the first which has been brought before the court under the recent act of parliament by which parties are authorized to obtain a judicial decision upon a statement of facts agreed to between themselves;—a great improvement in the law, and highly beneficial to the suitor.

The question arises on the construction of a charter-party; and in putting our construction on the instrument, we are bound to give effect to the intention of the parties, as far as it can be collected from the expressions they have used.

And I am of opinion that, according to the terms of this charter-party, the plaintiffs, in the events which have happened, are entitled to the larger freight.

The charter-party begins, that the vessel being loaded shall proceed to Oporto, “and should the master think it possible to enter the port without risk from the batteries, he agrees to discharge the cargo there; but if not, he binds himself to proceed off the castle of the Foz, or to some other point near to the bar where the vessel can lie in safety, and there discharge into boats, which the freighters bind themselves to send alongside.” If we go no further, it is manifest that the destination to enter the port or not, and to discharge the cargo inside or outside, was to depend on the circumstances that might determine the mind of the captain, with a view to the safety of the vessel; and it is clear he thought it unsafe to enter, for the case finds that, when the ship arrived off the bar, the Miguelites were in possession of the batteries on each side of the river, and it was not possible for her to enter the port without great risk. I should [292] say, therefore, that, as the captain thought *himself justified in not entering the port, the discharge must be considered to have taken place outside; in which case the charter-party provides “freight in full for the voyage 475*l.*; or, if the vessel can enter Oporto, discharge and reload there, 300*l.* only.”

The larger freight being due if entry into the port became impossible and the discharge took place outside, the conditions on which the plaintiffs were to receive the smaller freight are three: that the vessel should, upon arrival, enter the port; that she should discharge there, and reload.

As she did not discharge and reload there upon her arrival off the bar, two of the events contemplated did not arise, and the plaintiffs are entitled to the larger freight.

The charter-party goes on,—“twenty-five working days are to be allowed the said merchants (if the ship is not sooner dispatched) for unloading the cargo. Lay days to commence when the ship is off the castle of the Foz, or other point where she is to discharge; continue, whilst there; cease, if blown off the coast by stress of weather; and recommence when again at anchor at her station.”

The instrument, therefore, does not contemplate or provide for the case of the discharge beginning in one place and being concluded in another, but evidently contemplates, that if she be blown off the coast she will return to her former station, that is, outside the port. I point out this stipulation, as tending to show an intention that the plaintiffs should have the larger freight, unless, upon arrival, they could enter the port and make their whole discharge there.

It is said that this construction of the agreement might lead to absurd consequences; and an extreme case has been put, of a minute portion of the cargo being discharged outside, and the remainder within the port. *Here, [293] however, the cargo was, in fact, substantially discharged outside: and from the circumstance that one-eighth remained to be discharged when at length the ship entered the port, we cannot draw an inference to outweigh all

the other stipulations in the charter-party, and, in effect, to make it optional with the defendants whether they should pay the larger or the smaller freight. Besides, after the defendants have taken upon themselves to pay the larger freight before the vessel was entirely discharged, we must take it they waived any objection on that head.

It is then contended that the vessel was to discharge at Oporto, and that the lay days were not to commence till she was at the place of discharge: but they are not so limited by the language of the charter-party; for they are to commence at the Castle of the Foz, or other point where the vessel is to be discharged; to cease if the vessel be blown off the coast; and commence again on her regaining her station.

These considerations arise on the charter-party alone; but when we see that the delay in the discharge arose from the voluntary act of the defendant's agent, because the markets were low and the warehouses full, it can scarcely be doubted the defendants have made themselves responsible for the detention of the vessel.

I think, therefore, that the plaintiffs are entitled to the larger freight, and that the number of days claimed for demurrage has been correctly estimated.

GASELEE, J., and VAUGHAN, J., concurred.

BOSANQUET, J. I am of the same opinion. The court must put a rational construction on the charter-party: and the parties seem to have contemplated two events for the voyage; the arrival and discharge of the ship off the Castle of the Foz, in which case the owners *were to receive 475*l.* for the freight; and her entry into port and reloading there, in which case they were to receive only 300*l.* As the captain came to the Castle of the Foz, and could not enter the port for the greater portion of his discharge, the owners are entitled to the greater freight. It has been urged, that the consideration for the owners' entering into the charter-party, was the advantage of reloading at the port of Oporto: no doubt that was part of the consideration; but, on the other side, the risk of laying off the bar, and being beat about in bad weather, was part of the consideration which was to entitle the owners to the higher freight.

Judgment for the plaintiffs.

WAUGH v. ASHFORD. Nov. 18.

The defendant having been committed to the King's Bench prison by a Court of Bankruptcy, this Court gave the bail time to render, notwithstanding the committal was under a London commission of bankrupt, and the bail had justified after the bankruptcy, after judgment and at the request of the defendant's attorney.

THIS action by the endorsee against the acceptor of a bill of exchange, was commenced in September, 1833.

The defendant became bankrupt in London, in December, 1833, and the drawer of the bill was appointed one of his assignees.

Judgment in this action was signed on a cognovit, March, 13th, 1834; bail justified on the 14th of March; and in May, the defendant was committed to the King's Bench prison by a Subdivision Court of Bankruptcy for not answering satisfactorily; the plaintiff's attorney, who was one of the solicitors to the assignees, being present, and assisting in making out the committal.

Under this committal the defendant still continued in confinement.

In April, a *ca. sa.* in the action was lodged against him; *and on the 6th of June, after the return of the *ca. sa.*, the bail, who had justified at the request of his attorney, were served with the copy of a writ of *sci. fa.* returnable on the 12th of June.

On the 11th of June, in last Trinity term,

Price, on behalf of the bail, obtained a rule, calling on the plaintiff to show

cause why, under the circumstances above stated, the bail should not have time to render their principal.

The time required was, till he should have passed his last examination.

Wilde, Serjt., and Channell, showed cause.

The Court will not enlarge the time for rendering bail, except under peculiar circumstances; and there is nothing which gives the bail in the present case any claim to indulgence. It has been refused, where the principal could not be removed without endangering his life; *Wynn v. Petty*, 4 East, 102; where he has become lunatic; *Cock v. Bell*, 18 East, 855; and even where he has been unwarrantably detained by a foreign enemy; *Grant v. Fagan*, 4 East, 189: it has been granted in cases of bankruptcy, only where the commission has been sued out in the country, and in order to avoid the expense of bringing the bankrupt to London. *Maude v. Jowett*, 8 East, 145, *Show v. Cash*, 4 Bingh. 80. Here the bail did not justify till after judgment against their principal, and till three months after he had become a bankrupt; they were aware, therefore, of the responsibility they incurred, and after the return of the ca. sa. have no claim to the favor of the Court. In *Gibson v. White*, 2 Cr. & J. 85, 2 Tyrwh 162, the [*296] application was made before the bail had *justified; and previous to justification more latitude is allowed. If the present rule be made absolute, the surrender may, by the defendant's refusal to answer, be delayed to an indefinite time.

Bompas, Serjt., and Price, contra. If this had been an action in the Court of King's Bench, it would have been a matter of course, upon the defendant's being committed by the commissioners of bankrupt, to bring him up under a habeas corpus from the criminal custody of that Court, and render him in discharge of his bail. The Court of Exchequer and this Court have no authority to interfere with the criminal custody of the Court of King's Bench; *Currie v. Kinnear*, 1 B. & B. 28. In order, therefore, that the suitor of those Courts may be put on an equal footing with the suitors of the Court of King's Bench, it has been usual in those Courts to give the bail time to render the principal, wherever, in the Court of King's Bench, he might have been rendered under a habeas corpus. *Hodgson v. Temple*, 5 Taunt. 503, *Ashmore v. Fletcher*, 13 Price, 523.

Cur. adv. vult.

TINDAL, C. J. The application which has been made in this case, that the bail shall have time to render their principal till he shall have passed his last examination, is without any precedent. Yet there are circumstances in the case which may induce us to accede to the application to a small extent.

It is clear that, if these circumstances had occurred in the Court of King's Bench, the bail would have had an easy remedy by bringing up their principal under a writ of habeas corpus, and then rendering him in discharge.

[*297] By the constitution of this Court we are unable to *proceed in that course, but the practice has been to come as near to it as our jurisdiction will permit.

We are disposed to accede to the application to the full extent to which it has been made, because it might enable the parties to lie by, instead of using all the means in their power to accelerate a surrender; but we think it right to suspend the proceedings on the scire facias till the fifth day of next term.

We shall narrowly watch the conduct of the parties in the mean time, but it is expedient that the practice of the Courts should be assimilated as nearly as possible.

Rule absolute accordingly.

DAVIDSON v. CHILMAN. Nov. 18.

A plea of privilege, as attorney of another court, is a plea in abatement, and if it be not verified by affidavit, plaintiff may sign judgment.

To debt in this Court for goods sold, the defendant pleaded that he was an

attorney of the Court of King's Bench, and prayed judgment if this Court would or ought to take cognizance, &c.

He made no affidavit of the truth of this plea; whereupon

The plaintiff signed judgment, which

Talfourd, Serjt., obtained a rule nisi to set aside as irregular.

Wilde, Serjt., who showed cause, contended, that this was a plea in abatement; and, as such, might be treated as a nullity, if not verified by affidavit pursuant to 5 Ann. c. 16, s. 11. In *Horsfall v. Matthewman*, 3 M. & S. 154, where the Court set aside a judgment signed after a plea *in abatement, [*298] there was an affidavit, though in some respects objectionable.

Talfourd. All pleas to the jurisdiction of the Court do not require to be verified by affidavit: there is nothing in this plea, of which the Court is not apprised without affidavit; as, the existence of the privilege, and the entry of the defendant's name on the rolls of the Court: and the statute of Anne applies only to matters de hors the record, and not to such as appear to the Court on inspection of their own proceedings: *Hughes v. Alvarez*, 2 Ld. Raym. 1409. Nor ought such a plea as this to be classed with pleas in abatement; for it is neither to the disability of the plaintiff, nor to the person of the defendant, nor in abatement of the writ. Indeed, a plea concluding with a prayer of judgment if the Court will take cognizance, &c., is not considered even as a plea to the jurisdiction; *Chatland v. Thornley*, 12 East, 544; *Stokes v. Mason*, 9 East, 424. And a plea of the statute of additions has been held not to require verification by affidavit; *Gray v. Sidneff*, 8 B. & P. 397. At all events, the plea, if informal, was not a nullity; and, instead of signing judgment, the plaintiff should have moved to set the plea aside; *Horsfall v. Matthewman*.

TINDAL, C. J. A plea of privilege as attorney of another Court, is classed under pleas in abatement by Comyns; Com. Dig. Abatement (D) 6. It is a subordinate division of the class of pleas in abatement; and, if not verified by affidavit, may be treated as a nullity.

BOSANQUET, J., referred to *Stiles v. Serjeant Mead*, 2 Str. 738, and *Cunningham v. Johnson*, Say. 19.

Rule discharged.

**DUDDEN v. LONG.* Nov. 18.

[*299]

The Court refused to interfere in favor of the sheriff, under the interpleader act, where the under-sheriff's partner appeared to be concerned for some of the parties.

THE sheriff of Wilts having been ruled to return a *fi. fa.* issued against the defendant,

A rule nisi was obtained, on the sheriff's behalf, for a stay of proceedings, and for the plaintiff and the assignees of the defendant, who had become a bankrupt, to appear under the interpleader act, and state the nature of their respective claims.

The defendant's goods had been seized and sold under the *fi. fa.*, and the produce still remained in the hands of the sheriff.

Ludlow, Serjt., for the plaintiff, showed cause on an affidavit from the plaintiff's attorney,

That the *fi. fa.* had been lodged at the office of the under-sheriff of Wilts on the 30th of September, when a gentleman, who carried on business as a solicitor, in partnership with the under-sheriff, said the writ would have priority, as a *fi. fa.* issued against the same defendant by one W. D. W. had been returned for irregularity: that deponent gave orders for a bill of sale, and, by appointment, called for it the next day at two o'clock; no person, however, was then at the under-sheriff's office; but at seven the same evening, upon deponent's calling again, the under-sheriff's partner demanded an indemnity, saying, execution had that day been levied on the defendant's goods at the suit of W. D. W.

The indemnity being refused, the under-sheriff's partner said the under-

sheriff was not bound to sell without a venditioni exponas, and required deponent to wait for a week, when he should hear whether the under-sheriff would sell or not.

[*300] *On the 6th of October, deponent received a letter from the under-sheriff, dated the 4th, and stating that the defendant had committed an act of bankruptcy, and that the papers were gone to London for a fiat.

On the 6th, a fiat was issued against the defendant, to which fiat the under-sheriff's partner was solicitor; W. D. W. and the under-sheriff's brother, two of the commissioners; and the fiat was opened in the office of the under-sheriff and his partner.

Ludlow contended that, under these circumstances, the Court would not interpose to relieve the sheriff from any responsibility.

Coleridge, Serjt., was heard in support of the rule. It is no imputation on the under-sheriff that his brother acted as commissioner in the bankruptcy, the commissioners of bankrupt in the country being appointed by the Judge of assize to a given district; and within that district, no others can act.

TINDAL, C. J. Before we accede to any application, under the interpleader act, on behalf of the sheriff, we must see that he stands quite clear of any connexion with either of the parties. We do not see how we can say that here, where the under-sheriff is, in effect, the attorney for the assignees under the commission of bankrupt. It seems to us that, where there is such an intermingling of the characters of attorney and under-sheriff, the proceedings ought to go on.

The rest of the Court concurring, the rule was

Discharged.

On a subsequent day, the Court, upon the application of *Coleridge*, allowed the sheriff four days to make his return to the fi. fa.

[*301] *WILKINSON, Executrix of BEVAN v. EDWARDS. Nov. 18.

Where an executrix commenced an action with temerity, and prosecuted it recklessly, laying the venue in Middlesex, notwithstanding all the parties lived in Monmouthshire, and twice violating a peremptory undertaking to try, the Court refused to exonerate her from costs.

THIS was an action by the executrix of a payee, against the maker of a promissory note.

The payee died in June, 1831. The maker's signature was attested; and the maker, payee when alive, and attesting witness, all lived in Monmouthshire.

The plaintiff, nevertheless, laid her venue in Middlesex, thinking, as she alleged, that the action would be undefended.

In Hilary term, 1834, a rule for judgment as in case of a nonsuit was discharged, on the plaintiff's giving a peremptory undertaking to try at the next sittings.

In the February following, the plaintiff's attorney asked the defendant's attorney the nature of his defence, and to admit the defendant's handwriting.

The defendant's attorney refused to make the admission, and said his client did not owe the money.

The plaintiff's attorney made a similar application in April, which met with a similar answer, when he offered to change the venue into Monmouthshire.

In Easter term last, a second rule for judgment as in case of a nonsuit, was discharged upon a second undertaking to go to trial; which undertaking having been broken, and judgment as in case of a nonsuit having been entered up,

Atcherley, Serjt., obtained a rule nisi to stay proceedings, in order that the plaintiff, as executrix, might be exempted from costs. 3 & 4 W. 4, c. 42, s. 81.

Wilde, Serjt., who showed cause, after animadverting on the circumstance

of the plaintiff's laying the venue in *Middlesex, when the parties lived in Monmouthshire; on the breach of two peremptory undertakings to try; and on the temerity with which the action had been brought; contended, that it was not a case for the interposition of the Court in favor of the executrix. [*302]

Atcherley insisted that the discretion of the Court should be exercised under the recent statute, upon the same principles as before the statute; and in *Woolley v. Sloper*, 9 Bingh. 754, it was held that, upon a judgment as in case of nonsuit, an executor plaintiff, who had been guilty of wilful negligence, was not liable to the costs of the cause, but only to the costs occasioned to the defendant by such wilful negligence.

It was the duty of the executrix to sue, and her failure in that respect might amount to a devastavit.

TINDAL, C. J. Before the statute 3 & 4 W. 4, c. 42, executor plaintiffs were not liable to costs on a nonsuit or verdict for the defendant: not from express exemption by any law, but owing to the particular mode in which the language of the statutes giving costs to defendants was expressed. For on looking into the statute 23 H. 8, c. 15, s. 1, we find that costs are given to the defendant, where the plaintiff is nonsuited, or a verdict passes against him, in actions on contracts immediately with, or for wrongs immediately done to, the plaintiff. That statute was extended to all personal actions, by 4 Jac. 1, c. 3; which being framed on the model of 23 H. 8, c. 15, it has been holden, that executors and administrators are neither within the one nor the other, inasmuch as the contract on which they sue is not made immediately with themselves, but with their testator or intestate.

*The 3 & 4 W. 4, c. 42, was intended to amend this defect in the law, by enacting, "that, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the superior Courts shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff; and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for costs, and they shall be recovered in like manner." [*303]

The general rule, therefore, now is, that an executor or administrator who has been nonsuited, or who has lost a verdict, is liable to costs; and it is cast on him to make out that there are particular circumstances in his case which would justify the Court in exempting him by an exercise of their discretionary authority. We must therefore look to the course and conduct of the executor in the particular case. It is said to be his duty to sue, in order to collect the testator's assets: but it is his duty first to consider whether there be a fair prospect of success in the action.

Here the plaintiff appears to have failed, because she was unprovided with proof of the defendant's handwriting; but she should have secured that before she ventured to sue. To say the least, therefore, the action was a hasty proceeding. Then, although the cause of action substantially existed in Monmouthshire, she lays the venue in Middlesex, and twice neglects a peremptory undertaking to try. All these are proceedings which have a tendency unnecessarily to increase expense to the defendant. We think, therefore, it is not a case in which, in the exercise of its discretion, the Court ought to interpose in favor of the plaintiff.

*GASELEE, J. As no pains appear to have been taken before the action, to obtain proof of the defendant's handwriting, and the peremptory undertaking to try has been twice broken, I think this rule ought to be discharged. [*304]

VAUGHAN, J. The statute 3 & 4 W. 4, c. 42, was passed to remedy a gross abuse, and it is now thrown on the executor to make out his case for exemption

from costs. No ground has been shown here for such indulgence; the action appears to have been hastily commenced, and unnecessarily continued.

BOSANQUET, J. It is incumbent on a plaintiff who seeks relief under this statute, to show a satisfactory ground why he should claim to be exempted from costs.

For the reasons given by the Court, I think that has not been done on the present occasion.

Rule discharged.

POWER v. IZOD, Administrator of IZOD. Nov. 18.

1. The rule of Hil. 4 W. 4, which requires the party who pleads a plea of judgment recovered, to set out its date, &c., in the margin of the plea, does not apply to a plea of judgment recovered against an executor.
2. Barristers under the degree of the Coif are, as well as Serjeants, competent to sign pleas in the Court of Common Pleas.

In bar of this action, the defendant pleaded two judgments recovered against him, in his capacity of administrator; one in the Court of King's Bench, the other in the Exchequer; but omitted to set out, in the margin of the plea, the date of the judgments or the number of the roll.

For this omission the plaintiff signed judgment, which

[*305] *Wilde, Serjt., obtained a rule nisi to set aside for irregularity. Bompas, Serjt., who showed cause, relied on the rule Hil. 4 W. 4. "Where a defendant shall plead a plea of judgment recovered in another Court, he shall, in the margin of such plea, state the date of such judgment, and, if such judgment shall be in a court of record, the number of the roll, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea." He also objected that the plea was not signed by a Serjeant. Although the Bar at large were now admitted to practise in the Court of Common Pleas, nothing had been done to alter the rule which required a Serjeant's signature to a plea.

TINDAL, C. J. The rule of Hil. 4 W. 4, is not expressed with perfect precision; but on reading it, I should have thought it applied to the common plea of judgment recovered for the same cause of action, and such must be taken to be the meaning of the rule.

The present plea is, in effect, a plea that the defendant has not sufficient assets to answer the plaintiff's demand.

As to the second objection, the order by which the Bar in general are admitted to practise in the Court of Common Pleas is without qualification, and enables them to discharge there every duty of an advocate.

The rest of the Court concurred.

Rule absolute.

[*306] *SIMS and Another, Assignees of BARNARD, an Insolvent, v. SIMPSON. Nov. 19.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee under 7 G. 4, c. 57, passes only such property as the insolvent has at the time of the assignment.

In July, 1831, Barnard took from the defendant, under a lease, certain premises at a rent of 323*l.* 5*s.* a year. He also paid down 100*l.* as a deposit, by way of security for the rent.

On the 13th of April, 1832, he went to prison insolvent;

On the 14th, he surrendered to the defendant the premises he had occupied as above, and sold to him certain fixtures at a valuation of 60*l.* 1*s.* 4*d.*;

On the 18th, upon his petition to the Insolvent Debtors Court, his estate and effects were assigned to the provisional assignee of that Court;

And, in the following October, to the plaintiffs; who by this action of assumpsit for fixtures sold, and for money had and received, sought to recover the above 60*l.* 1*s.* 4*d.*, the value of Barnard's fixtures transferred by him to the defendant, and the 100*l.* deposited with the defendant as a security for rent.

In one count it was alleged that the fixtures were sold by Barnard; in another, by the assignees.

The defendant pleaded, and established, a set-off for rent due to him from Barnard, to a greater amount than 160*l.* 1*s.* 4*d.*

It was objected, on the part of the plaintiffs, that the assignment under the Insolvent Debtors Act had relation to the first day of the insolvent's imprisonment; it being enacted by sects. 30 and 32 of 7 G. 4, c. 57, "that if any person, who shall petition the Court for his or her discharge from imprisonment under this *act, shall, at the time of his or her arrest, or other commencement of such imprisonment, by the consent and permission of the [*307] true owner thereof, have in his or her possession, order, or disposition, any goods or chattels whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said Court, by the conveyance and assignment executed in pursuance of this act."—"If any prisoner, who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with a view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, or petitioning the said Court for his or her discharge from custody under this act." Whereupon,

A verdict was taken for the defendant, with leave for the plaintiffs to move to set it aside, and enter, instead, a verdict for the plaintiffs.

**Andrews*, Serjt., having obtained a rule nisi accordingly,

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Wilde and *Acherley*, Serjts., and *Butt* showed cause.

1st, The plaintiffs, having sued in assumpsit, are precluded from objecting that the insolvent had not authority to sell the fixtures in question. To have raised that objection, they should have sued in trover. By suing in assumpsit, they have affirmed the contract with the defendant, and let in his set-off: *Smith v. Hodson*, 4 T. R. 211; *Thorpe v. Thorpe*, 3 B. & Adol. 580.

2dly, The insolvent was the real, not the merely reputed owner of the fixtures; the plaintiffs have no claim, therefore, under sect. 30.

Nor under the thirty-second, because the transfer, being unaccompanied with fraud, and for a valuable consideration, was not voluntary within the meaning of that section. By the eleventh section, the prisoner is directed to execute, at the time of his petition, a conveyance to the provisional assignee of all his estate and effects; that is, of the estate he possesses at the time of his petition; the thirty-second section repels any presumption that such conveyance is to have a retrospective effect; for if, under section 11, all property were held to pass, which the insolvent had at the commencement of his imprisonment, section 32, would be unnecessary,—as would also the various provisions in the act against fraudulent transfers: and *Hopper v. Marshall*, 2 Bingh. 372, is a strong case to show that, under the assignment to the provisional assignee, nothing passes

but what the prisoner has at the time. That case was decided upon the construction of 1 G. 4, c. 119; but the language of that act, with respect to the assignment, is nearly the same as that of 7 G. 4, c. 57. *Herbert v. Wilcox*, 6 Bingh.

[*309] 203, only *decided that a voluntary payment by the insolvent to a creditor, within three months of the imprisonment, was fraudulent and void within section 32 of 7 G. 4, c. 57: *Sharpe v. Thomas*, 6 Bingh. 416, that a warrant of attorney, given by one who intends to take advantage of that act, is a charge on land, under the same section. In *White v. Bartlett*, 9 Bingh. 378, where defendant, an auctioneer, employed by C., a person in embarrassed circumstances, to sell his property, sold, and paid the proceeds to C.'s order; C. having shortly afterwards been declared insolvent, it was held, that defendant was not liable to C.'s assignees, although the defendant, when he sold the property, was aware of C.'s embarrassment.

Andrews, Serjt., and *Cresswell* in support of the rule.

1st, The objection to the form of action was not taken at the trial; and, assuming the articles to have been sold by the insolvent as agent of the assignees, they may recover the value as money had and received to their use, without affirming the contract of sale: *Hill v. Perrott*, 3 Taunt. 274; *Abbots v. Barry*, 2 B. & B. 369. In such case there are no mutual dealings to let in the defendant's set-off.

2dly, These articles were the property of the assignees; for the transfer of them, the day before the assignment, to the provisional assignee, must, in the insolvent's circumstances, be deemed fraudulent.

At all events, the assignment has relation to the first day of the imprisonment. It is true, there is no express enactment that the assignment by an insolvent shall so operate by way of relation: but the language of sect. 11, of his insolvent act requires that the prisoner, at the time of signing his petition, shall [*310] execute a conveyance *to the provisional assignee, which shall vest in him "all the real and personal estate and effects of such prisoner, and all the future estate and effects which shall come to such prisoner before his final discharge; this corresponds with the language of sect. 63, of the bankrupt act, 6 G. 4, c. 16, which enacts, "that the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed or come to him, before he shall have obtained his certificate;" and under which, notwithstanding the use of the word present, the property of the bankrupt always passes with relation to the act of bankruptcy.

Again, sect. 16, of the insolvent debtor's act, speaking of the estate of every such prisoner, must be taken to mean any estate he is possessed of while in prison.

Sect. 30, which gives his assignees property of which he has the apparent ownership and disposition, expressly refers to the commencement of the imprisonment; and the corresponding provision in sect. 72, of the bankrupt act has been held, even without express words of relation, to relate to the act of bankruptcy.

In like manner, sect. 31, of the insolvent debtor's act, which provides that distresses shall not be available for more than one year's rent, refers to distresses made after the commencement of the imprisonment. But such reference would be superfluous, if the property remained vested in the insolvent to the time of his petition; and that section corresponds with sect. 74, of the bankrupt act, which enacts, that "no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt (whether before or [*311] after the issuing of the commission), shall be available for more *than one year's rent accrued prior to the date of the commission."

Unless the assignment have relation to the first day of the imprisonment, the insolvent might, under the thirty-second section, dispose of his own goods, to the injury of his creditors, till the day of his petition; while, under sect. 30,

the goods of others, of which he had only the apparent ownership, would pass irrevocably to his assignees from the day he went to prison.

TINDAL, C. J. This is an action by the assignees of an insolvent debtor to recover the value of certain fixtures alleged in one count of the declaration to have been sold by the insolvent, and in another, by the plaintiffs, his assignees, to the defendant.

The defendant established, at the trial, a set-off for rent due to him from the insolvent, to a greater amount than the sum now sought to be recovered. It has also been contended to-day, that if the plaintiffs seek to recover on the ground that nothing passed by the sale from the insolvent to the defendant, their form of action has been misconceived, and they should have sued in trover instead of assumpsit. That objection, however, was not raised at nisi prius, and the only point we are called on to decide, is, whether, under the insolvent debtor's act, the assignment of the petitioner's estate and effects has relation back to the first day of his imprisonment.

In the present case, the insolvent went to prison on the 13th of April; sold the fixtures in question to the defendant on the 14th; on the 18th, his estate and effects were assigned to the provisional assignee; and in the following October to the plaintiffs, as permanent assignees.

If the property in the fixtures in question passed to them by relation, from the 13th of April, the first day *of the insolvent's imprisonment, the defendant on the 14th purchased, not the goods of Barnard, but the [*312] goods of the plaintiffs.

But upon the best consideration we can give to the question, we think that, under the insolvent debtors act, the assignment has no such relation back.

First, the eleventh section directs a conveyance, by the following words: "That such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner in and to all the real and personal estate and effects of such prisoner;"—"which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee."

And if the whole had turned on this section, there is nothing in it to show that the conveyance is to be more operative than any conveyance between ordinary parties. Unless, therefore, some other clause show an intention on the part of the legislature that the conveyance should have a relation back, it passes no more than the insolvent possessed at the time.

It is said that the use of the word *prisoner* implies that the assignment should pass whatever he possessed at the time he became a prisoner; but the word *prisoner* is used only to identify the person, and not to give a retrospective effect to his acts.

It is said, that under the sixty-third section of the bankrupt act, by which the commissioners are authorized to assign to the creditors "all the present and future personal estate of such bankrupt," everything passes *which the [*313] bankrupt possessed from the time of the act of bankruptcy, provided it were not more than two months before the commission; and that, *a fortiori*, all that the insolvent possessed at the time of the imprisonment ought to pass to his assignees by virtue of the corresponding section of the insolvent debtors act, which is not qualified even by the word *present*. However, the relation to the act of bankruptcy in the conveyance of a bankrupt's effects does not depend on sect. 63 of 6 G. 4, c. 16, but on an earlier and more powerful section (the 12th), by which it is enacted, that "the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed any act of bankruptcy, by any creditor or creditors of such trader, by commission under the great seal, to appoint such persons as to him shall seem fit, who shall, by

virtue of this act and of such commission, have full power and authority to take such order and direction with the body of such bankrupt, as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, which he shall have in his own right before he became bankrupt, and with all his money fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known, and to make sale thereof in manner herein-after mentioned."

The sixty-third section, therefore, can have no other effect than to enable the assignees to exert the same retrospective power which the Chancellor is authorized by sect. 12, to confer on the commissioners. But no such power is conferred by sect. 11, of the insolvent debtors act.

It is then said that, by the sixteenth section of the insolvent act, "It shall and may be lawful for the provisional assignee of the said Court to take possession himself, or by means of a messenger of the said Court, or other person [*314] or persons appointed by him, of all the *real and personal estate and effects of every such prisoner as shall subscribe such petition, and execute such conveyance and assignment as aforesaid;" and that "it shall be lawful for the said provisional assignee to sue in his own name, if the said Court shall so order, for the recovering, obtaining, and enforcing of any estate, debts, effects, or rights of any such prisoner."

That, however, does not carry the argument any further than the eleventh section.

But it is said, that if we fail to adopt the construction put on the act by the plaintiffs, we shall occasion a manifest inconsistency between the thirtieth and thirty-second section, inasmuch as, under the thirtieth section, the assignees would be entitled to property of third persons, of which the insolvent might have the apparent ownership at any time during his imprisonment, while they would not be entitled to property of his own, if he made away with it at any time before the date of the assignment. In answer to this, it is sufficient to observe that the words of sect. 30, are, "That if any person who shall petition the said Court for his or her discharge from imprisonment, under this act, shall, at the time of his or her arrest, or other commencement of such imprisonment, by the consent and permission of the true owner thereof, have in his or her possession, order, or disposition, any goods or chattels whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration, or disposition, as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said Court by the conveyance and assignment executed in pursuance of this act;" thereby expressly referring to the commencement of the imprisonment. We then come to sect. 32, which provides, with reference to fraudulent transfers, "That if any prisoner, who shall file his or her petition for his or her discharge under *this act, shall, before or after his or her imprisonment, [*315] being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over, any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage, of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention of the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act." This enactment would have been superfluous, if, according to the construction contended for by the plaintiffs, the property were vested in the assignees retro-

spectively from the first day of the imprisonment; and may, therefore, be considered as a legislative declaration that it was not intended the property should so vest.

I think, therefore, that, under the insolvent debtor's act, there is not that relation to the first day of the insolvent's imprisonment, that there is, under the bankrupt act, to the act of bankruptcy. It follows, that the sale to the defendant was not a sale by the agent of the assignees, but a sale by the insolvent, against which the defendant is entitled to set off whatever may be due to him from the insolvent; and consequently, this rule must be discharged.

*GASELEE, J. I am of opinion that, by the assignment to the provisional assignee, only such property passes as the insolvent has at the [*316] time of the assignment. For the purpose of preventing fraud, there are clauses in the insolvent debtor's act, which, in certain cases, vest in the assignees what the insolvent had at the time of his imprisonment. But no fraud is suggested in the present case; and those clauses would have been unnecessary, if the insolvent could not, *bonâ fide*, make any transfer previously to the assignment.

VAUGHAN, J. I am of the same opinion. Neither by express words, or necessary intendment, is the relation contended for to be collected from the act. At all events, according to *Smith v. Hodson*, the assignees, by suing in assumpsit, have affirmed the insolvent's contract, and then the creditor may set off his debt.

BOSANQUET, J. The single question before us is, whether the property in the fixtures in question was vested in the assignees of the insolvent from the commencement of his imprisonment; for if not, the insolvent did not sell as their agent; and the defendant, as against the insolvent himself, is entitled to a set-off.

Now there are no words in the insolvent act which indicate any such relation to the commencement of the imprisonment.

It is said, however, that the clause in the bankrupt act, under which the bankrupt's property passes to his assignees, is similar, in expression, to the clause which directs the assignment of the insolvent's property: and that, under that form of expression, the property of the bankrupt passes from the time of the act of bankruptcy. But the operation of the assignment under the bankrupt act, does not depend on the sixty-third section alone, which directs the assignment, but on the twelfth *section also, by which it is enacted, [*317] "that the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed an act of bankruptcy, by any creditor or creditors of such trader, by commission under the great seal, to appoint such persons as to him shall seem fit, who shall, by virtue of this act and of such commission, have full power and authority to take such order and direction with the body of such bankrupt, as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, which he shall have in his own right before he became bankrupt; and with all his money fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known, and to made sale thereof in manner hereinafter mentioned." And there is this difference between the insolvent laws and the bankrupt laws,—that the bankrupt laws operate in invitum, whereas the insolvent law is put in force by the voluntary act of the insolvent. When the insolvent assigns his property, he is entitled to the benefit of the act; and the assignment made, takes effect on all property in the insolvent's possession.

Undoubtedly there are various clauses in the insolvent debtor's act directed towards the prevention of fraud; and when a conveyance is made by the insolvent with a fraudulent intent, the act sets it aside; in the bankrupt act, the nullity of a conveyance within two months of the date of the commission does not depend on fraud, but on its being subsequent to the act of bankruptcy. I cannot find in the insolvent debtor's act any such relation, express, or implied, to the commencement of the imprisonment; and therefore this rule must be

Discharged.

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*COWNE v. GARMENT. Nov. 19.

A memorandum signed by the lessee on the margin of a lease, and stating that the lessee was to be tenant and pay rent for a period of six weeks antecedent to the term granted by the lease, held admissible in evidence on the part of the lessor, to show the amount of rent due.

ASSUMPSIT for money had and received.

The plaintiff occupied a house under a lease from the defendant, and being distrained upon for rent arrear, came to an account with the defendant; upon which accounting he had, as he alleged, paid by mistake 12*l.* 10*s.*—half a quarter's rent—too much.

This sum he sought to recover by the present action.

At the trial before the under-sheriff of Middlesex, the defendant offered in evidence the counterpart of a lease, by which the premises had been demised to the plaintiff from Michaelmas, 1832, at 100*l.* a year,

On the margin of this lease was the following memorandum, signed by the plaintiff: "It is hereby understood that Mr. Cowne is to be tenant and pay rent from the 12th of August, 1832."

The under-sheriff told the jury that they must look to the body of the lease alone, and that the memorandum was not admissible in evidence. Whereupon

A verdict was found for the plaintiff, for 12*l.* 10*s.*, with leave, however, for the defendant to move to enter a nonsuit instead, if, as it was objected on the part of the defendant, the action ought to have been case for an excessive distress, or the memorandum had been improperly excluded.

Petersdorff having obtained a rule nisi accordingly, citing *Lindon v. Hooper*, Cowp. 414.

Justice showed cause. In *Lindon v. Hooper*, the money sought to be re-
[*319] covered, had been paid to release *cattle damage feasant. The case, therefore, is inapplicable to the present. But in *Feltham v. Terry*, cited in that case (p. 416), the words of the Court were these: "It is manifest the taking was tortious, and that the plaintiff might have brought an action of trespass. But we all think he may waive the tort, and go for the money clearly due; and if he does, it is a benefit to the defendant, because he can then recover no more than in equity he is bound to receive." See also, Com. Dig. Assumpsit.

The distress here was not irregular; the plaintiff, therefore, could not have sued in case under 11 G. 2, c. 19. Nor could he sue under the statute of Marlbridge for an excessive distress, when the excess was so small as 12*l.* 10*s.* Whether the memorandum was admissible in evidence or not, its rejection does not entitle the defendant to enter a nonsuit.

Wilde, Serjt., and *Petersdorff* in support of the rule.

The plaintiff, if the defendant demanded too much on occasion of the distress, ought to have replevied, or to have sued for the excess, under the statute of Marlbridge; and in such action he would not have been confined to any precise sum; *Sells v. Hoare*, 1 Bingh. 401.

At all events, he cannot recover in an action for money had and received, a sum paid upon drawing up an account, with full knowledge of all the circumstances to which the account related; *Bilbie v. Lumley*, 2 East, 469; *Longridge v. Dorville*, 5 B. & Ald. 117; or paid for the purpose of ending a dispute: *Stracy v. The Bank of England*, 6 Bingh. 754; *Marriot v. Hampton*, 7 T. R. 269.

TINDAL, C. J. It is clear that the verdict ought not to stand without further inquiry, because the under-sheriff has rejected evidence which he ought to have
[*320] *received. At the same time I am not prepared to say we can go so far as to order a nonsuit. The parties having come to an account in which the defendant stated the demand for the rent of a house in the plaintiff's occupa-

tion, and the plaintiff having acquiesced, I cannot see that the case of *Lindon v. Hooper* applies with such certainty as to authorize a nonsuit. The other points were not reserved, nor was the rule granted on them. There must be a new trial.

The rest of the Court concurred.

Rule absolute for a new trial.

USBORNE and Another v. PENNELL. Nov. 19.

After a rule to plead in Easter term, in an action on a bill of exchange, defendant paid a portion of the bill, with costs to that time, and agreed to pay the residue with the costs of the action, the 1st of October following, if it were not previously paid by another party: no payment having been made according to the agreement, Held, that plaintiff might sign judgment in Michaelmas term, without a fresh rule to plead.

THIS was an action by the endorsees, against the endorser of a bill of exchange for 600*l.* due April 6th, 1834. The action was commenced April 19, Easter term, and a rule to plead was given in the same term.

On the 28th of April, the defendant commenced an action of trover against the plaintiffs for the same bill.

On the 12th of May, the defendant, having obtained a summons for further time to plead in this action,

Agreed to pay to the plaintiff, at once 200*l.* towards the bill, and if the drawer or his trustees did not discharge the residue of the bill in the following September, the defendant was to pay it on the 1st of October, together with the costs of this action; the intent being, that the plaintiffs should receive the whole amount due, with interest and costs; and, if they pleased, should sign a composition-deed with the drawer, without releasing the defendant from his liability on the bill. [*321]

The defendant paid this 200*l.* with costs up to the time of payment: among which costs, was a charge for "attending defendant on settlement of suit."

The drawer and the defendant having omitted to discharge the bill by the 1st of October the plaintiffs, without giving any new rule to plead, signed judgment; which

Talfourd, Serjt., obtained a rule nisi to set aside for irregularity, contending that the action had been settled by the agreement of May 12. He urged, also, that the judgment not having been signed of the same term the rule to plead was entered, but the cause having stood over to another term, without further proceedings, a new rule to plead ought to have been entered before the plaintiff could sign judgment; for judgment ought, in general, to be entered of the same term in which rules are given, See *Tidd's Pr.* 422.

Wilde, Serjt., who showed cause, maintained that the action was not settled, but suspended conditionally; and that the defendant having neglected to observe the condition, the plaintiffs were remitted to the situation in which they stood when the action was suspended. A new rule to plead was therefore unnecessary; *Puckford v. Maxwell*, 6 T. R. 52; *Penfold v. Maxwell*, 1 Chitt. Rep. 275 n.; *Cantellow v. Trueman*, 2 Dowl. Pr. C. 2. In *Pryer v. Smith*, Id. 114, it was held, that where the declaration was delivered in term, judgment might be signed in the following term for want of a plea, without giving a rule to plead of the term of which the judgment was signed. *Mould v. Murphy*, Id. 54, is to the same effect.

**Talfourd*. The agreement of the 12th of May was a settlement of the action, as appears from the charge for a settlement, in the bill of costs. [*322]

At all events, the suspension of proceedings by virtue of the agreement did not authorize the plaintiffs to sign judgment without a fresh rule to plead, when the time given by the agreement had expired.

TINDAL, C. J. After this agreement, which amounts to a cognovit, there

cannot be any defence to the action, and no merits are suggested. The defendant pays down, with costs, a portion of the sum sought to be recovered, and engages to pay the remainder by the 1st of October.

Upon his failing to do so, the whole agreement falls to the ground, and the plaintiffs are remitted to their former status. Upon the same principle, in *Puckford v. Maxwell*, the defendant having failed to perform the agreement he entered into upon being arrested, the plaintiff was allowed to arrest him anew upon the same affidavit of debt. Our decision, therefore, is called for on the single ground of an alleged irregularity in signing judgment without a fresh rule to plead. Where the merits are with the plaintiffs, we should be sorry to set aside the judgment on such grounds, and *Pryer v. Smith* relieves the Court from that difficulty. That case decisively shows that there has been no irregularity.

The rest of the Court concurred, and the rule was

Discharged.

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*MOORE v. BOULCOT. Nov. 20.

To action on an attorney's bill, defendant pleaded that the bill was for work at law and in equity, and was not delivered to her a month before action. Replication, that the bill was not for work at law and in equity; Held, ill.

THE plaintiff declared that the defendant was indebted to the plaintiff for the work and labor of the plaintiff, by him bestowed as the attorney and solicitor of and for the defendant, in drawing, copying, and engrossing of divers deeds and writings for the defendant; and in and about other business of the defendant, and at her special instance and request, &c.

Plea, That this action was brought by the plaintiff against the defendant, to recover from her the amount of a bill of fees for the work and labor of the plaintiff, by him bestowed as the attorney and solicitor of and for her, the defendant, at law and in equity; and that the plaintiff commenced this action against the defendant for the recovery of such bill of fees, before the expiration of one month after the delivery of his said bill of fees to the defendant (she being the party to be charged therewith), contrary to the form of the statute in such case made and provided: and that, the defendant was ready to verify, &c.

Replication, That this action was not brought by the plaintiff against the defendant, to recover from her the amount of a bill of fees for the work and labor of the plaintiff, by him bestowed as the attorney and solicitor of and for the defendant, at law and in equity, in manner and form as the defendant had above in her plea in that behalf alleged: and that, the plaintiff prayed might be inquired of by the country, &c.

Demurrer, for the following causes:—That the plaintiff had alleged that this action was not brought by him against the defendant for the amount of a bill [*324] of fees for the work and labor of the plaintiff, by him *bestowed as the attorney and solicitor of and for the defendant, at law and in equity; whereas the plaintiff ought to have alleged that the action was not brought against the defendant for the amount of a bill of fees for the work and labor of the plaintiff, by him bestowed as the attorney and solicitor of and for the defendant, at law or in equity: also, that the replication tended to raise an immaterial issue; inasmuch as if the defendant should join issue thereupon, and should on the trial prove that the bill of fees contained charges for fees at law, though not for any fees, charges, or disbursements in equity, such issue must be found for the plaintiff, although it would be manifest the plaintiff had not complied with the statute, and therefore would have no right to maintain his action.

Whitmore, in support of the demurrer, referred to *Goram v. Sweeting*, 2 Wms. Saund. 206, and to the several authorities cited in the note to that case. The rule as to traverses is, that where the plaintiff's claim is founded on title to land, and he sets out in the declaration a title larger than he possesses, the de-

fendant may take advantage of it by traversing the entire allegation. But in actions for damages, where the plaintiff is entitled to recover, although his proof should not substantiate the whole of his demand, a traverse which seeks to bind him to the proof of his entire demand, is immaterial and bad.

A' Beckett, *contra*. If the plaintiff had traversed the plea in the disjunctive, his replication would have been ill for duplicity; and the most correct way of negating any allegation of the opponent, is to follow precisely the terms of the allegation. It is the defendant's fault if her allegation be laid too widely; for she had the plaintiff's bills before her; and if they contain charges in law only, she should have declared according to the fact which was with- [*325] in her own knowledge. In *Wood v. Budden*, *Hob.* 119, where, to trespass in plaintiff's close, defendant pleaded a right of chace as well over that close as over the whole parish, which the plaintiff traversed by denying the right as well over the close as the parish, and the jury found he had not such right over the close and parish, the traverse was held good upon motion in arrest of judgment, although the defendant would have been entitled to a verdict if he had the right over the plaintiff's close only.

TINDAL, C. J. The replication is a bad answer to the plea, and bad, for the cause assigned in the demurrer.

The stat. 2 G. 2, c. 28, provides that no attorney or solicitor shall commence any suit for the recovery of fees, charges, or disbursements at law or in equity, until a month after the delivery of his bill to the party to be charged.

The defendant pleads that the action was brought for charges at law and in equity, and that no bill has been delivered pursuant to the statute: and this would be an answer to the action if the claim were for charges either at law or in equity.

If the plaintiff's claim was not open to the objection arising under the statute, he could have answered the plea by denying the existence of charges at law or in equity. But it is not because the defendant may have unnecessarily specified both, that the plaintiff is exonerated from taking a material issue. In the case in *Hobart* the objection was not taken till after verdict.

GASKLEE, J. The proper replication would have been, in effect, that the bill was not taxable, whereas the plaintiff only says it was not taxable at law and in equity.

VAUGHAN and BOSANQUET, Js., concurred. Judgment for defendant.

*THOMPSON v. BRADBURY and Another, Assignees of
VENABLES, a Bankrupt. *Nov.* 22. [*326]

The Court allowed the assignees of a bankrupt to plead, in covenant on a lease. First, that the lessee's interest did not pass to them. Secondly, that they renounced the term in time to be discharged from the performance of covenants.

To covenant by lessor against the assignees of lessee,

Hoggins obtained a rule nisi to plead, first, that all the lessees' estate and interest, &c., in the premises, did not pass to the defendants.

Secondly, that a term in the premises was vested in Venables, who became a bankrupt; that the defendants were appointed his assignees, concurrently with the official assignee, who afterwards abandoned all claim to the premises, and therefore, defendants never became assignees of the term, and the term did not so vest in them as to render them chargeable with the performance of covenants.

Amos, who showed cause, contended that the second plea was superfluous, for all the allegations contained in it might be given in evidence under the first. But *Hoggins* urged, that under the stat. 1 & 2 W. 4, c. 56, s. 26, it might be doubtful, whether or not the term passed to the assignees without their actually taking possession; and in case the Court should hold that at all events the legal

interest passed upon the issuing the commission of bankruptcy, the defendants ought to have the opportunity of showing, under the second plea, that they had renounced the property before taking such a possession, as should fix them with the performance of covenants.

And of that opinion was the Court. But they required that the second plea should be confined to the single point, that the defendants had renounced or [*327] abandoned the term in time to be discharged from *liability on covenants; and ordered the allegation that it had never vested in them to be struck out. That allegation, if correct, might be proved under the first plea.

WATSON and Another, Assignees of DEVEY, a Bankrupt, v. PEACHE.
Nov. 22.

A coal-merchant, at the time of his bankruptcy, had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act. These barges he had hired of defendant, it being the custom for coal-merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal-merchant's assignees under his bankruptcy. Held, that it was properly left to the jury to find whether the custom to hire was generally notorious in the coal trade; and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large.

TROVER for eleven barges, which were in the possession of Devey at the time of his bankruptcy in October, 1833.

Devey was a coal-merchant, and a freeman of the Waterman's Company; the defendant, an owner of barges, which he let out to hire, and not a member of the Waterman's Company: and the barges in question, which belonged to the defendant, had been hired of him by Devey in 1829, and previously.

Two of them, the Francis and the Oak, had originally belonged to Devey; but he, being in debt, sold them to, and then took them from the defendant on hire, by one and the same instrument, in May, 1829. This transfer was only known to the defendant's clerks. Nine of the barges had Devey's name and number painted on them; and two, the name and number of the defendant or his son. The Francis and Oak had Devey's name before the sale, and continued in exactly the same state after the hiring. With the exception of two—the Rose and Pink—all were registered in Devey's name at the office of the Waterman's Company; where it was the general practice to register only the [*328] name of the *true owner, although, in some few instances, the name of a lessee had been substituted.

The Rose and Pink were not registered.

Devey had once hired two barges of one Griffith, and had navigated them, with Griffith's name and number painted thereon, for five or six years; he had also been in the habit of hiring barges for a short time, with the defendant's name and number on them.

The statute 7 & 8 G. 4, c. 75, s. 39 requires the Waterman's Company, upon the request of any person who shall "keep any barge," to cause the name and place of abode of "such person" to be registered in a book of the Waterman's Company, and to cause a number for such barge to be delivered to "such owner," who shall cause the same, together with the name of such barge, to be painted on the barge. Penalty for omission 40s. Sect. 101. Nothing in the act, except the provisions for compelling the name of the barge and "of the owner" to be painted thereon, to apply to western barges. Sect. 56. The Waterman's Company to make by-laws. Sect. 37. Any person not a freeman of the company, acting as a lighterman, to pay for each offence 10l.

By a by-law of that company, of April, 1828, No. 1, the owner is required to have his name painted on the barge; and the penalty for omission is increased to 5l. By No. 10, if any freeman of the company navigate any barge without his own name or that of his master thereon, he shall forfeit 40s. By No. 20,

if any freeman of the company, who hires a barge of any person not free of the company, and has his own name thereon, permits such persons to participate in the profits, or shall permit any owner not being free of the company to have his name thereon, such freeman shall forfeit 40s.

The defendant called eighteen witnesses, chiefly coal-merchants, barge-builders, and lighterman; who proved *that for the last twelve years, a [*329] custom had existed for persons in the coal-trade to hire barges and [*329] wagons, and when they hired them for any length of time to have their own names and number painted on them.

It was stated that, when the vessels were hired for a short time only, as for a week or fortnight, it was usual to leave on them the name of the owner.

TINDAL, C. J., after observing that the plaintiffs had made out a strong *prima facie* case, left it to the jury to determine whether the alleged custom was so general and notorious in the trade which the bankrupt carried on, that those who had dealings with him—the world in which he moved—might reasonably be provoked to inquire, before giving the bankrupt credit, whether the barges were his or not; and if they thought the custom so notorious, to find for the defendant.

The jury having found for the defendant,

WILDE, Serjt., obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence, and that it ought to have been left to the jury, whether the alleged custom was notorious to the world at large, and not merely to the trade in which the bankrupt was engaged.

COLERIDGE, Serjt., THESIGER, and CHANNELL showed cause. The question was correctly left to the jury, and correctly determined, according to the principle established by *Storer v. Hunter*, 3 B. & C. 368, where with respect to the machinery of a colliery, ABBOTT, C. J. said, "It appears by the evidence, that in some instances the articles used in collieries belong to the tenants, in others they do not; that, though in some cases, the landlord, in demising collieries, permits the lessee on certain conditions to *have the use of the fixtures and other [*330] things during the demise, yet, in other instances, they belong absolutely [*330] to the lessee. Then, if the possession of such things is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession of such things ought not to raise an inference in the mind of any cautious person acquainted with the usage, that the person in possession is the owner. If it had not been the usage for the owners of collieries ever to demise the machinery and other things used in the colliery, then possession by the lessee would be evidence of reputed ownership; and no evidence having been adduced to show that the bankrupt ever had the absolute ownership in the articles used in these collieries, I am of opinion that the jury ought, upon these facts, to have given a verdict for the defendant."

In *Horn v. Baker*, 9 East, 289, upon a question as to the reputed ownership of a distiller's vats, Lord ELLENBOROUGH said, "If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in the trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not, in such a case, have carried the reputed ownership." *Gurr v. Rutton*, Holt N. P. C. 327; *Muller v. Moss*, 1 M. & Sel. 885; and *Clark v. Crownshaw*, 3 B. & Adol. 804, are to the same effect. It was for the plaintiffs to make out affirmatively that Devey was the reputed owner of the barges within the meaning of the seventy-second section of 6 G. 4, c. 16. But he was not reputed owner by those who dealt with him and had the best means of knowing his situation; and if so, it is immaterial what was the opinion of the rest of the world. [*331] Those who deal with him were no more liable to be imposed upon by his [*331] possession of the barges, than the customers of a factor by the appearance of goods which he holds on consignment. The defendant, not belonging to the

Waterman's Company, could not legally put his name on the barges: and the only object of requiring any name to be inscribed, was, that some person might be responsible for damage done on the river.

In *Thackthwaite v. Cock*, 3 Taunt. 487, the plaintiff's hops, of which the bankrupt was held to be the reputed owner, were mixed up with the bankrupt's hops, for the purpose of deceiving the public; and though that appeared to be the custom, such a custom is illegal. In *Knowles v. Horsfall*, 5 B. & Ald. 134, no usage was stated or relied upon.

Talfourd, Serjt., and *Swann* in support of the rule. This custom is contrary to 7 & 8 G. 4, c. 75, and therefore illegal; for the barges ought to be registered in the name of the true owner, and ought to bear his name and number. And the testimony for the defendant consisting chiefly of persons interested in supporting such a custom, the verdict is not warranted by the evidence. But supposing such a custom legal if it were well established, here it has only been proved to be known to the trade; which is not sufficient; *Hickenbotham v. Groves*, 2 Carr. & P. 492: it ought to be known to the world at large; for a trader accepts bills of exchange, which circulate beyond the limits of his trade. In *Thackthwaite v. Cock*, 3 Taunt. 491, *MANSFIELD*, C. J., says, "It must be such a custom, that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor." In *Knowles* [*332] *v. Horsfall*, 5 B. & Ald. 139,—where brandies had been *sold to the plaintiff by Dixon, of whom the defendants were assignees, and the casks had been marked with the letter K., the initial of the plaintiff's name, but remained in Dixon's possession,—it was notorious to the trade that the brandies had been sold; but *ABBOTT*, C. J., says, "the letter K. marked on the casks might speak a language to a certain class of persons intelligible, but to others, who might be induced to become the creditors of Dixon in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that he would have had a good title to them as against the plaintiff. For the real owner ought not to have left the goods after the purchase in the hands of Dixon, and suffered him to treat them as his own." *BAYLEY*, J., says, "It was necessary that something should be done to make the change of property notorious to the public at large, or at least to those persons who were likely to trust the bankrupt upon the faith of his having the property in these goods. It is not sufficient that it should be known only to persons in the same trade." And *BEST*, J., says, "It is not sufficient that the sale was known to persons in the wine trade at Liverpool. The transfer of the property ought to have been known to all other persons who might, in consequence of the bankrupt's continued possession of it, have been induced to give him credit."

And such a custom as the defendant relies on has never been sanctioned, except in cases where the possession has been of so equivocal a description as to be consistent with either supposition; that the trader was absolute owner, or was not; it has never been allowed to prevail where the property, as in the present case, has been registered in the bankrupt's name and inscribed with his name and number. No creditor would be safe, if such unequivocal indications of ownership *were insufficient to justify him in giving credit. [*TINDAL*, [*333] C. J. A hired carriage is often adorned with the arms of the party hiring; yet few would infer from that circumstance that the vehicle was his.] At all events, with regard to the Francis and Oak, they were originally the bankrupt's property; the transfer to the defendant was never made public, and therefore the reputed ownership in Devey has been clearly established. In *Lingard v. Messiter*, 1 B. & C. 308, which was an action by the assignees of a bankrupt, brought to recover property in the bankrupt's possession as reputed owner, the plaintiffs proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession of them until he

committed an act of bankruptcy; and it was held, that that was *prima facie* evidence that he continued in possession as owner, and that it then lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant proved that, long before the act of bankruptcy, the goods had been seized under an execution, at the suit of a creditor, by the sheriff; that they were conveyed by a bill of sale to the creditor; and that he afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of his bankruptcy: soon after the bill of sale was executed, the creditor's initials were marked on all the goods; and it was held, that that was no evidence of the notoriety of the change of property; and, consequently, that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. In *Newport v. Hollings*, 3 Carr. & P. 223, it was held that an innkeeper, by never putting his name on vehicles, gave out, in effect, that they were not his own. The converse of that proposition holds good in the present case.

*TINDAL, C. J. The question in this cause arises on the seventy-second section of the last bankrupt act, 6 G. 4, c. 16, by which it is [334] enacted, "That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission." The words of the act are, "whereof he was reputed owner;" and the question is, whether on the trial of this cause such a reputed ownership was properly established. The jury have found by their verdict that it was not.

Two objections have been made to that verdict. First, that the mode in which the question was left to the jury was not correct; secondly, that the verdict was contrary to the evidence.

Now there was evidence on both sides. The plaintiff's made out a strong *prima facie* case of reputed ownership in the bankrupt; but on the other side, evidence was adduced to show that there prevailed in the coal trade a usage, well known in the neighborhood in which the bankrupt resided, for coal merchants to carry on their business in hired barges, bearing the name of the hirer.

There was, therefore, a balance of testimony to be left to the jury, and it would put an end to the use of juries, if, upon a balance of testimony, their finding were to be set aside. If, upon evidence thus conflicting, we were to send the cause down to trial again, and a second jury were to find a contrary verdict, are we to send the cause down to a third trial, and so on ad infinitum?

We come then to the other point, whether the question was properly left to the jury.

*I left it to the jury to say, whether in the coal trade in London, there [335] was any general custom for merchants to carry on their business in hired barges, bearing the name of the hirer: I said, that to warrant a verdict for the defendant, the custom must be so general as that all should know it who had dealings or were likely to have dealings with the bankrupt.

It is objected that this direction was too limited, and that in order to warrant a verdict for the defendant, the jury should have been required to determine whether the custom was notorious to the whole world, or whether, in the language of the seventy-second section of 6 G. 4, c. 16, the bankrupt was the reputed owner of the barges of which he had the disposition.

Now it would have been leaving the question in too limited a way, if the jury had simply been directed to consider whether the bankrupt was the reputed owner of the goods; a question, which, by itself, they could not be expected easily to deal with; and in all the cases the jury have been directed to consider whether the usage set up in answer to a *prima facie* case of reputed ownership, has been a general usage, and known to those who have dealings with the bankrupt. Whether the bankrupt be the reputed owner of property, or not, can only

be known by looking to acts of the trader, his contracts, and his dealings in his trade,—in the world in which he moves..

When the jury are satisfied that the usage relied on is notorious to all who are likely to have any dealings with the bankrupt, there is sufficient to warrant their verdict and the question which they were directed to consider.

Two cases have been relied on for the plaintiffs. First *Thackthwaite v. Cock*: there the plaintiff, in 1808, purchased seventy-eight pockets of hops, the goods [336] in question, of Moore, who was a hop-merchant, and paid *for them, and agreed with him that the hops should remain in Moore's warehouses at the rent of a penny a pocket per week, until the plaintiff should think it advantageous to resell them. In 1810 Moore became a bankrupt, and his assignees, finding these goods on the premises, refused to deliver them to the plaintiff. The plaintiff endeavored to take the case out of the statute of 21 Jac. 1, by proving a custom of the trade for purchasers of hops to permit their hops to remain upon rent in the hop-merchant's warehouses. The hops were exposed to the view of persons coming into the warehouse to purchase, promiscuously with the other goods of the bankrupt: they were not distinguished by any conspicuous mark from Moore's goods, because anything that would draw attention to the length of time they had been on sale, would hurt the sale of them. It is clear, therefore, that, as far as the eye of the public went, there was no distinction between the goods of the bankrupt and the residue. The whole mass was calculated to give a false credit; and it was held that this was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees in case of bankruptcy, as being in his possession, order, and disposition, within the statute of 21 Jac. 1, c. 19, s. 11.

But there is a great distinction between that case and the present: the one relates to the bankrupt's stock in trade, the different portions of which were not distinguishable by the public; the other concerns only the implements with which the bankrupt carried on his trade, and which according to a usage notorious in the trade, were frequently hired by the trader. In *Thackthwaite v. Cock*, indeed a usage was relied on, but the learned Judge said it was not clearly proved; while it was a usage calculated to deceive the public, and therefore bad.

*In *Knowles v. Horsfall*, no general custom was set up, and the only [337] question was, whether the bankrupt was to be reputed owner under the circumstances of the particular case. There Dixon, a spirit-merchant, sold to the plaintiff, a wine merchant, several casks of brandy, some of which, at the time of the sale, were in Dixon's own vaults and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that the sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited.

It was there contended, that as it was notorious to the trade that plaintiff had purchased the brandies in question, there could be no reputed ownership in Dixon. But it was held, that as Dixon became bankrupt while the brandies remained where they were originally deposited, the whole of them passed to the assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1, c. 19, s. 11. It was impossible to say, that though to some extent the defendant might have taken possession, that circumstance was not, upon the whole, overbalanced by the conflicting evidence of reputed ownership in the bankrupt.

The present case, therefore, has been left to the jury in the same way as those which have preceded it, and there is no ground for disturbing the verdict.

GASELER, J. I am of the same opinion. In *Knowles v. Horsfall* no usage [338] was relied on, and it could not be *said that the transfer of the article was notorious, when the warehouse-keeper himself did not know the fact.

I think the present case was left to the jury correctly ; and, if a juror, I should have concurred in the verdict which has been given. At all events, I cannot say it was wrong.

VAUGHAN, J. I am of the same opinion. The question was properly left to the jury, and the jury have come to a proper conclusion.

The possession of the bankrupt raised a strong *prima facie* case of reputed ownership ; but whether there was such a usage in the trade, as to do away with the effect of the apparent ownership, was a question of fact for the jury : they have found that the usage was notorious ; and, upon the principles laid down in *Storer v. Hunter*, I think this rule must be discharged.

BOSANQUET, J. The only question is, whether the verdict of this jury has proceeded on too narrow a ground, either in consequence of the observations of the Chief Justice, or from the nature of the evidence.

The jury were not wrong, in finding on the two questions left to them, the existence of the usage, and its notoriety in the trade.

The bankrupt carried on the business of a coal merchant ; the barges he used, were hired of the defendant ; and the question is whether there was such a reputed ownership in the bankrupt, as to pass the property in the barges to his assignees. Now it is material to consider what is the nature of the articles in respect of which the assignees seek to recover in this action. They are not goods for sale ; not the premises in which the bankrupt carried on his business ; but are implements of trade ; and the evidence is, that it is usual *for [*339] persons engaged in this trade to hire their barges, and when they hire them for any length of time, to paint on them the name of the hirer : this appears to be a police regulation, required by the statute 7 & 8 G. 4, c. 75, that in case of damage some person may be forthcoming to answer for it : but it is contended, that though the usage might be known in the particular trade, it might be unknown to creditors of the bankrupt unconnected with that trade.

Still, however, the question is, whether under such circumstances the bankrupt is generally reputed the owner.

Now, if it be known in the trade that such a usage prevails, at least there is no reputed ownership within the sphere of the trade : that is, among the persons with whom the bankrupt constantly deals : if not with them, it is no answer to say that persons unconnected with the trade, who may have advanced money to the bankrupt, were ignorant of the usage. That would be going a long way ; for every trader has creditors beyond the sphere of the trade in which he is engaged. But the question has always been, whether articles hired under such a custom have been reputed to belong to the bankrupt. According to the evidence in this case, they have been as frequently reputed to belong to the lessor as to the bankrupt : upon that ground, therefore, I think the verdict is well founded.

In *Knowles v. Horsfall*, *Hickenbotham v. Groves*, and *Lingard v. Messiter*, no usage was proved. *Thackthwaite v. Cock*, it is said, however, is more applicable, because there a usage existed. But what sort of a usage was it ? a custom of the trade for purchasers of hops to permit their hops to remain upon rent in the hop-merchant's warehouses. The hops were exposed to the view of persons coming into the warehouse to purchase, promiscuously with the other goods of the *bankrupt ; they were not distinguished by any conspicuous mark from the bankrupt's goods, because anything that would draw [*340] attention to the length of time they had been on sale, would hurt the sale of them. If the custom had been good in other respects, at least it was in the teeth of the statute, for the goods in question were articles of merchandise, and after a transfer remained apparently as part of the stock of the vendor : the object of the custom, however, was to deceive the public, and therefore the custom was bad.

It has been urged in the present case, that one or two of the barges *had* been the property of the bankrupt, which distinguishes the case from *Storer v.*

Hunter, and brings it within the principle of *Lingard v. Messiter*. That case, however, shows that such a circumstance is only *prima facie* evidence of reputed ownership; as are the circumstances of possession, and the inscription of the bankrupt's name; but, like every *prima facie* case, it is open to an answer.

When, therefore, a usage is proved, from which it appears that the barges with which a coal merchant carries on his trade are not necessarily his, how is that answered by showing that one or two among those which he has hired were originally his own property? It only makes the *prima facie* case stronger: but, the notoriety of the custom having been established by the jury, the rule for setting aside the verdict must be

Discharged.

[*341] *MOSTYN and Others v. CHAMPNEYS and Others. Nov. 20.

Testator being seised in tail of lands at C., with remainder to his son in tail, and reversion to himself in fee, and being seised in fee of other lands at D., devised "all his real estates whatsoever, over which he had any disposing power," to R. and his heirs, in trust for testator's son for life, with several remainders over in tail, subject to terms for the payment of debts, annuities, and marriage portions: Held, that by this devise testator's reversionary interest in the lands at C. passed to the devisee.

By order of the Lord Chancellor, the following case was submitted for the opinion of this Court:

Sir Thomas Mostyn, Bart., was, at the time of making his will, and of his death, seised in fee simple of, and absolutely entitled in possession to, divers manors and lands in the county of Chester, and in the county of the city of Chester; and also of large estates in the counties of Flint, Denbigh, Carnarvon, and Anglesea: and being so seised and entitled, by his last will and testament in writing, duly executed and attested, in May, 1752, gave and devised the estates in Wales to his son Roger in tail male; remainder to his son Thomas in tail male; remainder to all and every other the son and sons of testator's body in tail male, severally and successively one after another, according to the seniority of age of each of them; remainder to testator's brothers John, Savage, and Roger, severally and successively in tail male; remainder to testator's own right heirs. And the testator thereby gave and devised his several manors, lands, tenements, and hereditaments in the county of Chester, and in the county of the city of Chester, unto the person or persons who should be entitled to the inheritance of his lands in Wales after his decease, by virtue of the limitations thereof aforesaid in his said will contained.

Sir Thomas Mostyn died in the year 1758, without having revoked or altered his will; and upon his death, the premises in the county of Chester and in the county of the city of Chester, did under and by virtue of his will; become vested in Roger Mostyn (who then became Sir Roger Mostyn, Bart.), the eldest son [*342] and heir-at-law of the testator, as tenant in tail male thereof, with such remainders over as in the same will mentioned, with the ultimate reversion in fee in him the said Sir Roger Mostyn as heir-at-law of Sir Thomas Mostyn.

Sir Roger, besides the estates in the county of Chester, and in the county of the city of Chester, of which he was tenant in tail male as aforesaid, was seised of and well entitled in possession to divers other estates and hereditaments in the counties of Denbigh, Flint, and Carnarvon, part whereof were settled by him in or about the year 1766, on the occasion of his marriage; but he never suffered any recovery, or made any other assurance for barring the estate in tail male, or the remainders over, in the estates in the county of Chester, and county of the city of Chester, but continued in possession or in receipt of the rents and profits thereof, as tenant in tail male, up to the time of his decease in 1796. He also in his lifetime, and after his marriage in the year 1766, purchased divers other real estates in the county of Flint, and continued to be, at the time of

making his will, and at his death, seised in fee simple of or otherwise well entitled to the real estates so purchased by him.

Sir Roger, by his last will and testament in writing, duly executed and attested, in April, 1793, gave and devised as follows: To each of his unmarried daughters who should attain twenty-one, from that age until marriage, "such an annuity, as with the interest of their share of 20,000*l.*, provided for their portions by his marriage settlement, would, at 4 per cent., furnish them severally with 500*l.* a year."

Upon their respective marriages, he directed "their annuities to cease, and in lieu thereof, that each daughter marrying shall be entitled to such sum as, with her share of the said 20,000*l.*, would make up 10,000*l.*"

Then he devised "all his real estates, whatsoever and wheresoever, over which he had any disposing power," unto *Hugh Scott, his heirs, &c., to the uses and upon the trusts, &c., thereafter expressed concerning the [*343] same; that is to say,

To the use of the Duke of Roxburgh, and others, for 500 years, upon trust to pay out of the rents and profits such debts and annuities as the testator's personality should be insufficient to discharge: and subject to the said term and the trusts thereof.

To the use of his son, Thomas Mostyn, for life, remainder to a trustee to preserve, &c.; remainder to the use of the said T. M.'s first and other sons in tail male; remainder to the use of the daughters of the said T. M. in tail male; remainder to the use of the sons and daughters of the said T. M. in tail general; remainder to the said trustee for 1000 years, upon certain trusts; remainder to the use of testator's daughter, Essex Mostyn, for life; remainder to a trustee to preserve, &c.: remainder to her sons in tail male; remainder to testator's daughter, Charlotte Champneys, and her sons, in like manner; remainder to testator's daughter, Elizabeth Mostyn, and her sons, in like manner; remainder to testator's own right heirs. The testator then declared, that the 1000 years term was limited to the trustees upon trust, that when and as soon as his estates should come into possession of any of his daughters, or her issue male, the said trustees should, by sale or mortgage of a competent part of the estates comprised in the said term, raise and pay to each other of his said daughters who should happen to be then living the sum of 10,000*l.*, and in case any of his daughters should be dead, leaving any child, &c., the like sum for such child.

The testator, Sir Roger, died in the year 1796 without having altered or revoked his will, leaving Thomas Mostyn, his only son and heir-at-law, surviving, who thereupon became Sir Thomas Mostyn, Bart. And he, *Sir Thomas Mostyn the younger, upon the death of the testator Sir Roger, [*344] his father, became seised of and entitled to the said manors, estates, hereditaments, and premises in the said county of Chester, and in the county of the city of Chester, as tenant in tail male thereof in possession, under and by virtue of the devise thereof in the will of his grandfather, Sir Thomas Mostyn the elder, and subject to the remainders over in tail thereby limited.

Sir Roger was, at the date of his will, and at the time of his death, in the receipt of the rents and profits of the estates in the county of Chester and county of the city of Chester in question in this cause, amounting annually to the sum of 5000*l.* or thereabouts; and was also in possession and in receipt of the rents and profits of estates in the counties of Flint and Carnarvon, over which he had a disposing power, amounting to the annual sum of 2,750*l.* or thereabouts.

At the time of the death of Sir Roger, the several persons to whom estates in tail male in remainder in the said manors, estates, hereditaments, and premises in the said county of Chester and county of the city of Chester were devised by the will of Sir Thomas Mostyn, the elder, were respectively dead, without ever having had any children, except Thomas Mostyn, his son named

in his will, who was then the Rev. Thomas Mostyn; and Sir Thomas Mostyn the elder had no sons except Sir Roger and the Rev. Thomas Mostyn: the Rev. Thomas Mostyn, therefore, at the time of the death of Sir Roger, was the only person alive entitled to any estate tail in remainder, or other estate in remainder, in the said manors, estates, hereditaments, and premises in the county of Chester and county of the city of Chester, under the will of Sir Thomas Mostyn the elder.

The Rev. Thomas Mostyn died in the year 1805, without ever having had issue.

[*345] *Sir Thomas Mostyn the younger died in the year 1831, without having had issue, or having suffered any common recovery, or made or effected any assurance by which his estate in tail male, or the remainders limited by the will of Sir Thomas Mostyn the elder, in the manors, estates, hereditaments, and premises in the county of Chester, and county of the city of Chester, were in any manner barred or destroyed.

The plaintiffs alleged that the reversion in fee of the estates in the county of Chester and the county of the city of Chester, upon the death of Sir Roger, vested in Sir Thomas Mostyn the younger, who was from that time, and up to the time of his death, under the will of Sir Thomas Mostyn the elder, seised in tail male in possession, with (as the plaintiffs alleged) the immediate reversion in fee simple in himself.

Essex Mostyn, one of the devisees mentioned in the will of Sir Roger, died on the 20th of May, 1829, without issue.

Upon the death of Sir Thomas Mostyn the younger without issue, Dame Charlotte Champneys, one of the defendants, became seised or entitled under the limitations contained in the will of Sir Roger, of or to the estates and hereditaments thereby devised, as tenant for life thereof; and she claimed to be entitled, as such devisee, not only to the estates of which Sir Roger was seised in fee-simple in possession at the time of making his will; but also to the manors, estates, hereditaments, and premises in the county of Chester and the county of the city of Chester, of which the testator was tenant in tail, with such remainders over in tail as aforesaid, with the reversion to himself in fee; she asserting that the said reversion in fee passed by the will of Sir Roger, and was subject to the limitations thereby made.

The question for the opinion of the Court was, whether the reversion in fee of the said manors, estates, *hereditaments, and premises in the county [*346] of Chester and county of the city of Chester, passed by the will of Sir Roger Mostyn, or descended upon his death on his son Sir Thomas Mostyn the younger.

Hodgson for the plaintiffs. The reversion in fee of the county and the city of Chester estates did not pass by the will of Sir Roger Mostyn.

First, he devises only the estates over which he has "any disposing power;" that is, any power of disposing by that instrument: now, as he *might*, by suffering a recovery, have acquired such a power of disposition, but omitted to pursue that course, it cannot be supposed he intended them to pass under these words. It is to be inferred from the case that he had, in fact, suffered recoveries of the Welsh estates; and, therefore, he must have been aware of the distinction between the two properties, and the steps necessary to be taken in order to acquire the power of disposing of the Chester estates. In 2 Ves. & Bea. 199, in reference to a similar case, Sir W. GRANT says, "With all the anxiety which the will manifests to keep the estate in the family as long as possible, by making his son and grandson tenants for life, it is inconceivable that he should not have acquired to himself the power of making those limitations effectual, if he knew that, as things stood, they would be wholly inoperative."

Secondly, general words in a will do not pass a reversionary interest where the will contains dispositions incompatible with an intention that such reversionary interest should pass. In *Goodtitle dem. Daniel v. Miles*, 6 East, 494,

the testator—who was possessed in fee of lands at Kewson, &c., and of other lands settled on himself and his wife for life with remainder to the heirs of their bodies and reversion to himself in fee,—devised to one *of two daughters, his only children, and the heirs of her body, subject to an annuity [*347] to her sister, his lands at Kewson, &c., and all other lands, whatsoever and wheresoever, which he should be possessed of, or in anywise entitled to, at the time of his decease, and which were not settled in jointure on his late wife: it did not appear he had any other property than the settled lands, and the lands at Kewson, &c. And upon a question, whether, under this devise, the reversion of the lands settled in jointure passed to the devisee, Lord ELLENBOROUGH, upon a review of all the previous cases, says, “Under these circumstances the deviser had no interest which could be the object of any disposition to be made by him, but subject to the remainder in tail general in his daughters; nor had he anything upon which his will could operate in the limitation of any estate in possession until both the daughters should be dead without issue; and, therefore, if the testator’s object was, as according to the provisions of the will it must have been, to limit estates which were to take effect during his daughters’ lives, it is impossible to suppose the testator could mean that his will should extend to lands, in respect of which he must have known that it could not operate to create the estates intended.”—“One of the grounds taken by Lord MANSFIELD, for restraining the general words of a will to a distinct class of lands, in the case of *Strong v. Teatt*, 2 Burr. 912, was the absurdity that would follow from giving it its utmost latitude of construction. This argument appears to us so conclusive on the question, as to make it unnecessary to consider what weight is due to the other arguments on the part of the defendant.”—“Our opinion goes on this, that, supposing the words ‘not settled in jointure on my wife,’ to insufficient of themselves to restrain the effect of the general words in the clause relied on by *the plaintiff, yet, taking with them, at the same [*348] time, into our consideration the limitations in the settlement and in the will, they must, we think, be understood as being restrictive; and the question in this case is, as in most other cases on wills, a question of intention, to be collected from the whole of the instrument, as applied to the subject-matter.”

Another difficulty was stated in *Welby v. Welby*, 2 V. & B. 194, where Sir WILLIAM GRANT, intimated, that if a court of law should hold the property to pass under general words, where the will contained limitations incompatible with an intention to pass the reversion, the question must arise whether the devisee would not be put to his election in a court of equity; and therefore, for a court of law to hold that under such circumstances the reversion passed, would be to hold that the intention was to pass an estate in possession, which would be manifestly absurd.

Now, in the present case, the primary object of the testator, the first disposition in his will, is for the payment of debts, and of annuities to his daughters. For this purpose he creates a term, and appoints trustees, who are to make the payments immediately out of rents and profits, or by sale or mortgage. The testator could never have intended to apply to this purpose a reversion which did not come into possession till thirty-five years after his death, and of which, during all that time, the devisees might at any moment have been deprived, by the tenant in tail, or his successors, suffering a recovery. And that distinguishes the present case from *Glover v. Spendlove*, 4 Bro. Ch. Ca. 337, where, as the testator had no son, he had for all purposes of substantial benefit the fee expectant on his wife’s life estate.

Preston, contra. The reversion in fee of the county and city of Chester estates passed by this devise.

*General words in a will must receive the largest interpretation, [*349] unless they are restrained by express exception, or by dispositions in the will clearly and absolutely incompatible with the testator’s apparent intention to pass all that he has. *Welby v. Welby* and *Roe dem. James v. Avis*, 4

T. R. 607, on the authority of which Sir WILLIAM GRANT proceeded in *Welby v. Welby*, were both overruled by Lord ELDON in *Church v. Mundy*, 15 Ves. 406; and the polar star upon subjects of this sort is the case of *Strong v. Teatt*, 2 Burr. 912: there, the testator being entitled to the reversion of estates settled on himself for life, with remainder to his son Henry for life, remainder to issue of Henry successively in tail, and being possessed of other lands in fee, after disposing of the latter, devised all other the lands and hereditaments whereof he was seised in fee, or any other person was seised in trust for him (subject to an annuity for his wife, and a power of sale to discharge debts), to his son Audley for life, with remainder to his issue in tail; remainder to testator's sons James, Theophilus, and Henry, severally and successively for life, with like successive remainders to their several issue in tail; with several remainders over: if Henry and Audley died without issue male in the lifetime of James, the lands and tenements devised to James were to go over to Theophilus: the executrix was to have power to incumber the lands with portions for daughters; and the testator's sons in succession were to have power to commit waste, and to settle jointures. And Lord MANSFIELD said, "The generality of the expressions, if unrestrained and unqualified by other words, would carry all the testator's estate in possession, reversion, or remainder. But these general words may, by other words and expressions in the will, be restrained to any or either of these; and it is the same thing whether it be directly expressed, or clearly [*350] and plainly to be collected from the *will. Now, here are plain expressions in this will, which are fully sufficient to show, that the testator did not intend to devise the reversion of this settled estate. One instance is, the clause 'that if Henry and Audley should both of them die without issue male in the lifetime of James, then James should not take any interest or estate in the lands and tenements thereinbefore devised to him, but that the same should remain and go over to Theophilus.'" He then adverts to the powers to charge and jointure; and adds, "But these minute and critical observations serve only to weaken the argument, since there are in this will sufficient general words, which expressly and clearly show that the testator had no intention to include the reversion of the settled estate in his will, as much as if he had used particular words and expressions to declare it directly and explicitly. It appears clearly upon the very words of the whole will taken together, that there can be no doubt of the testator's intention that the reversion of the settled estate should not be included in it, but only the lands which he had in possession."

In *Doe dem. Cholmondeley v. Weatherby and Others*, 11 East, 322, it was held, that a remote reversion of a settled estate would pass by the general words of a residuary clause in a will, by which the testator,—having before devised certain other real estates in strict settlement, and given annuities for life to A., B., and C., which annuities he charged upon "all and singular his manors, lands, tenements, and hereditaments, &c., not before disposed of,"—devised "all and singular his said manors, lands, &c.," and other his real estates so charged with and subject to the said three several annuities as aforesaid; notwithstanding one of the annuitants had a prior life estate in the property: for general words in a residuary clause carry every estate or interest which is not [*351] *expressly or by necessary implication excluded from its operation; and no intention of the testator to exclude the reversion was necessarily to be implied from the circumstance that the charge of one of the annuities could not attach upon that reversion, as the other two might: the clause would be construed *reddendo singula singulis*.

Also, in *Morgan v. Surman*, 1 Taunt. 289, it was held, that a general residuary clause would carry estates not in the contemplation of the testator, unless the will contained special indications of a contrary intention.

The same principle was acted on in *Goodright dem. Earl of Buckinghamshire v. The Marquis of Downshire*, 2 B. & P. 600; in *Doe dem. Nethercote v. Bartle*, 5 B. & Ald. 492, in *Doe dem. Morton v. Fossick*, 1 B. & Adol. 186, and in *Doe*

dem. *Pell v. Jeyes*, Id. 593. Also upon the construction of an act of parliament in *Freeman v. Duke of Chandos*, Cowp. 863.

In *Goodright dem. Daniel v. Miles*, there was an express reference to the lands in jointure, so that the testator must have adverted to them at the time of making his will; and upon that point the decision mainly turned.

But in the present case there is much more reason for assuming that the testator had forgotten he was bound by the estate tail created by his father, than that he was aware he had only a reversion in the property. His other estates, over which he had a disposing power, produced only 2750*l.* a year; and yet he orders his debts to be paid, and, upon the failure of issue of his son, he creates a term of 1000 years, under which 40,000*l.* might have been raised for four daughters, in addition to the 30,000*l.* which might have been raised under the term for 500 years. An estate of 2750*l.* a year would have been insufficient to meet these charges; the disposition of the will, therefore, *instead of being incompatible with an intention to pass the reversion in question, are such [*352] as to demonstrate the necessity of giving the general words their unrestrained effect.

Hodgson, in reply. Upon considering the contingencies subject to which the moneys were to be raised under the terms of 1000 and 500 years, it will be found that the amount would never exceed 50,000*l.*, so that the estate of 2750*l.* a year was amply sufficient for the purpose: but neither with respect to that sum, nor with respect to his debts, could the testator have intended that the payment should be deferred till the reversion in question, subject, as it was, to be defeated by successive remaindermen, should come into possession after an indefinite lapse of time: *Roe dem. James v. Avis*. In some of the cases relied on for the defendants, the reversion in dispute passed because it was the only property to answer the general words of devise: in others, as in *Doe dem. Lord Cholmondeley v. Weatherby*, and *Doe dem. Nethercote v. Bartle*, the existing limitations were held to be scarcely inconsistent with the operation of the will.

The following certificate was afterwards sent:—

We are of opinion that the reversion in fee of the manors, estates, hereditaments, and premises in the county of Chester, and county of the city of Chester, passed by the will of Sir Roger Mostyn, the words of the devise being sufficient to include such reversion, and no intention to exclude it being expressed in, or necessary to be implied from, any other part of the will.

N. C. TINDAL.
S. GASELEE.
J. VAUGHAN.
J. B. BOSANQUET.

**VERE v. GOLDSBROUGH*. Nov. 24.

[*353]

To a declaration of two counts, one on a bill of exchange, the other on an account stated, defendant, without a rule to plead several matters, pleaded, "that he did not accept the bill: and for a further plea, that he did not account:" Held, that the informality of omitting to confine each plea to the count to which it applied, did not authorize plaintiff to sign judgment.

THE declaration contained two counts: one against the defendant as the acceptor of a bill of exchange, the other on an account stated.

The plea was as follows:—"And the said defendant by I. S., his attorney, saith, that he did not accept the said bill of exchange in the said declaration mentioned; and for a further plea saith, that he did not account with the said plaintiff as in the said declaration is alleged."

There was no rule to plead several matters.

The plaintiff signed judgment; and Mansell having obtained a rule nisi to set aside this judgment as irregular.

Wilde, Serjt., who showed cause, contended that the pleas, in the form in

which they were pleaded, were irregular ; for there was no rule to plead several matters ; and the pleas, not being restricted, or applied distributively to each of the counts, must be taken to be pleaded in bar of the action generally : Reg. Gen. Hil. 4 W. 4, "9th. All pleas shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action."

Mansell. It necessarily appears from the subject-matter that these pleas must have been pleaded distributively, one to each count of the declaration : an express formal restriction, therefore, would have been superfluous. At all events, the plaintiff should have demurred specially for the supposed defect, and not have taken upon himself to sign judgment.

[*354] **TINDAL, C. J.* I think the plaintiff should have demurred specially, and not have taken upon himself to sign judgment. The defendant has fallen into a breach of the rules of pleading rather than of practice ; and the question, if necessary, might have been raised upon special demurrer.

GASELEE, J. These are two separate pleas, informally pleaded, no doubt. But the informality is not such as to render the pleas nullities, and authorize the plaintiff to sign judgment. The objection should have been taken, if at all, on special demurrer.

VAUGHAN and BOSANQUET, Js., concurred.

Rule absolute.

PIGOU v. DRUMMOND. Nov. 24.

Outlawry ; when an abuse of process.

THE plaintiff, knowing that the defendant was abroad, and that he was represented by an attorney in this country, without making any application to the defendant's attorney, sued out a *capias* against the defendant, with orders to the sheriff to return non est inventus, and then proceeded to outlawry.

Wilde, Serjt., upon affidavit of these facts, having obtained a rule nisi to set aside the outlawry with costs,

Talfourd, Serjt., who showed cause, contended, that as there was no other mode by which the plaintiff could be sure of compelling an appearance, the outlawry ought to stand. But

[*355] **The Court* thought that the plaintiff's proceeding in this manner, without making any application to the defendant's attorney, was an abuse of the process of the Court, and made the rule Absolute.

LOCKINGTON, Demandant ; SHIPLEY and Wife, Conusors. Nov. 24.

The Court refused to amend a fine in a case of misdescription cured by 3 & 4 W. 4, c. 74, s. 7.

W. H. Watson moved to amend a fine, by substituting for the parish of Burton Latimer, which was mentioned by mistake in the fine, the parish of Isham, in which, according to the deed to lead the uses, the premises were situated.

He referred to the statute 3 & 4 W. 4, c. 74, s. 7, by which it is enacted, "That if it shall be apparent from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would

have done if there had been no such error, misdescription or omission;" but contended, that this did not exclude the jurisdiction of the Court in matters of amendment, which, indeed, by sect. 9, is expressly reserved in cases not provided for by the act; and in the present instance, *a purchaser had refused to accept the title unless the amendment were sanctioned by the Court. [*356]

TINDAL, C. J. Here is a misdescription apparent on the face of the instrument, within the meaning of sect. 7, of 3 & 4 W. 4. If we accede to your application, we shall be in the same situation as before the act—called on to amend, upon every conveyancer's doubt,—and all the expense will be incurred which the act was passed to prevent. Without deciding the question of jurisdiction, we think that, under sect. 7, you do not stand in need of our interference.

Watson

Took nothing.

CLEMENTSON v. WILLIAMSON. Nov. 24.

Where a prisoner has been served with a rule to plead, the omission of an endorsement of notice to plead, on the declaration, will not render irregular a judgment signed for want of a plea.

Mansell obtained a rule nisi to set aside interlocutory judgment,—signed for want of a plea on a writ of detainer,—on the ground that no notice to plead had been endorsed on the declaration delivered to the defendant in prison. He had, however, been served with a rule to plead.

Wilde, Serjt., who showed cause, contended, that the service of that rule was sufficient.

Mansell. The notice to plead was necessary; for by Reg. Gen. Trin. 3 W. 4, in all actions against prisoners, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

But, on conferring with the prothonotary,

*The Court said, it was in daily practice for these declarations, in actions against prisoners, to be delivered without any endorsement of notice to plead. [*357]

Rule discharged.

Mansell made another objection, which was overruled as coming too late.

ROSE v. MAIN. Nov. 24.

A bill of exchange for a portion of his debt, given by a bankrupt, after commission and before certificate, to his assignee, who was also petitioning creditor, and had proved for the residue of his debt, Held void in the hands of the assignee.

THIS was an action by the drawer against the acceptor of a bill of exchange for 70*l.*, bearing date the 16th of November, 1832, and payable twelve months after date.

The defendant pleaded first the general issue; secondly, that he became a bankrupt on the 24th of December, 1832, and that the supposed cause of action, if any, accrued to the plaintiff before the bankruptcy; and at the trial before TINDAL, C. J., it appeared,

That the plaintiff, to whom the defendant owed nearly 400*l.* for goods sold, issued a fiat of bankruptcy against the defendant on the 1st of November, 1832.

The plaintiff was appointed assignee on the 12th of November, and on the same day proved under the commission to the amount of 140*l.* On the 16th of November, 1832, the defendant accepted the bill for which this action was brought: he passed his last examination in the presence of the plaintiff on the 14th of December in the same year: obtained his certificate; which was signed by the plaintiff, and, according to the defendant's deposition, was obtained fairly and without fraud. The bankrupt's estate had hitherto paid no dividend.

[*358] On the part of the defendant, it was contended that *it was contrary to the policy of the bankrupt laws, to allow a petitioning creditor to sue on a bill of exchange obtained by him from the bankrupt for a portion of his debt, between the fiat and the last examination of the bankrupt. The tendency of such a proceeding would be to oppress bankrupts, and injure the general body of their creditors.

A verdict was found for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit instead, and

Kelly having, on the ground above stated, obtained a rule nisi to that effect, *Barstow* showed cause.

The bill having been given without fraud, there is no objection to the plaintiff's recovery. In *Brix v. Braham*, 1 Bingh. 281, where a bankrupt having promised, after his bankruptcy, and before certificate, to pay a debt due before the bankruptcy, endorsed to the plaintiff two promissory notes for that purpose, it was held, that his certificate was no bar to an action on those notes. The circumstance that, in the present case, the plaintiff is assignee under the bankruptcy, makes no difference, for he cannot prefer himself to the other creditors, and the statute has in no way distinguished him from them. [TINDAL, C. J. But he has an interest that all the bankrupt's property should not be brought into the common fund; so that his interest is in conflict with his duty.] That conflict exists in many other cases, but it has never been deemed sufficient, of itself, to render void a transaction in which there is no fraud. This bill would not be void in the hands of an endorsee; the plaintiff, therefore, having given [*359] value, is as much entitled to recover *as an endorsee. And the legislature seems to have contemplated the possibility of the bankrupt's giving a bill under circumstances such as the present, by enacting (6 G. 4, c. 16, s. 131) "That no bankrupt, after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing."

Kelly. In *Brix v. Braham*, the plaintiff was neither petitioning creditor nor assignee. If the assignee be allowed to take securities of this sort before the bankrupt has obtained his certificate, the general fund for the creditors will be in danger of diminution from the assignee's endeavor first to insure the payment of his own debt. Section 131 of the Bankrupt Act must, therefore, be taken to apply to securities given after certificate.

TINDAL, C. J. This rule must be made absolute; the plaintiff, petitioning creditor and assignee of the bankrupt, having, by his voluntary act, put himself in a situation in which his duty and his interest conflict.

Under the eighth section of the Bankrupt Act, which has not been referred to at the bar, it appears clearly to be the intention of the legislature that securities taken under such circumstances should be void. It enacts, that "if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security [*360] for his debt or *any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or se-

curity as aforesaid, or the full value thereof." In this section the legislature contemplated a security given by the person against whom a docket is struck, in the interval between the docket and commission. Here, the security was given after the commission had issued, and before the bankrupt had obtained his certificate. But when we see the intention of the legislature in avoiding every payment or security given by the bankrupt to the party striking a docket, in the interval between docket and commission, the principle applies more strongly when the security is received by the assignee himself, after the commission and before the bankrupt has obtained his certificate. The present case, therefore, though not within the very letter of sect. 8, is within the mischief which the legislature intended to prevent; and, therefore, this rule must be made absolute.

GASELEE, J. I am of the same opinion. Independently of sect. 8 of 6 G. 4, I think on the general policy of the bankrupt law, this action could never lie; for a petitioning creditor who sues out a commission, is appointed assignee, and then takes from the bankrupt *a security for half his debt, before [*361] the certificate has been granted, or the estate has paid a single dividend.

But sect. 8 puts it beyond all doubt: for, according to that, the giving such a security is not only an act of bankruptcy, but the person taking it is liable to repay the full value of all that he receives.

VAUGHAN, J. We should abet a gross fraud on the principle of the bankrupt law if we expressed any doubt in this case. *Brix v. Braham* does not apply: for the plaintiff, there, was not assignee, and had not proved his debt; and there being a good moral consideration, he was entitled to sue on the bill, as had before been ruled in *Trueman v. Fenton*, Cowp. 544, and *Birch v. Sharland*, 1 T. R. 715. Here, the plaintiff has proved his debt; is petitioning creditor and assignee: and the security he has taken is made the subject of a distinct act of bankruptcy by sect. 8, of 6 G. 4, c. 16.

BOSANQUET, J. I am of the same opinion; and our decision is perfectly compatible with the case of *Brix v. Braham*, where the plaintiff did not stand in the same situation.

Here he is petitioning creditor and assignee. His taking this security raises a conflict between his interest and his duty; and would equally have done so, even if he were only petitioning creditor.

Whatever difficulties he might experience in interfering improperly with the distribution of the bankrupt's estate, the object of the security was, to give him an advantage over the other creditors. It is on that ground that securities given to a particular creditor for a portion of his debt, by a debtor who executes a composition deed with his creditors at large, have always been *esteemed void in the hands of a party to the deed. But sect. 8 of 6 G. 4, [*362] clearly shows that the legislature had an eye to transactions of this sort, and intended to set them aside. Rule absolute.

BOSLER v. LEVY. Nov. 25.

Quære, whether a writ of *capias* ought to disclose the county of the defendant's residence.

Atcherley, Serjt., obtained a rule nisi to set aside the copy of the writ of *capias* in this cause, and to cancel the bail-bond given by the defendant, on the ground,

1st, That the defendant was described as of Leman Street, Goodman's Fields, without any mention of county, city, town or parish.

2dly, That the endorsement on the copy stated the writ to have been issued by Henderson and Smith, of Leman Street, Goodman's Fields, without any mention of county, city, town, or parish.

3dly, That the day on which the writ issued was not specified.

He pointed out that the form of the *capias* given in the schedule of 2 W. 4, c.

39, runs, as to the description of the defendant, thus,—“C. D. of ———;” and that, according to the opinion of TINDAL, C. J., delivered in *Roberts v. Wedderburne*, 1 New. Cas. 4, sect. 4, which prescribes the form of *capias*, is to be construed by sect. 1, which prescribes the form of the writ of summons; and in that writ it is required to state the county in which the defendant resides.

[*363] *If the omission of the county renders the description of the defendant insufficient, the omission must have a similar effect in the description of the plaintiff's attorney, who is required to state his place of abode.

Comyn showed cause. The form given in the schedule of the act for the writ of *capias* does not specify the county of the defendant's residence, although the form for the writ of summons does. And there is good reason for the difference, since the *capias* is executed by the sheriff, who cannot go out of his county. Sect. 4, therefore, ought not to be construed by analogy to sect. 1.

With respect to the plaintiff's attorney, all that is required is a description of his place of abode; and in *Engleheart v. Eyre*, 2 Dowl. Pr. Cas. 146, “Ely Place” was held a sufficient description of the attorney's place of abode.

And the act does not require that the day on which the writ issued should be specified: *Webb v. Lawrence* (1 Cr. & Mee. 806; but see *Constable v. Johnstone*, 1 Cr. & Mee. 88).

Then, the motion should have been to set aside the writ; for if the copy be wrong, as suggested, the writ is wrong: and if the writ be right and the copy wrong, the writ still remains in force though the copy be set aside.

[TINDAL, C. J. The defendant can only act on the copy—he never sees the original. And by using the word copy, he does not mean to affirm that this is an exact copy of the writ, but that it is the piece of paper delivered to him and called a copy.]

Atcherley was heard in support of his rule.

[*364] *TINDAL, C. J. The only objection on which any doubt remains on the mind of the Court, is, that the copy of the writ describes the defendant as of *Leman Street, Goodman's Fields*, without specifying any county. Upon reference to the distinction between sect. 1, of 2 W. 4, c. 39, which gives the writ of summons, and sect. 4, which gives the writ of *capias*, and also to the distinction in the schedule, which, in the one case, specifies the county, and in the other leaves only a blank, I think it was not necessary to state the county of the defendant's residence in the copy of this writ of *capias*.

With respect to a writ of summons, the first section of the act prescribes, that the process shall be according to the form in the schedule annexed, marked No. 1.: and with respect to a writ of *capias*, the fourth section prescribes, that the process shall be according to the form in the schedule annexed, and marked No. 4.

Now, when we look at the form for the writ of *capias*, it runs, “To the sheriff of ——— greeting: We command you,” &c., “that you take C. D. of ——— if he be found in your bailiwick.”

But, upon referring to the preceding form for a writ of summons, it runs, “William the Fourth,” &c., “To C. D. of ——— in the county of ——— greeting: We command you,” &c.

It would seem, therefore, that the mention of the county has been required in the writ of summons, and not in the writ of *capias*. And there may be this reason for the difference: that the writ of summons is addressed to the defendant, and executed by the plaintiff or his attorney, who ought to be confined, by the authority expressed on the face of the writ, to serve it in the county in which it is sued out; whereas the *capias* being addressed to the sheriff, who cannot go out of his county, the specification of the county in the body of that [*365] writ *becomes unnecessary. In *Roberts v. Wedderburne*, the very point now in discussion was not before me, and I do not feel bound to adhere to what I said with respect to construing sect. 4, by reference to sect. 1.

GASELEE, J. I differed from the rest of the Court in *Roberts v. Wedderburne*, and should hold the description of the defendant sufficient here.

The writ of summons is addressed to the defendant; and, in order to identify him, it may be necessary to specify in what county he resides. The *capias* is addressed to the sheriff, who knows whether the place of which the defendant is described is situated within his own county or not.

VAUGHAN, J. I should have been better satisfied with a better description. If *Leman Street, Goodman's Fields*, will do, so would *Broad Street*, or any other, less notorious. A literal compliance with the statute occasions the least inconvenience.

BOSANQUET, J. I am sorry I cannot agree with the Chief Justice and my brother GASELEE. The act requires a literal compliance with the forms set out in the schedule, and we are not to inquire whether words which have been used are equivalent, or whether the place specified is or is not notorious.

Sect. 1. directs that the writ of summons shall be in the form marked in the schedule No. 1, and sect. 4, that the writ of *capias* shall be in the form marked in the schedule No. 4. Does that enactment include the directions contained in No. 1? Does "C. D. of —" mean that the blank should be filled up as in the form marked No. 1, or does it allow greater latitude for the description of the defendant? I think the fourth section should be construed with reference to the first, as was *laid down in *Roberts v. Wedderburne*. [*366] There the blank in the *capias* for the defendant's residence had not been filled up at all, and it was held that it ought to have been filled up by analogy to the form for a writ of summons, marked No. 1 in the schedule. I consider that, therefore, an express decision that sect. 4, is to be construed by sect. 1, and though it is true that in this case no person can have been misled, I think the rule should be made absolute.

TINDAL, C. J. One circumstance which has operated with me is, the direction in the schedule for the endorsement on the writ of *capias*, in which endorsement no statement is required of the county in which the residence of the plaintiff or of his attorney is situated.

The Court being equally divided, no rule will issue.

WATSON v. MASKELL. Nov. 25.

Where one judgment is set off against another, the lien of an attorney does not extend beyond his costs in the particular cause.

At the *Essex Spring assizes, 1834*, *Watson*, the plaintiff in this action, obtained a verdict for 200*l.* against *Maskell*. *Watson's* costs were afterwards taxed at 139*l.*

At the same assizes, *Maskell*, in an action in the *King's Bench*, obtained a verdict for 536*l.* against *Watson*; but a rule nisi to set aside this verdict was obtained in *Easter term*.

Maskell died on the 18th of *April*. On the 21st *Watson* signed judgment in this action, and on the 22d issued a *fi. fa.* endorsed to levy 339*l.*, and tested the 15th of *April*, the first day of *Easter term*.

On the 26th of *April* a rule nisi was obtained to set aside this *fi. fa.* for irregularity; the time for *showing cause against which was afterwards, by [*367] a rule of Court, enlarged to the 7th of *May*.

On that day the rule for setting aside the *fi. fa.* was discharged; the executors of *Maskell* agreeing to pay 339*l.* into court, there to remain till the further order of the court, and to refer all matters in difference between them and *Watson* to a barrister.

In consequence of this, no further steps were taken on the rule for a new trial in the action by *Maskell* against *Watson* in the *King's Bench*.

Maskell's executors claimed before the arbitrator 1268*l.* as due to their testa-

tor from Watson, besides the costs of the action in the King's Bench, if they should be found entitled to sustain their verdict.

Watson claimed 977*l.* as due to him from Maskell for rent, besides the 339*l.* debt and costs he had recovered in the action in this court.

The arbitration being still undetermined,

Wilde, Serjt., on the part of Watson's attorney, obtained a rule calling on the executors of Maskell to show cause why it should not be referred to the prothonotary to ascertain what was due from Watson for business done by his attorney generally, and why such sum should not be paid to the attorney out of the 339*l.* paid into court in the action of *Watson v. Maskell*.

A copy of this rule was also served on Watson, who was a prisoner in the King's Bench.

Goulburn, Serjt., and *Hoyes* showed cause.

The 339*l.* having been paid into court by Maskell's executors, to abide the order of the court in case the arbitrator should decide in their favor upon the action in which Maskell has recovered a verdict, they will be deprived of the benefit of that compact so sanctioned by the Court, if Watson's attorney be allowed to possess *himself of the money before the result of the arbitration is known.

But, at all events, he can claim no more than his costs in the particular action: he has no general lien on the money for the amount of all that may be due to him from Watson; for in *Stephens v. Weston*, 3 B. & C. 535, it was held that when costs and damages in one action are to be set off against those recovered in a cross action, an attorney has a lien on the judgment obtained by his client against the opposite party, to the extent of his costs in that cause only. [The learned counsel also urged and relied on in opposition to the rule, an alleged irregularity on the part of Watson, in entering up judgment and proceeding to execution after Maskell's death, without a *scire facias*. But the Court thought that question had been settled upon the rule which was discharged May 7th.]

Wilde. It is an established principle that the equitable claims of the parties to the suit are not to prejudice the lien of the attorney. It is clear that if Watson's attorney had received the 339*l.* paid into court subject to the equitable claims of the parties, he would have been entitled to retain the whole for his general balance, if it amounted to so much.

And it was in order to leave the payment into court open to such a claim, that it was paid in, not to abide the event of the arbitration, but the order of the court.

TINDAL, C. J. This rule must be made absolute to the extent of 139*l.*, but no further. As to that—the amount of the applicant's costs in the particular cause—his lien cannot be prejudiced by anything that the parties have done. But further than that we cannot proceed with safety. Upon the discussion of [*369] a rule to *set aside for irregularity the *fi. fa.* which had been issued against Maskell's effects, the rule was discharged, all matters in difference between the parties being referred to an arbitrator, upon an agreement that the 339*l.* recovered by Watson should be paid into court, to abide the further order of the court; and before we order it all to be taken out, we should see clearly that it can be done without injury to others who may have an equitable claim thereon.

The rest of the Court concurred, and the rule was made

Absolute to the extent of 139*l.* only.

HUTCHINSON v. HARGRAVE. Nov. 25.

Affidavit to hold to bail for 50*l.* due for money paid and expended to the use of defendant, and at his request, and for interest agreed to be paid thereon, Held sufficient.

THE affidavit to hold to bail alleged that the defendant was indebted to the

plaintiff in the sum of 50*l.* for money paid and expended by the plaintiff for the use of the defendant and at his request, and for interest due and agreed to be paid by defendant for and in respect of the preceding matters.

Addison obtained a rule nisi to set aside the bail-bond, on the ground that this affidavit was not sufficiently certain; it should have shown how much was due for principal and how much for interest, as was required in *Latraille v. Hoepfner*, 10 Bingh. 334.

Coleridge, Serjt., showed cause. In *Latraille v. Hoepfner*, the arrest was for 70*l.*, "the balance of principal and *interest due on a bill of exchange for 100*l.*" The plaintiff could not arrest for interest unless reserved by [*370] the bill, which was not stated to be the fact; and possibly less than 20*l.* might have been due for principal. Here he arrests for interest alleged to be due under an agreement. The two demands, therefore, may be combined with the same propriety as demands for goods sold, and work and labor.

Addison. The plaintiff should, at least, have disclosed the nature of the agreement. Peradventure it contained no assent by the defendant to pay interest.

Per Curiam. The word *agreed* imports the assent of both parties. The affidavit is sufficiently certain. Rule discharged.

FLIGHT v. BOOTH. Nov. 24.

The particulars of sale of certain leasehold premises in Covent Garden, stated, that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter."

The original lease, when produced, appeared to prohibit the business of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working-hatter, and many others, and the sale of coals, potatoes, or any provisions: Held, that there was such a material discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract.

THIS cause having, by consent of parties, been referred to arbitration under an order of nisi prius, the arbitrator found, in a special award,

That the declaration in this action was for money paid by the plaintiff for the defendant's use, and for money received by the defendant to the plaintiff's use, to which the general issue was pleaded; and the action *was brought to recover the sum of 100*l.* paid by the plaintiff as a deposit on the purchase [*371] by auction of certain premises situated in the Piazza, Covent Garden, and held under a lease from the Duke of Bedford. The premises were described in the printed particulars of sale, on the back of which the plaintiff had signed the memorandum of the contract, as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea trade, or coach-building. It was also stated in the same particulars, that, by a clause in the lease, "the lessee is to insure the premises for 3000*l.*, and no offensive trade is to be carried on; they cannot be let to a coffee-house keeper, or working hatter." Printed conditions of sale followed; and by the sixth it was provided, that if, through any mistake, the estate should be improperly described or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way. By the last condition it was, among other things, provided, that if the purchaser should neglect or fail to complete the purchase within a day, which had expired previously to the commencement of the action, the deposit money should become forfeited to the vendor. The sale took place, and the contract was signed, on the 16th of May, 1833. On the 10th of June, an abstract of title was delivered by the vendor's solicitor to the plaintiff's, which contained the following note of the proviso hereinafter

set out,—“ proviso for re-entry in case of non-payment of rent, or non-performance of covenants, or carrying on any particular trade without a license for that purpose under the hand of the Duke of Bedford first had and obtained.” At [*372] the date *of the sale and contract the lease was a valid and subsisting one. The plaintiff’s solicitor made several objections upon the abstract to the completion of the purchase, which the arbitrator found to have been either insufficient in themselves or satisfactorily removed; but the plaintiff’s solicitor never required to see the lease. And on the 15th of July, the plaintiff, so far as in him lay, rescinded the contract; and having demanded back again the deposit, without success, brought the action in question.

At the trial of the cause the lease was produced, and appeared to contain the following proviso:—“ Provided always, that if the yearly rent hereby reserved, or any part thereof, shall be unpaid for fifteen days next after any of the said days of payment; or if, at any time during the continuance of the said term, the trades or businesses of a brewer, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheesemonger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter, or any or either of them, shall be used or exercised in or upon the said demised premises, or any part thereof; or any auctions or public sales of household goods, or other things, be made in or upon the said premises or any part thereof; or the same be used as a shop or place for the sale of coals, potatoes, or any provisions whatever; or if the leasees, their executors, administrators, or assigns, shall, at any time during the last seven years, of the said term, assign or set over this indenture, or any part of the premises, and their estate and interest therein, without a license for that purpose under the hand of the said duke, his heir or assigns; or on breach or nonperformance of any or either of the covenants and agreements hereinbefore contained, then and thenceforth, and in either of such cases, it shall [*373] *be lawful for the said duke, his heirs and assigns, to re-enter.”

It was not proved before the arbitrator that the plaintiff, at the time of the sale, or of the signing the contract, had ever seen the lease or heard it read, or that he or his solicitor were aware of the terms of the proviso until the day of the trial. Evidence was offered, on the part of the defendant, to prove that the lease was produced at the sale, and that the proviso had been publicly read. That evidence was objected to on the part of the plaintiff’s counsel; the arbitrator received it only to negative any wilful concealment or misrepresentation by the defendant of the terms of the lease; and found that none such was proved against him. No claim was made by the defendant, before the arbitrator, for damages for non-performance of the plaintiff’s contract, nor any attempt to compel a specific performance.

Upon these facts, the arbitrator found that the plaintiff had good cause of action against the defendant, and ordered that the verdict should be reduced to the sum of 100*l.*; for which sum, and the costs of the cause when taxed, he directed that the plaintiff should be at liberty to sign judgment on the sixth day of Trinity term then next ensuing, and not before. And if the facts above set out did not authorize the plaintiff, in the opinion of the Court, to rescind the contract of sale, then the arbitrator directed the verdict to be entered for the defendant, and that he should be at liberty to enter up the judgment for himself.

Taddy, Serjt., obtained a rule nisi to enter up judgment for the defendant under this award, contending, that if there had been any misdescription of the premises at the auction, it was a misdescription originating from inadvertence, [*374] and not from fraud or any intention to *mislead; and that, under such circumstances, though the plaintiff might require compensation for any difference in value between the representation and the reality, yet he could not rescind the contract: *Duke of Norfolk v. Worthy*, 1 Campb. 337; *Wright v. Wilson*, 1 Mood. & Rob. 207; *Stewart v. Alliston*, 1 Mer. 26; *Trower v. Newcombe*, 3 Mer. 704.

Wilde, Serjt., showed cause. Where the misdescription, whether proceeding from intention or inadvertence, is such that the purchaser finds himself in possession of a thing materially differing from that which he proposed to buy, he is at liberty to rescind the contract: *Jones v. Edney*, 3 Campb. 285; *Waring v. Hoggarth*, 1 Ry. & Mood. 39; *Coverly v. Burrell*, 5 B. & Ald. 257; *Brealey v. Collins*, 1 Young. 317. Here the plaintiff could never have inferred from the particulars prohibiting offensive trades and the business of coffee-house keeper and hatter, that he should be prevented from selling fruit or vegetables in a district devoted to that line of business. There is no principle upon which, in such a case, compensation can be calculated: *Sherwood v. Robins*, 1 M. & M. 194. The object of the purchaser is entirely defeated, and he can only be indemnified by rescinding the contract. In *Tomkins v. White*, 3 Smith, Rep. 489, Lord ELLENBOROUGH said, "A little more fairness on the part of auctioneers in the forming of their particulars would avoid all these inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and, in favor of justice, considering how little knowledge the parties have of the things sold, much more particularity and fairness might be expected of them." *In *The Duke of Norfolk v. Worthy*, the jury found that the misdescription was wilful. *Trower v. Newcombe* only decided that *bonâ fides* is not to be impeached by the mere babble of an auction room. But *Stewart v. Alliston* is in favor of the plaintiff.

Taddy and Cresswell in support of the rule. As to the possibility of the plaintiff's intending to deal in vegetables, the alleged misdescription could not have misled him, for the house is not described as situated in the market, but in the piazza; and the rule, *caveat emptor*, applies. The lease was read by the auctioneer, and the plaintiff might have required to inspect it. Even where property is held under a lease containing covenants contrary to custom, a purchaser is not entitled to compensation if he knew of the existence of the lease: *Hall v. Smith*, 14 Ves. 426; *Walter v. Maude*, 1 Jac. & Walk. 181. The arbitrator having found that there was no fraud, the plaintiff could not rescind the contract: *Oldfield v. Round*, 5 Ves. 508; *Scott v. Hanson*, 1 Sim. 13. If there be any misdescription, the conditions of sale expressly entitle him to compensation, and *Drewe v. Hanson*, 6 Ves. 675, shows the principle on which it may be estimated.

Our. adv. vult.

TINDAL, C. J. The question in this case arises upon the special facts found by the arbitrator on his award: and it is this, whether the plaintiff was at liberty under the circumstances stated in the award to consider the contract of sale to be rescinded. For if rescinded, the plaintiff is entitled to recover the deposit as money had and received to his use; but if the contract is still *unrescinded and open, the present action is not maintainable, but [376] whatever injury the plaintiff has sustained by the misdescription must form the subject of a special action on the contract of sale.

Now the arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the defendant, we must consider the case as standing clear from any fraud, and take the misdescription of the premises to have originated either from ignorance, inadvertence, or accident.

The question, therefore, is narrowed to the single point, whether the misdescription in the printed particulars of sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether; or whether it was such as was contemplated by the sixth condition of the printed particulars of sale, by which it was provided, that "if through any mistake the estate should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale thereof; but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money as a compensation, either way."

It is extremely difficult to lay down, from the decided cases, any certain

definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, *however gross, shall avoid the contract, but shall form [*377] the subject of compensation only: *Duke of Norfolk v. Worthy*, 1 Camp. 340; *Wright v. Wilson*, 1 Mood. & Rob. 207; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale: *Jones v. Edney*, 3 Campb. 284; *Waring v. Hoggart*, 1 Ry. & Mood. 39; and *Stewart v. Alliston*, 1 Mer. 26. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney*, where the subject-matter of the sale was described to be "a free public house," while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.

In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated; to which it was added, "that no offensive trades are to be carried on: the premises cannot be let to a coffee-house keeper or working hatter." Any person reading this particular, and having no information but what he derives from it, that is, perhaps, every person attending the sale, would conclude, that he was not pre-vented by the terms of the *lease from carry on any trade in it, except [*378] those which were of a class generally acknowledged to be offensive, and the two enumerated trades of coffee-house keeper and working hatter. He would never suppose, nor have any reason to suppose, that he was prevented from carrying on the trade of a baker, a fruiterer, or an herb-seller, in a house situated in the piazza of Covent Garden market, much less that the lease was to become void, if the house, so situated, was used as a place for the sale of any provisions whatever. The latter restriction would extend to prevent trades of the most innocent and inoffensive kinds from being exercised on the premises; such as a flour factor, a biscuit seller, or the like; yet such are the restrictions found to exist in the lease when it is first submitted to the inspection of the purchaser. Under these circumstances, it appears to us, that a lease which is described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades but also against some trades that are inoffensive, are not one and the same thing, but a different subject-matter of contract; and that where a man purchases by the former description, it may very well be supposed that he would not have become the purchaser, whether he bought for the purpose of carrying on trade upon the premises himself, or for a money investment, if he had known the lease had contained the larger and more extensive restrictions; and, indeed, the very terms of the sixth condition of sale scarcely apply to a case where the difference of value is so uncertain and arbitrary as in the present case. The condition, that the parties are to pay or allow a proportionate value according to the average, will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple calculations of that nature; but how will

it govern such a misstatement as the present? What *action at law can be framed upon it? It would at least involve the purchasers in great difficulties. The lease being in the hands of the vendor, he had peculiarly, and indeed exclusively, the means of knowledge of the exact restrictions contained in it; the purchaser at the auction had none. For the reading the lease at the auction by the auctioneer has been decided to be no excuse for a misdescription of the terms of the lease in the particulars of sale, *Jones v. Edney*, 3 Campb. 285. And as to any laches on the part of the purchaser in not sooner demanding an inspection of the lease, which was urged as an argument on the part of the defendant, he had not the most distant reason to suspect any misdescription, until the abstract was delivered, and then the suspicion would come too late; for the question is, whether he was bound or not at the time the contract was made. If, indeed, there had been any waiver of the objection in this case, our decision would have been different; but a waiver should have been found by the arbitrator: and so far as can be inferred from the facts found upon the award, the lease was never seen by the purchaser, nor the objection ever taken, until the trial of the cause. He stood then, as he might do, upon his legal right to recover the deposit.

Upon the whole, we see no reason to be dissatisfied with the arbitrator's award, and therefore the rule for entering the verdict for the defendant must be discharged.

Rule discharged.

***PRICE v. PEEK, HUMPHREY, WILLIAM JACKSON, and RICHARD JACKSON.** Nov. 25. [380]

In trespass against bailiff and sheriff, for taking plaintiff on a charge of felony to a police station, and thence to a prison, the sheriff, after pleading the general issue, justified the taking from the police station to the prison under a ca. sa. The plaintiff, admitting the writ, and the delivery of the warrant to the bailiff, replied *de injuria absque residuo causæ*.

Held, that under this replication he could not give evidence to involve the sheriff in the misconduct of the bailiff committed before the plaintiff arrived at the police station; in order to the admission of such evidence, the circumstances should have been replied specially.

THE plaintiff in his first count declared against the four defendants for assaulting him, seizing him, dragging him about, and compelling him to go to a certain police station and there imprisoning him on the 19th of January, 1834, without reasonable or probable cause, for an hour, under a false and malicious pretence that he had committed a felony; and also for then and there taking and conveying him in custody from the said police station to White Cross Street prison, and there imprisoning him from thence until the 28th of January. To this declaration the two defendants Peek and Humphrey, separating themselves from the other defendants, pleaded, first, the general issue, not guilty, to the whole; and, secondly, as to the assaulting the plaintiff in the first count mentioned, and seizing him, and taking him into custody from the said police station to White Cross Street prison, and there imprisoning him,—a justification under a writ of ca. sa. issued out of this Court against the plaintiff directed to the sheriffs of London, and which writ they averred to have been delivered to them as such sheriffs, and that they made their warrant thereon directed to another of the defendants, William Jackson, then being a serjeant-at-mace of the said sheriffs, which warrant was delivered to William Jackson, to be executed in due form of law: by virtue of which said warrant the said William Jackson gently laid hands on the plaintiff and seized and laid hold of him, to take and arrest, and did arrest and take *him into custody by virtue of the said writ and warrant, and took and conveyed him from the said police station to White Cross Street prison, and there imprisoned him. The replication admitting the issuing of the writ, the delivery of the writ to the sheriffs,

the making of the warrant, and the delivery of the same to the serjeant-at-mace, traversed the residue of the cause stated in the plea. In effect, the replication denied that the trespasses enumerated in the plea were committed under the warrant so delivered to William Jackson.

At the trial, it appeared that the defendants, Peek and Humphrey, in their capacity of sheriffs of London, issued a warrant to the defendant, William Jackson, a serjeant-at-mace, to arrest the plaintiff under a writ of *capias ad satisfaciendum* directed to the sheriffs of London.

William Jackson, in order to secure the capture, stationed his son, the defendant Richard Jackson, at one door of the plaintiff's residence in the Temple, while he himself remained with the warrant in his hand at another door.

The plaintiff was shortly afterwards arrested in Fleet Street, by Richard Jackson, who, not having any warrant to produce, gave the plaintiff in charge of a policeman under pretence of an accusation of felony.

The plaintiff was taken in custody to a police station. Richard Jackson went to his father, who, upon hearing of the capture, placed the warrant in his son's hand, and returning with him to the police station, enforced the arrest, and conducted the plaintiff to Whitecross Street prison, whence after a detention of some days, he was discharged by order of a Judge.

The jury having found a verdict for the plaintiff, with 100*l.* damages, expressly for the whole of the trespasses and imprisonment,

[*382] **Bompas, Serjt.*, on the part of the sheriffs, obtained a rule nisi for leave to enter a nonsuit, or for a new trial, on the ground, first, that the sheriffs had by their plea and evidence justified the detainer at the police office and the custody in Whitecross Street prison, under the warrant delivered to William Jackson, and that they were not responsible for the previous illegal arrest by Richard Jackson: *Drakes v. Sykes*, 7 T. R. 113. Secondly, even if they were so responsible, the plaintiff could not avail himself of such responsibility on pleadings framed as these were framed: instead of denying that the sheriffs acted by virtue of the writ, he should have replied specially the facts which would show them to be trespassers *ab initio*: *Lucas v. Nockolls*, 10 Bingh. 157; *Bardons v. Selby*, 9 Bingh. 756. As he had not so replied, the sheriffs could not be liable to damages for that portion of the alleged trespasses which constituted the imprisonment at Whitecross Street; and as the verdict was expressly found against them for the whole of the trespasses, it could not stand.

Spankie, Serjt., R. V. Richards, and Price, showed cause against the rule.

The conduct of the two Jacksons shows clearly that they were acting in combination against the plaintiff, and that the illegal conduct of the son took place under the instructions of the father, who held the sheriff's warrant. And the sheriffs are responsible for whatever the father did or sanctioned under that warrant: *Ackworth v. Kemps*, Doug. 40; *Parrott v. Mumford*, 2 Esp. 585; *Saunderson v. Baker*, 3 Wils. 309; *Smart v. Hutton*, 2 N. & M. 426. Indeed [*383] this Court has already determined on these facts, that the *arrest was illegal by the wrongful act of the sheriff himself: *Barrett v. Price*, 9 Bingh. 566. There can be no ground, therefore, for a nonsuit. As to the application for a new trial, the defendants having abused the writ intrusted to them, the proper replication to a plea justifying under the writ, was, that they acted of their own wrong, and without the excuse set up by them. That is the true result of the case of *Lucas v. Nockell*: Com. Dig. Pleader, F. 24. If, under such circumstances, a plaintiff were to reply specially, it would be ill: Com. Dig. Pleader, F. 6; *Wimbish v. Tailbois*, Plowd. 51, 52.

Bompas and *Martin* in support of the rule.

Where a defendant acts under a writ, but acts in an illegal manner, the special circumstances which constitute the illegality ought to be shown in reply to a justification under the writ. Where a defendant, notwithstanding he is in possession of a writ, in no respect acts in pursuance of it, the plaintiff may reply generally that he acted of his own wrong, and without the cause alleged.

In *Lucas v. Noekells* the defendants did nothing under the *fi. fa.* but sold the goods as importers, and not as execution-creditors. Here the defendants, from the time the plaintiff arrived at the police station, expressly detained him under the *ca. sa.* The plaintiff, therefore, if he meant to make them responsible for what previously occurred, should have replied specially: *Taylor v. Cole*, 3 T. R. 292; *Dye v. Leatherdale*, 3 Wils. 20.

But William Jackson was only the sheriff's deputy; and as a deputy has no power to depute, the sheriffs could never be responsible for the conduct of Richard *Jackson. He was neither their agent, nor was he acting [*384] under the writ. *Cur. adv. vult.*

TINDAL, C. J. (after stating the pleadings, as *antè*, p. 380). The question now before the Court arises upon a motion made by the sheriffs for leave to enter a nonsuit, or for a new trial. The only ground on which the former branch of the motion is placed in argument is this, that these defendants, as they contend, are entitled to a verdict in their favor as to the trespasses covered by their special plea, all the facts therein stated and traversed by the replication having been proved by them at the trial; and as to the residue of the trespasses mentioned in the declaration, and to which the general issue is pleaded, there was no evidence whatever against these two defendants, so as to make any case for the jury.

The second plea appears to us to be confined by the enumeration of the trespasses in its commencement to the period of time beginning with the arrest of the plaintiff by William Jackson at the police station, and terminating with the discharge of the plaintiff from his imprisonment in White Cross Street prison, and so it has been taken in the course of the argument by the plaintiff's counsel. And this part of the trespass complained of appears to us to have been justified under the writ delivered to the sheriffs, and the warrant made out by them to William Jackson, unless such arrest at the police station is made illegal by the previous misconduct of William Jackson, a question to which we shall presently revert. For it was proved at the trial, that the arrest at the station house was made by William Jackson, having the warrant at that time in his possession, and that the plaintiff was carried, under the warrant, *by William Jackson from the station house to White Cross Street prison, and was [*385] there confined under the same warrant, which are the several allegations contained in the plea.

In order, therefore, to be entitled to a nonsuit, the defendants must show that there was no evidence whatever, for the consideration of the jury, of the two defendants, the sheriffs, having made themselves liable for the assault and imprisonment which took place previous to the arrival at the station house. We think, however, there was evidence given at the trial which made that question proper for the consideration of the jury under the general issue. The possession of the warrant by William Jackson, the serjeant-at-mace, at the time when Richard Jackson, his son, caused the plaintiff to be taken into custody by the police officer in Fleet Street; the delivery of the warrant by the father to his son, whilst the plaintiff was still in custody at the station house, in order, if possible, to cover the illegality of such act of the son; the return of the father with the son to the station house, and his there enforcing the warrant; these were facts properly to be laid before the jury for their determination, whether the illegal act of the son had been committed by the previous authority of the father. And if the jury thought so, they would be right, at all events, in finding their verdict for the plaintiff as to that part of the trespass which was left uncovered by the justification. For the act of the bailiff in the execution of a writ, though not justified by the writ, is the act of the sheriff himself: as where he takes the goods of A. under a warrant upon a *fi. fa.* against the goods of B.: *Doug. Rep.* 40; or, as it has even been held (which is a much stronger case), where the bailiff makes an arrest after the return of the writ: 2 *Esp.* 585. We therefore think the rule cannot be supported in that part of it which prays

[*386] that a nonsuit may be entered. But the rule, so far as relates to *a new trial, stands upon a different footing. For if the sheriffs are entitled to a verdict upon the issue joined on their special plea, then it follows that, as part of the trespass complained of has been covered by the plea of justification, the entire damages which have been given by the jury for the whole of the trespass and imprisonment cannot be supported.

The several facts of that plea have, as already observed, been proved on the part of the sheriffs, so as to entitle them to a verdict thereon, unless the plaintiff is at liberty to show that the original taking into custody was the act of the sheriffs, through their officer, and that such original taking, being illegal in itself, destroys the legality of the subsequent arrest under the writ and warrant. For we are of opinion, as we before decided upon facts arising out of this very transaction in the case of *Barrett v. Price*, 2 Moore & Scott, 634, S. C. 9 Bingh. 568, that if the son was acting in aid of his father, when he caused the illegal imprisonment of the plaintiff in the station house, and the father afterwards, knowing of the illegality, availed himself of it, and proceeded to execute the warrant, such previous illegality would affect and run through the whole transaction, and make the subsequent proceedings illegal also.

But the objection made on the part of the defendants, the sheriffs, is, that even if such should be the facts in the case, the plaintiff is not at liberty to give them in evidence upon this state of the pleadings, as an answer to the defendants' pleas; but that, if he intended to avail himself of them for the purpose of converting an act, legal in itself, into an illegal act, he was bound by the rules of pleading to have replied those facts specially. And we are of that opinion. The traverse, *de injuria sua propria absque residuo causæ*, puts [*387] nothing in issue, but each and every fact alleged in the special plea, and *not admitted in the replication. In this case it puts nothing in issue but whether the assault and imprisonment mentioned in the plea were committed under color of the writ and warrant or not. It is true, that under the authority of the case of *Lucas v. Nockells*, 10 Bingh. 155, the plaintiff may show under that traverse, that the sheriff did not act under the writ at all; that, although he had it in his possession, he acted at the time for a purpose, and with an object entirely distinct from the execution of the writ, and that he only avails himself of it at the trial, as an excuse for an illegal act. But there is no authority in that case or any other, that where the sheriff has really acted under the writ at the time, and avails himself of it in his plea, the plaintiff shall be at liberty under this replication to give antecedent matter in evidence to render the subsequent arrest under the writ illegal. Such a reply, as it appears to us, confesses the arrest stated in the plea to have been made under the writ, but avoids it by new matter of fact; and, therefore, like any other matter of confession and avoidance, must be specially pleaded.

It is well established, that where the plaintiff seeks to avoid any legal excuse for a trespass, by showing matter subsequent which makes the defendant a trespasser ab initio, he is bound to plead such matter, and cannot take advantage of it under the general traverse, *de injuria*, &c. (see the authorities collected in 1 Saund. 300 d, in note); and the case appears to us to be the same upon principle, whether the act done by the defendant is precedent or subsequent to the execution of the writ; and the reason is undoubtedly the same in each case, viz., that the defendant ought not to be taken by surprise at the trial.

Upon the ground, therefore, that the present damages are entire for the whole trespass committed, and that [*388] the plaintiff is not entitled upon the present state of the pleadings, to recover such damages for the arrest and imprisonment which actually took place under the writ, we think there must be a new trial to ascertain the amount of damages for the taking to the police station, which forms the preceding illegal arrest and imprisonment, in case the jury shall be of opinion that such previous illegal arrest is brought home to the sheriffs. And we think the costs of the former trial should abide the event of the second.

Rule absolute.

DENNETT v. PASS and BARTON. Nov. 25.

A rent charge is extinguished by a devise, to the grantee, of part of the land out of which the rent charge issues, notwithstanding the devise is expressly made over and above the rent charge.

2. When a charge on the land is clear, and upon the construction of a will it is doubtful whether or not the testator meant to transfer the charge from the realty to the personality, it will be held to continue a charge on the land.

THIS was an action of replevin tried before BAYLEY, B., Chester spring assizes, 1833, when a verdict was found for the defendants, subject to the opinion of the Court upon the following case:—

The declaration was for the taking the goods and chattels of [the plaintiff in the township of Thelwall, in the parish of Runcorn, and county of Chester. There were two avowries by the defendant Mary Barton, in her own right, and the defendant Pass as her bailiff. The first avowry justified the taking as for a distress for six years' arrears of an annuity or rent charge of 200*l.* issuing out of the places in which, &c., among other property, and alleged to be due to the said defendant Mary Barton, by virtue of a settlement in bar of dower executed by her husband Thomas Pickering, in 1775, with power to enter on nonpayment. The second avowry justified the taking as for a distress for six years' arrears *of an annuity or rent charge of 20*l.* issuing out of the same property, [*389] and alleged in the like manner to be due to the defendant M. Barton, under the will of her husband. The plaintiff by his pleas in bar denied that M. Barton was seised of the annuities.

Thomas Pickering being seised in fee of the premises, on the 9th and 10th of May, 1775, by deed of settlement and jointure, in bar of dower, conveyed all his manor, lands, &c., in Chester and Lancaster to S. Egerton and J. Way, to various uses during his life, and after his decease, to the use, intent, and purpose, that Mary Pickering, if she survived him, should receive an annuity of 200*l.* a year for life, payable out of and chargeable, and charged upon the said manor and lands, &c., in the name and in nature of a jointure in bar of dower, with power of entry to M. P. in case the annuity should be in arrear: subject thereto, to the use of such children as the said T. P. should by deed or will appoint; and in default of appointment by him, as M. P. should appoint: in default of appointment by either, equally amongst the children; and in default of issue, to such uses as T. P. should by deed or will appoint, with ultimate remainder in fee to T. P. and power to T. P. to charge by deed or will to the amount of 15,000*l.* subject to the annuity.

In June, 1775, T. P. by his will,—reciting that he had conveyed all his real estates at Thelwall and elsewhere in the county of Chester and Lancaster, unto S. Egerton and J. Way, upon the trusts, and to and for the purposes therein mentioned, with a power to raise and appoint any sum or sums of money not exceeding 15,000*l.*, or annuities as therein mentioned, to be paid and applied by the said S. Egerton and J. Way, as he should by his last will and testament direct and appoint,—“charged all his real estates, except the house and premises given to his wife for life, with the payment of the sums of money and annuities mentioned in his will; and directed his trustees to raise those sums of *money and annuities by mortgage;” and, first, an annuity of 20*l.* to his wife, M. P., for life, over and above what he had already settled [*390] upon her. He then devised to his wife his mansion-house at Thelwall for life; and also the lands and premises that he then occupied there, being about six or seven fields.

By a codicil of the 5th of December, 1775, after revoking a devise of his real estate to T. P. of C., and subject to the specific and pecuniary legacies in and by his said will, and in that codicil bequeathed, and not thereby revoked, he gave and bequeathed all the rest, residue, and remainder of his personal estate unto his nephew H. P., to and for his own proper use and benefit; but if his personal

estate and effects, not specifically bequeathed, should be insufficient to pay all his just debts, funeral expenses, and the pecuniary legacies thereinbefore in his said will mentioned, and in case he should happen to die without issue, or there being such, they should happen to die without issue, he gave and devised all that his manor or lordship of Thelwall, and all and every his messuages, lands, tenements, and hereditaments, situate, lying and being in Thelwall aforesaid, or elsewhere, and every part and parcel thereof, with their and every of their appurtenances, subject to the provisions which, in and by the said will, he had made for his loving wife, to the several uses, intents, and purposes thereafter mentioned; that is to say, to the use of his said nephew, H. P., for life, remainder to his issue in tail, with power to H. P. to jointure: so as such limitation or appointment of such jointure should be without prejudice to the provision which, in and by his said will, he had made for his loving wife.

By a second codicil, he provided that as he had left his dear Mrs. Pickering the hall of Thelwall, and all the lands he then held, for her life; and as it was [*391] not intended she should cut down any timber on the premises, *so it was his will and intention that she should have timber from the premises she was to occupy, or any other part of the estate, for gates and stiles, or to repair.

On the 28d of July, 1776, the said Thomas Pickering died, without having altered or revoked the said will and codicils, leaving his wife, the defendant, who afterwards, by another marriage, became M. Barton, him surviving and without issue.

After his death, the defendant, M. Barton, entered into or continued in possession under and by virtue of the said devise of the mansion-house and out-houses at Thelwall, which the testator lived in at the time of making his will, with the garden, orchard, fields, and also the lands and premises which the testator occupied at the time of making his said will, being about six or seven fields, and took and enjoyed the rents and profits from thence hitherto.

The mansion-house and premises were, and still are, a part of the said manor or estate of Thelwall, upon which the said annuity of 200*l.* was, by the said indentures of lease and release, charged. No payment had been made for the six years preceding the distress, to the defendant Mary Barton, in respect either of the said annuity of 200*l.*, or of the said annuity of 20*l.*

The question for the opinion of the Court was, whether the said annuity or rent-charge of 200*l.* was extinguished by the devise to the said M. Barton of a part of the premises upon which the annuity was charged, or out of which the rent-charge was to issue; and by the acceptance of M. Barton of that devise.

If the Court should be of opinion that the annuity was not extinguished, then the verdict was to stand for the defendant's arrears of 1,200*l.*; but if the Court should be of opinion that the annuity was extinguished, then *a [*392] second question arose, whether the defendants were justified in making the distress in respect of the annuity of 20*l.* granted to the defendant, M. Barton, by the above recited will and codicils; and if the Court should be of that opinion, the verdict was still to stand for the defendants, but the arrears were to be reduced to 120*l.* If the Court should be of a contrary opinion, the verdict entered for the defendants was to be set aside, and a verdict entered for the plaintiff, with 3*l.* damages.

This case was argued twice. In Trinity term, by *J. Jervis*, for the avowant, and *Lloyd* for the plaintiff; and in Michaelmas term, by *Taddy*, Serjt., for the avowant, and *Lloyd* for the plaintiff.

Arguments for the avowant.—The 200*l.* annuity was not extinguished by the devise of a portion of the land on which it was charged. It is true, that if a party who has a rent-charge issuing out of land purchase any part of the land, the rent-charge is said by Littleton to be extinguished: Lit. s. 222. But the word purchase, though said by the text-writers to include all modes of acquisition except descent, could not have been used by Littleton in so wide a sense,

but must rather have been applied to conveyances arising exclusively out of the spontaneous act of the party. A devise was not a mode of conveyance known at common law; and it transfers the estate partly by operation of law and partly by act of the party; for to some purposes the estate is in the devisee before acceptance. Now, in dower, the act of the widow concurs with the act of law, and yet the incidence of dower does not extinguish a rent-charge belonging to the widow: Co. Lit. 150 a; the rent-charge shall be apportioned. And other instances are pointed out by Lord COKE, where the rent shall be apportioned, notwithstanding a part of the land come to the owner of the rent partly by his own act: Co. Lit. 147, b; 148, a; *Bac. Abr. Rent, N. A devise is taken as a benevolence: Vernon's case, 4 Rep. 3; all the devisee does is to con- [*393] cur. The devise is not pleaded with an acceptance; it is complete unless the devisee refuses. In *Knight v. Calthorpe*, 1 Vern. 347, and *Slatter v. Buck*, Moseley, 256, the heir applied for relief against a jointress, under circumstances like the present, and was refused.

And this is not so much a rent-charge as a rent in lieu of dower. Lord COKE says a rent-charge is against common right, and must be strictly pursued; it is opposed to rent service; but a rent for jointure stands on the same footing as dower, which is favored in law.

Secondly, it is clear that the devisor did not intend that this annuity should be extinguished. The devise is expressly given over and above what is provided by the settlement. The power of charging the land was, in its creation, subject to the wife's annuity: the testator devises under the power, and he could only charge subject to the power. The will is, in fact, only the execution of the power, and so, may be said to form part of the original deed: *Venables v. Morris*, 7 T. R. 347.

At all events, the devise was a re-grant of the annuity. Lord COKE says (Co. Lit. 147, b), "If the grantee of a rent-charge purchase parcel of the land, and the grantor by deed reciting the said purchase of part, granteth that he may distreyn for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent, or the same in quantity. And so it is if a man by deed granteth a rent-charge out of his land to a man for life, and granteth further by the same deed that he and his heires may distreyn in the land for the same rent, this amounteth to a new grant of a rent in fee simple."

As to the annuity of 20*l.*, the objection of extinguishment *does not arise, the charge being on property other than that devised to the wife. [*394]

Arguments for the plaintiff.—The devisee was a purchaser in the ordinary sense of the word. She was not bound to take possession, and by electing to take under the will she took by her own act, and not by operation of law.

As to the devisor's intention, it is immaterial what his intention was. The question is, what are the legal rights of the parties after the annuitant has taken as a purchaser, part of the lands charged. And the devise does not appear to have been made under the power in the marriage settlement; for that settlement contains a power to charge and a power to devise; the testator, in his will, recites the power to charge, and charges, but does not advert to the power to devise.

Nor can the devise be construed as a re-grant of the annuity for which the defendants have avowed; that annuity is described in the avowry as an annuity charged on all the testator's lands, whereas the re-grant now set up is a grant of an annuity charged on all the testator's lands, minus that portion of them devised to the avowant.

With respect to the annuity for 20*l.*, it is a charge on the personality and not on the land. By the power in the marriage settlement, the devisor had an alternative, either to charge the land, or raise 15,000*l.* in a gross sum: having adverted to that power, having directed his trustees to raise the annuity by mortgage, and having given no power of distress, he must be taken to have intended a charge on the personality: *Marnell v. Blake*, 4 Dow. P. C. 248.

In reply it was urged, that the language of the pleadings did not exclude the supposition of a re-grant, for the avowry set out the original deed of settlement; and *the will being the execution of the power given by the deed, operated upon all the lands the testator had at the time of its execution.

As to the annuity for 20*l.*, it was expressly charged on the land; the direction to mortgage was only by way of further security. Distress is incident to such a charge, whether expressed in the devise or not; *Buttery v. Robinson*, 3 Bing. 392. *Our. adv. vult.*

TINDAL, C. J. The questions which have been argued in this case are two: one, whether Mary Barton, the avowant, was seised of the annuity or yearly rent-charge of 200*l.* per annum for her life, at the time of the distress made; the other, whether she was seised of the annuity or yearly rent-charge of 20*l.*: both which questions are raised by traverses for that purpose, in the pleas in bar by the plaintiff to the avowries.

As to the annuity or rent-charge of 200*l.*, the question is, whether it is extinguished by the devise to the grantee of the annuity of part of the land out of which such annuity or rent-charge issues, coupled with the acceptance of such devise. And we are of opinion that such is the necessary legal consequence to be drawn from the facts stated in the case.

By the settlement made in May, 1775, the avowant, then the wife of Mr. Pickering, became seised for the term of her natural life of a rent-charge or annuity of 200*l.* per annum issuing out of the manor of Thelwall, and the lands belonging to the same; and under the will of the settlor, who died within a year after the settlement made, she became entitled for the term of her natural life, to the mansion-house at Thelwall and the lands occupied therewith, being part of the [*396] premises out of which the rent-charge issued, into which she entered after her husband's death.

The rule of law is laid down in Lit. s. 222, in these terms, "If a man hath a rent-charge to him and his heirs, issuing out of certain land, if he purchase any parcel of this to him and his heirs, all the rent-charge is extinct, and the annuity also, because the rent-charge cannot by such manner be apportioned." And the reason of this rule of law is very fully explained by Lord Chief Baron GILBERT, upon feudal principles. See his Treatise on Rents, p. 151.

On the part of the avowant it is contended, that the present case does not fall within the principle above laid down, upon several grounds. In the first place it is said, that this is not a purchase within the meaning of the term in the section above referred to. But when it is considered that Littleton has before, in sect. 13, defined purchase to be "the possession of lands and tenements that a man hath by his deed of agreement, into which possession he cometh not by title of descent from any of his ancestors or of his cousins, but by his own deed;" and when Lord Chief Justice COKE, in his commentary on that section, explains it to be "always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift; for that is in law also a purchase," there is no ground for contending that a devisee who enters and enjoys the subject-matter of the devise can be any other than a purchaser within the meaning of the section first above referred to. And again, Littleton himself, in sect. 224, takes the express distinction between the case where the land comes to the grantee by his own act, and where by descent and by course of law; in which latter case the rent-charge shall be apportioned. And as to the cases cited by the avowant's counsel from 1 Vern. and from [*397] Moseley's Reports they were not cases where the heir or devisee of the land chose to stand upon the strict legal doctrine of extinguishment, but applied to the court of equity for aid and assistance against the jointress, which was refused by that Court.

It is argued in the second place, that the devise of the land is expressly made over and above the rent-charge; and that such intention of the deviser ought

to prevail; but the question before us is not a question of intention, but a question as to the strict legal rights of the parties under the circumstances of the case.

It is then argued, that the devise is made under a power given under the same settlement which creates the rent-charge, and it is urged that the case must be considered the same as if the provisions of the will made in execution of the power had been inserted in the settlement itself; in which case it is contended, that if the grant of the rent-charge, and the conveyance of part of the land out of which such rent-charge issues, had been by the same deed, no extinguishment could reasonably be supposed to take place. No authority is cited for this position; and even admitting the law to be correctly stated, upon reference to the will, the devise in question does not appear to be made under the power of appointment reserved to the settlor in the event of his dying without issue, but to take effect out of the ultimate remainder in fee limited to him by the settlement: for the power recited in the will is the power to charge, and not any power to appoint by deed or will; the charge on the estate is therefore made in execution of the power so recited, but the devise of the lands is not made under any power at all, but is a direct devise of the land itself.

It is urged lastly, that whatever may be the effect of the devise as to creating an extinguishment, yet, the will is in effect a re-grant of the rent-charge of 200*l.*, as *it treats that rent-charge as still actually subsisting; for the devise of the rent-charge of 20*l.* is expressed to be "over and above what I [*398] have already settled upon her." But it is unnecessary to determine whether such construction of the will can be sustained or not; for if that construction be adopted, still the rent-charge of 200*l.* per annum cannot be supposed to issue out of those lands which by the will are expressly devised to the wife, but out of the residue of the lands from which it was made to issue in its original creation. It is not, therefore, the rent-charge described in the avowry, which is made to issue out of the manor and all the lands of Thelwall, for it issues out of the manor and all the lands, with the exception of those devised to the widow of the testator.

As to the annuity of 200*l.*, therefore, we think the issue upon the seisin of the rent-charge, as taken upon these pleadings, ought to be found for the plaintiff.

As to the rent-charge of 20*l.* first devised by the will of Thomas Pickering, inasmuch as the devise is so worded as to make the rent issue out of all the lands, save and except those devised by the same will to the wife, it is free from the objection taken as to the rent-charge of 200*l.* But the objection taken to the seisin of this rent-charge is, that although at first it is made a charge upon the realty, yet the proper construction of the codicils to the will is, to transfer it from the realty to the personal estate. We think, however, this is far from being clear; the construction of the will being quite compatible with the continuance of the rent-charge of 20*l.* per annum as a charge upon the land. Inasmuch, therefore, as the original charge on the land is clear, and the exemption of the land from this charge, and the transfer of it to the personalty is subject to considerable doubt and difficulty, we think it must be held still to continue a charge upon the land.

*The result is, that we think judgment ought to be given for the plaintiff, on the issue raised as to the seisin of the 200*l.* rent-charge; [*399] but for the avowant, as to the rent-charge for 20*l.* per annum.

Judgment accordingly.

BEDFORD and Others, Assignees of DANIEL AUSTIN, a Bankrupt, v.
BRUTTON and Others. Nov. 25.

Plaintiff and defendants were members of a joint stock company; plaintiff agreed to demise land to defendants as trustees for the company; defendants covenanted to pay

him rent; and by a separate deed, plaintiff and the other members of the company covenanted to indemnify the defendants for acts done by them as trustees :
Held, that plaintiff, notwithstanding he was a member of the company, might sue defendants on their covenant.

COVENANT. The plaintiffs, as assignees of Austin, declared, that by an indenture of the 25th of July, 1827, between Austin of the one part, and the defendants and Henry Parry, deceased, of the other,—after reciting that the defendants and Parry on behalf of themselves and the other members of a society called the British Building Society, had agreed with Austin to take on lease a parcel of ground described in the indenture, to build forty houses on, according to the stipulations thereafter contained,—Austin covenanted with the defendants and Parry, that when the houses should be built to the approbation of Austin, he would, at the request of the other parties to the indenture, grant a lease of the land and erections to such persons as they or the major part of the members of the society, for the time being, should require, at certain rents therein specified: that in consideration of the premises the defendants and Parry covenanted with Austin to pay him the rents until the leases should be granted: that by virtue of the indenture the defendants and Parry entered into the premises; but before the leases were granted, or ought to have been granted, failed to pay the rents.

[*400] The defendants set out the indenture upon oyer, by *which it appeared that there was a proviso for re-entry by Austin, in case the buildings were not finished by a certain specified time; and also that Austin should resume a portion of the land and make a corresponding abatement in the rents if forty shares in the society were not taken within a given period. They then pleaded that by another deed of the same date with the former, and made between the defendants and Parry of the one part, and Austin, and the several other persons whose names and seals were thereto subscribed and set, of the other part, and also by certain articles of agreement (set out in the plea and referred to and confirmed by the deed), Austin and the several other persons mentioned in that deed, had formed themselves into a society called the British Building Society, for the purpose of erecting a number of houses, not exceeding forty, to be paid for out of a fund to be raised by the monthly subscriptions of the members: that Austin had agreed to demise the land on which the houses were to be built, at certain stipulated rents, to be paid at certain stipulated times; and that the agreement for the leases should be made to and executed by the trustees of the society in trust for the benefit of the members thereof, until the completion of the same: that the deed contained a covenant on the part of all the members of the society, that for the better indemnifying the trustees, each of the members would, when called upon at their general meetings (to be held quarterly), do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in execution of the trusts.

The plea then averred, that the society in the indenture in the plea mentioned, and the society in the articles of agreement in the plea mentioned, were one and the same society; that Austin was, during all the time aforesaid, a [*401] member thereof; and that the defendants *and Parry entered into and made the covenants in the declaration mentioned, by and on behalf of themselves and Austin and others, the members thereof as aforesaid, and for their use and benefit, and at their request and not otherwise.

In a second plea the defendants alleged, that at the time of the making the indenture in the declaration mentioned, Austin was a member of the Building Society in the declaration mentioned, and held and was possessed of divers, to wit, four shares therein: that the defendants made and entered into the several covenants therein contained by and on behalf of themselves and Austin and others the members thereof, and as trustees for themselves and Austin and the

other persons as aforesaid, and not otherwise: and that Austin and the said other persons were jointly liable with the defendants to pay the damages, if any, to be recovered by reason of the alleged breach of the said covenant in the declaration mentioned.

The last plea stated, that the defendants and Austin were, among others, members and shareholders of the British Building Society in the declaration mentioned; that the defendants were duly chosen and appointed trustees by and on behalf of Austin and the several other members of the said society; and that the defendants executed the indenture in the declaration mentioned, as such trustees: that by a certain indenture made and entered into on the 25th of July, 1827, between the defendants of the one part, and Austin and the several other persons whose names and seals were thereunto subscribed and set, of the other part, Austin did, for himself, his executors, administrators, and assigns, covenant, promise, declare, and agree, with and to the defendants, their executors, administrators, and assigns, that, for the better protecting and indemnifying the trustees of the society from and against all costs, damages, and expenses which they or any or either of them might be put to in and about the execution of the trusts thereby reposed in them, *he would, when called upon at any of their general meetings, [*402] do and perform all such acts as might be necessary fully and completely to indemnify the said trustees from all loss or damage they might sustain or be put to in and about the execution of the said trusts. That the damages sought to be recovered by reason of the supposed breach of covenant in the declaration mentioned were incurred by them, if any, as such trustees as aforesaid within the true intent and meaning of the said indenture.

Upon demurrer by the plaintiffs to the first of these pleas, and by the defendants, to immaterial replications to the second and last,

R. V. Richards, for the plaintiffs, argued that the pleas were ill. In order to determine whether one deed shall operate as a release of another, we must inquire whether the parties are the same; whether the damages to be recovered are the same; and whether it was the intention of the parties that the deed should so operate. 2 Wms. Saund. 47, b, note. Thus, when an obligee covenants not to sue at all, the obligor, in order to avoid circuity of action, may plead the covenant as a release. In *Lacy v. Killigrew and Kynaston*, Holt's Rep. 178, 12 Mod. 548, 1 Ld. Raym. 688, 2 Salk. 575, a perpetual covenant not to take advantage of a covenant was held to operate as a release. *Gawden v. Draper*, 2 Ventr. 217 and *Cage v. Acton*, 12 Mod. 288, establish the same principle. But in *Dean v. Newhall*, 8 T. R. 168, it was held, that an obligee might sue one of two joint and several obligors, notwithstanding a covenant not to sue the other. And in *Hutton v. Eyre*, 6 Taunt. 289, a covenant not to sue one of two joint debtors was held not to discharge the other. *Solly v. Forbes*, 2 B. & B. 39, is to the same effect. In *Rose v. Poulton*, 2 B. & Adol. 822, one of the parties to a *deed was both covenantor and covenantee; but upon his death, it was held, that the intent being clear, the surviving [*403] covenantees might sue on the deed; and *PARKE, J.*, thought the action would have been maintainable in his life.

Now, here the deed on which the action is brought was executed on the same day as the deed set up in answer by the defendants, and it cannot be supposed that so soon after the execution of the first deed for the payment of rent till the houses should be built, the covenantee would release the defendants before a single stone was laid. On the contrary, the main object of the second deed was to insure the completion of the building, and make the first deed effectual.

Kelly, for the defendants. Upon the deeds set out on oyer, the plaintiff cannot have the judgment of the Court. It is unnecessary to discuss whether or not the second deed operated as a defeasance or release of the first; for upon these pleadings it appears that Austin was in partnership with the defendants,

and that this is in effect an action by one partner against another, to recover damages out of the partnership fund. The second deed is not pleaded as a release, but merely to show the existence of the partnership; and whether it amounts to a release or not, the principle on which a covenant not to sue may be pleaded as a release, applies here. GIBBS, C. J., says in *Hutton v. Eyre*, "the principle on which the covenant not to sue operates as a release is, to avoid circuity of action, but it goes no further;" and with a view to avoid such circuity, the Court, in that case, looked to the equitable situation of the parties. Here, if Austin or his assignees were to recover against the defendants for rent, the defendants would have a cross action against Austin for contribution under his [*404] covenant to indemnify them as trustees for the society. *The parties to the two deeds are substantially the same; and so are the damages to be recovered; and even in *Rose v. Poulton* it was held, that if it had appeared the plaintiff must himself have contributed to the damages, the action could not have been sustained. The effect of the two deeds here is, an engagement by a company, of whom the plaintiff forms one, to pay him a rent for land let by him to the company; he is, therefore, at once suing himself, and seeking in an action at law to recover damages out of a partnership fund in which he is himself a partner. But one partner cannot sue a firm of which he is a member. *Bosanquet v. Wray*, 6 Taunt. 597.

Again, the defendants have a complete answer in a court of Equity; and in *Bottomley v. Brooke*, cited in *Winch v. Keeley*, 1 T. R. 621, which was debt on bond, the defendant pleaded that the bond was given for securing 100*l.* lent to the defendant by one E. Chancellor, and was given by her direction to the plaintiff in trust for her; and that E. Chancellor before the action brought, was indebted to the defendant in more money than the amount of the bond; to that there was a demurrer, which was withdrawn by the advice of the Court. So that the Court there did not look to the person legally entitled, but to her who was beneficially interested in the bond. The authority of this case was afterwards recognised in *Rudge v. Birch*, cited in *Winch v. Keeley*, 1 T. R. 621, where, to debt on bond, the defendant pleaded that the bond was given to the plaintiff in trust for A., for a debt due from the defendant to A., and that A., at the time of exhibiting the plaintiff's bill, was indebted to the defendant in more money. The plaintiff demurred, and the Court, on the authority of the case of *Bottomley v. Brooke*, held that to be a good plea.

*[405] 209. The same principle was acted on in *Goddard v. Hodges*, 3 Tyrw. *Cur. adv. vult.*

TINDAL, C. J. The point raised upon the pleadings in the present action is this, that it appears from the first special plea, that the action is virtually and substantially an action of covenant, brought by the assignees of one partner, who has become bankrupt, against three of his partners, to recover damages against them, to which the plaintiff himself must be contributory if he succeeds; and undoubtedly, if this account of the situation of the parties is correct, the action would not be maintainable at law. But upon looking at the deed upon which the action is brought, and the deed set out in the defendant's plea, together with the articles referred to in the latter deed, and which may be considered as incorporated therein, we are of opinion there is no ground for the objection which has been made.

The deed upon which the declaration proceeds, contains a covenant under the seal of the three defendants and one Henry Parry, since deceased, with Austin before his bankruptcy, that they would pay to Austin the several yearly rents in the indenture mentioned, until he, Austin, should grant the leases which he had covenanted by that deed to grant. Here, therefore, is an express covenant for payment of a certain sum under the seal of the defendants, and it is unnecessary to observe that this forms the fit and proper ground of an action of covenant in a court of common law, unless sufficient matter is brought forwards in the plea to avoid it.

Now the substance of the first plea is this, that by another deed of the same date with the former, and *made between the defendants and Parry of [406] the one part, and Austin and the several other persons whose names and seals were thereto subscribed and set of the other part, and also by certain articles of agreement set out in the plea, and referred to and confirmed by the deed, Austin and the several other persons mentioned in that deed had formed themselves into a society called the British Building Society, for the purpose of erecting a number of houses not exceeding forty, to be paid for out of a fund to be raised by the monthly subscriptions of the members; that Austin had agreed to demise the land, on which the houses were to be built, on certain stipulated rents, and that the agreement for the leases should be made to and executed by the trustees of the society in trust for the benefit of the members thereof, until the completion of the same. The deed set out in the plea then contains a covenant on the part of all the members of the society, that, for the better indemnifying the trustees, each of the members would, when called upon at their general meetings, do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in execution of the trusts.

The first observation that arises on this state of the pleadings is, that if we hold the action to be not maintainable, we defeat the very object and intention of the parties. The object was that Austin, who was an equal contributor to the common funds of the society by his monthly subscriptions, with the other members, and who, besides that contribution, gave up his land for the general purposes of the society, should receive an annual remuneration for the use of his land in the shape of rent, separate and distinct from his profits as a member of the society; and in order to avoid the difficulty of any direct agreement between himself and each of the other members, he covenants with the trustees to *grant the leases when the houses shall be finished, and they [407] covenant with him, on the other hand, to pay certain annual sums in the mean time. Unless, therefore, some unanswerable objection can be brought forward against the maintenance of this action upon the covenant, the intention of the parties will be best effected by allowing it to be maintainable. It is objected that the damages recovered for the breach of covenant will be borne out of the common fund in which Austin is interested. The answer is, that the damages are, in the first instance, to be borne by the defendants, who are to be indemnified at a future and uncertain time in such manner as the members of the society, at a general meeting, shall direct. The rent is reserved at certain stipulated times,—the meetings of the society are to be held quarterly. It never was intended that the landlord should wait till the quarterly meeting, when the day of payment occurred before it.

It is argued, that to avoid circuity of action, the present action is not maintainable; for if the plaintiffs recover on the covenant made with Austin, the defendants may recover back again from him the damages they have sustained. But this is not so, for each member has covenanted only to do what he shall be called upon to perform at a general meeting, in order to indemnify the trustees. The agreement, therefore, between Austin and the defendants, differs from an agreement between partners in two important points—the damages, when recovered by the plaintiff, do not go to any partnership fund, but are his own separate property;—and his damages are not to be paid out of any partnership fund, but by the trustees on their personal contract.

The cases of *Rudge v. Birch*, and *Bottomley v. Brooke*, referred to by the defendants' counsel, go no further than this, that the courts of law will so far take notice of the existence of a trust, as to let in against the plaintiff, *the [408] trustee, that which would be a valid defence against the *cestui que trust*. But those cases have never been extended; and they certainly furnish no authority for considering the *cestui que trusts* the defendants upon the record, where such a proceeding would defeat the whole object of the parties. And the

case of *Andrews v. Ellison*, 6 B. Moore, 199, is a strong authority to show that this action is maintainable: there, in an action of covenant upon a policy under the seal of the defendants, it appeared upon the record, that the defendants were jointly interested with the plaintiff in the funds which were ultimately to satisfy the plaintiff's loss by fire; and it was held that the defendants were liable on their express covenant that the plaintiff should be entitled to a remuneration out of the society's funds in case of loss by fire. Upon the whole, we think the present action maintainable, and give judgment for the plaintiffs.

Judgment for the plaintiffs.

BLOUNT v. PEARMAN. Nov. 6.

A lease contained a demise of two separate farms, with two *habendums* differing from each other; a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm some to the other. The lessee entered on the whole at one time: Held, that one *ad valorem* stamp for the amount of both rents was sufficient.

DEBT by lessor against lessee for a penalty incurred by a breach of covenant. A verdict having been found for the plaintiff,

Ludlow, Serjt, moved, upon leave given at the trial, to enter a nonsuit, on the [*409] ground that the lease "containing the covenant had no sufficient stamp, and, therefore, ought not to have been received in evidence.

The lease contained a demise of two separate farms, with two *habendums*, differing from each other in duration; a reservation of two distinct rents—one in respect of each farm; and separate covenants, some applying to one farm, and some to the other. The lessee entered on the whole at the same time. There was one *ad valorem* stamp, calculated upon the united amount of the two rents.

Ludlow contended that there should have been two stamps; one for each of the rents reserved, which would have yielded a larger amount of duty; or, at all events, the single stamp should have been for that larger amount. The lease contained in effect two demises; and if the higher rate of duty might thus be eluded, there would be no limit to the number of demises which might be contained in a single instrument, for the purpose of defrauding the revenue.

In *Boase v. Jackson*, 3 B. & B. 185, where a single stamp was held sufficient upon a lease of a slate pit at B. and stone quarries at C., there was only one *habendum*; and in *Boster v. Cowling*, 7 Bingh. 456, *ALDERSON, J.*, said the lease was held to be properly stamped, "because it appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease."

TINDAL, C. J. I am not able to say, with a sufficient degree of certainty, that the case of *Boase v. Jackson* has been wrongly decided; or, sufficiently to distinguish this case from that, to grant a rule for entering a nonsuit. This appears to me to be, virtually and substantially, one transaction: there is one [*410] landlord and one tenant; *the whole premises are demised together in one contract, at one and the same time. It is true, there are two rents reserved: one in respect of one part of the premises demised, another in respect of the other; and that the terms upon which these premises are granted, differ. But I think we should be interfering with many transactions which are perfectly fair in the ordinary case of landlord and tenant, if we were to grant the rule on that ground. It is no uncommon thing that different parts of premises should be entered upon at different periods of the year,—the arable land at one time, the meadow and pasture ground at another, and the building at a third; and the *habendum* is to have and to hold the arable from such a time to such a time, and the meadow from such to such time. But unless the parties mean that these should be separate transactions, one stamp must be deemed sufficient.

The rest of the Court concurring, a rule as to this point was Refused.

***REGULA GENERALIS.**

[*411]

WHEREAS inconvenience hath arisen by reason of the attorneys practising in this court not having made any entry of their admission as attorneys, and of the taking out of their annual certificates in the book kept for that purpose by the clerk of the warrants :

AND WHEREAS, by the customs and rules of this court every attorney ought to pay to the clerk of the warrants or his deputy, his termage fees, being eight pence in every term, one moiety of which forms the fund for the support of the criers of this court :

AND WHEREAS, complaint has been made to us, that of late such payments have been much neglected :

IT IS ORDERED, That every person admitted an attorney of this court, not having already entered such his admission, and also every attorney hereafter to be admitted, shall forthwith enter his admission, and shall cause his annual certificate to be on or before the first day of Easter term in every year, entered with the said clerk of the warrants, which entries shall in all cases where the annual certificate has been already entered in one of the courts, be made without fee or reward ; and shall at the same time pay and discharge all his arrears of termage fees.

N. C. TINDAL.

S. GASELEE.

S. VAUGHAN.

I. B. BOSANQUET.

END OF MICHAELMAS TERM.

NEW CASES
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

Hilary Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were,

TINDAL, C. J.,
PARK, J.,

VAUGHAN, J.,
BOSANQUET, J.

DABBS v. HUMPHRIES. Jan. 18.

Sheriff's costs upon interpleader,

UNDER a *fi. fa.* against Humphries, the sheriff of Sussex, on the 25th of February, 1834, seized, among other things, goods of Firminger and Aylmore in the house of Humphries, without any express instructions from Dabbs.

On the 7th of May, the sheriff, without recurring to Dabbs, applied to this court under the interpleader act; when an issue was directed between Dabbs on the one side, and Firminger and Aylmore on the other.

On the 28d of May, by the consent of all parties, the goods were sold under the *fi. fa.*, and the produce of them paid into court, to abide the order of the Court.

[*413] *On the 7th of July, Dabbs abandoned all claim to the goods; and under the order of a judge, 11*l.* 2*s.* was paid out of court to Firminger, and 12*l.* to Aylmore, in respect of their several claims, leaving in court only the sum of 11*l.* 6*s.*

Clarkson, on the part of the sheriff, obtained in Trinity term a rule, calling on Dabbs, Firminger, Aylmore, and Humphries to show cause why this 11*l.* 6*s.* should not be paid out of court to the sheriff, towards covering the expenses incurred by the sheriff in the sale of Humphries's goods seized under the *fi. fa.*; and why the plaintiff should not repay the sheriff the sum paid to the auctioneer for conducting that sale, together with 15*l.*, the expenses of keeping possession of the goods, and the sheriff's costs of the application on the 7th of May, and on the present occasion.

Bompas, Serjt., on the part of Firminger and Aylmore, contended that if the sheriff were entitled to any of these costs, he must seek them at the hand of Dabbs.

Barstow, for Dabbs insisted, that under the circumstances of the case, the sheriff was entitled to no costs. He had taken the goods upon his own responsibility, in the discharge of his own duty, and without being prompted by Dabbs. He should have proceeded with more caution; and, at all events, should have applied to Dabbs for instructions, before he incurred the expense of coming to this Court.

Clarkson. Dabbs having allowed an issue to be raised in respect of goods to which he knew he had no claim, and having omitted to put in his disclaimer till two months after the rule of the 7th of May, ought at all *events [*414] to pay the sheriff the expenses of sale and of keeping possession.

TINDAL, C. J. The justice of the case requires, that this rule should be made absolute for allowing the sheriff the costs of the sale, and of keeping possession from the 7th of May till the time of the sale. And under the circumstances of the case, those costs must come from the pocket of the plaintiff. From the time of the application to this Court on the 7th of May to the time of the sale, the sheriff clearly became the agent of the plaintiff, for the object of turning the goods in question into money, with a view to the payment of the plaintiff's debt. The sheriff, also, and Firminger and Aylmore, are entitled to receive from him the costs of this application.

The rest of the Court concurred.

Rule absolute accordingly.

CRANCH v. WHITE. Jan. 14.

R. being employed to procure a bill of exchange to be discounted for plaintiff, instead of doing so, endorsed it, and placed it in the hands of defendant, who was clerk to a creditor of R. Defendant carried the bill to R.'s account with his creditor, and though afterwards apprised of the circumstances under which R. held the bill, refused to restore it: Held, that defendant was liable to plaintiff in trover.

TROVER for a bill of exchange of 200*l.*, dated July 13th, 1833, drawn by the plaintiff on and accepted by James Plimpton, payable four months after date: and endorsed by the plaintiff, by Boyn and Co., and by Roberts.

The defendant acted as clerk to his mother, who carried on the business of a coal-merchant. Roberts, *who was employed by the plaintiff to get the bill discounted, owed the defendant's mother a considerable sum for [*415] coals, and instead of procuring the bill to be discounted, endorsed it, and placed it in the hands of the defendant, who carried it to the credit of Roberts's account with his mother.

The defendant was afterwards apprised that Roberts had only been employed to get the bill discounted, and was requested to give the bill up; but he refused to do so, saying he had placed it to his mother's account.

The acceptor afterwards refused payment to the defendant or his mother.

At the trial before TINDAL, C. J., a verdict was found for the plaintiff, which *Atcherley*, Serjt., moved to set aside, on the ground that the action ought to have been brought against the mother of the defendant, and not against the defendant; that if the plaintiff had declared in assumpsit on an alleged contract to discount the bill or to redeliver it, the action must have been against the mother the principal, and not against the defendant, who was only her clerk, and known at the time to Roberts to be so; and that the plaintiff by declaring in trover instead of assumpsit, could not vary the liability of the parties: *Powell v. Layton*, 2 N. R. 365; *Jennings v. Rundall*, 8 T. R. 335. Secondly, that the refusal to deliver up the bill, did not amount to evidence of conversion of the bill by the defendant; for he had not the legal control over the bill, which was in his custody merely as clerk or agent, and not on his own account. If this bill had been paid by the acceptor, an action for money had and received would not have lain against the defendant, it must have been brought against the mother. Thus in *Stephens v. Badcock*, 3 B. & Adol. 354, an attorney *who was [*416] accustomed to receive certain dues for the plaintiff his client, went from

home leaving his clerk at the office. The clerk, in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a receipt signed by the clerk for his master. The master was in bad circumstances when he left home, and never returned; but it did not appear that his intention so to act was known at the time of the payment to the clerk. The clerk afterwards refused to pay the money over to the client, and on assumpsit brought against him for money had and received, it was held, that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it; the master on the other hand, being answerable to the client for the sum received by the clerk.

In the present case there is no privity of contract between the plaintiff and defendant; and if the defendant be not liable in assumpsit, neither is he in trover.

TINDAL, C. J. Two objections have been made to the verdict in this cause, which has been given for the plaintiff: first, that according to the facts proved at the trial, the action has been misconceived, and should have been assumpsit instead of trover; and secondly, that even if trover lies, the action should have been brought against the defendant's mother, for whose benefit the note was received.

With respect to the first objection, that the action should have been conceived in contract instead of tort, let us see what are the facts. The defendant acted as clerk to his mother, who carried on the business of a coal-merchant: Roberts, who was employed by the plaintiff to get the bill discounted, owed to the defendant's mother a considerable sum for coals; and instead of procuring the bill [*417] to be discounted, endorsed it and *placed it in the hands of the defendant, who carried it to the credit of Roberts's account with his mother. The defendant was afterwards apprised that Roberts had only been employed to get the bill discounted, and was requested to give the bill up; but he refused to do so, saying he had placed it to his mother's account. The acceptor afterwards refused payment to the defendant or his mother.

What evidence is there here of any contract on the part of the defendant? But it is said that if the acceptor had paid the bill, the defendant's mother would have been liable to the plaintiff in an action of assumpsit for money had and received; and that a plaintiff cannot, by changing the form of action, deprive a defendant of any advantage to which he is fairly entitled. I agree in the latter proposition. In *Powell v. Layton*, it was held, that to an action on the case in the form of tort, against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant might plead in abatement that the goods were delivered to him and his partners jointly, and that his partners were not sued. So in *Jennings v. Runall*, it was held that a plaintiff could not convert an action founded on a contract into a tort, so as to charge an infant defendant; and that, therefore, where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, &c., wrongfully and injuriously rode the mare so that she was damaged, &c., the defendant might plead his infancy in bar, the action being founded on a contract.

Those two cases, however, do not decide that the form of action had, under the circumstances, been misconceived, and that the plaintiff, as it is contended [*418] here, ought to have been nonsuited, but merely that the *defendants were entitled to be let into the same defence as if the actions had proceeded on the contract. What difference would it have made to the defendant in this action,—what better answer would he have had to the charge made against him, even if the plaintiff had declared upon an implied contract to redeliver the bill?

Then, if the action be not misconceived in trover, has the defendant been improperly sued instead of his mother? The general rule is, that in actions of

tort all persons concerned in the wrong are liable to be charged as principals. In *Perkins v. Smith*, 1 Wils. 328, it was held that trover lay against a servant who disposed of goods the property of another to his master's use, whether he had any authority or not from his master for so doing. It was objected that the action was improperly brought against the servant Smith, who acted wholly in that matter for his master, and that the conversion was found to be to the use of his master, which was the gist of an action of trover;—that applies to the point now under discussion;—and LEE, C. J. said, “the point is, whether the defendant is not a tort-feasor, for if he is so, no authority that he can derive from his master can excuse him from being liable in this action.” To apply that doctrine here, the son standing in his mother's shop, cannot justify a wrong under any authority from his mother.

Next, it is said there was no evidence of any conversion. But a demand and refusal, when not met with any counter evidence, amounts to a conversion. Lord COKE says, 10 Rep. 56, “That if A. brings an action against B. upon trover and conversion of plate, jewels, &c., and the defendant pleads not guilty, now it is good evidence *prima facie* to prove a conversion, that the plaintiff requested the defendant to deliver them, and he refused; and, *therefore, [*419] it shall be presumed that he has converted them to his own use.” Here the note was bailed to the defendant, and his refusal to return it, on demand, was evidence whence the jury might find a conversion. So in 1 Roll. Abr. 5, l. 45. “*Si home trove mes biens et conuast eux destre mon biens, et jec eux demand de luy, et il refuse et denie a eux deliverer a moy, ceo est un conversion en ley.*”

According, therefore, to the facts in evidence before the jury, I think this action was maintainable; that it was properly brought against the defendant; and that any justification of his conduct as the agent of his mother falls to the ground on the authority of *Perkins v. Smith*, which has been confirmed in *Stevens v. Elwall*, 4 M. & S. 259.

PARK, J. The effect of the decision in *Powell v. Layton* is only that the defendant shall not, by the mere form of action, be deprived of any just answer he has to the plaintiff's claim. And in all cases adverted to by the Chief Justice, the circumstances were more favorable for the defendant than in the present action. In *Stevens v. Elwall*, LE BLANC, J. was, at the trial, impressed with the notion which has now been advanced on behalf of the defendant; but he afterwards acknowledged he had been mistaken. And Lord ELLENBOROUGH said, “The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion:”—Here the defendant acted with full knowledge of the circumstances, and yet persisted in holding the note in discharge of Robert's debt *to his mother:—“For a person is guilty of a conversion who intermeddles with my property [*420] and disposes of it; and it is no answer that he acted under authority from another, who had himself no authority to dispose of it.”

That was a much harder case against the defendant than the present; but it has always been recognised as law, and was in the preceding decisions, confirmed in *Alexander v. Southey*, 5 B. & Ald. 247.

VAUGHAN, J. I think the rule ought to be refused. This is an action of trover, and all the requisites of such an action have been complied with. There can be no doubt that the note was the property of the plaintiff, that it came into the hands of the defendant, and that he refused to restore it, or apply it in the manner required by the owner. And as to his being a servant to his mother, if he has a knowledge of what was done, he is liable to the plaintiff.

In *Stevens v. Badcock*, the clerk had received various sums from the plaintiff, and with the plaintiff's assent had carried them to his master's account, so that they could no longer be distinguished by any earmark, and the action was

in assumption; but if it had been a bag of money, and he had refused to deliver it, it had been held in trover a conversion.

In *Saxby v. Wynne*, Starkie, Evid. 842 (last edit.), where A. deposited goods with B., and then sold them to C., and afterwards directed B. to deliver the goods to D.; it was held that B. was not guilty of a conversion in delivering them to D. But there, A. was the rightful owner when he deposited the goods with B.; whereas in the present case, Roberts had never any right to endorse the bill to the defendant.

[*421] *BOSANQUET, J.* Here there was a wrongful appropriation of the plaintiff's property, with a knowledge on the part of the defendant that the appropriation was wrongful, and that amounts to a conversion.

As to the form of action, assuming that an action on contract would lie, the only consequence would be, not to exonerate the defendant, but merely to enable him to object to the non-joinder of his mother, as defendant.

Rule refused.

LAYTHOARP v. BRYANT. Jan. 16.

Plaintiff put up to sale by auction a lease of premises, which he occupied as assignee of the lease, stipulating not to produce any title prior to the lease. In an action against a purchaser for not completing his purchase, in which action plaintiff declared he was possessed of the lease, Held, the defendant having rejected the abstract, that plaintiff was bound to prove the execution of the lease by calling the attesting witness, and that it was not sufficient to prove the assignment to plaintiff.

THE declaration stated that the plaintiff on the 3d December, 1833, in London, by one Thomas Ross, his auctioneer and agent in that behalf, caused to be put up and exposed to sale by public auction a certain lease of a certain house, shop, and premises, for a certain unexpired term of twenty-five years from Lady-day then last, upon the subject of the following, amongst other conditions of sale: that is to say, that the purchaser should have and accept an assignment of the lease under which the vendor held the premises,—and which agreeably to a clause in the lease, was to be furnished by the solicitor for the time being of the original ground landlord, at the purchaser's expense, on completing the purchase agreeably to the said conditions,—and should not require the production of any title prior to such lease: that the purchaser should pay [*422] into the hands of the *auctioneer twenty-five per cent. in part of the purchase-money; that if he should fail to comply with the conditions of sale, the deposit-money should be forfeited to the vendor, who should be at liberty to proceed to another sale without notice to the purchaser; that whatever deficiency might arise, together with all charges attending the same, should immediately after such result, be made good by the defaulter; and in case of the non-payment of the same, the whole should be recoverable by the vendor, as for liquidated damages, without the necessity of previously tendering an assignment to the purchaser. That, on the exposure to sale of the premises on the 3d of December 1833, at, &c. the defendant became and was the highest bidder for, and then, and there became, and was in due manner declared to be, the purchaser of the premises with the appurtenances as aforesaid, at and for a certain large sum of money, to wit, the sum of 441*l.*: and thereupon the defendant afterwards, to wit, on, &c., at, &c., signed a memorandum of agreement in writing, that he had that day purchased the premises for the sum of 441*l.*, subject in every respect with the said conditions of sale. That the defendant then and there, in consideration of the premises, and that the plaintiff, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to perform and fulfil all things in the said conditions of sale contained on the part of the vendor to be performed and fulfilled, undertook, and then and there faithfully promised the plaintiff, to perform and fulfil everything in the said conditions of sale on his part and

behalf, as such purchaser as aforesaid, to be performed and fulfilled. That although the plaintiff was possessed of such lease as aforesaid, for the said unexpired term in the conditions mentioned, and did afterwards, to wit, on, &c., at, &c., produce such lease to the defendant, and *then and there requested [*423] the defendant to accept an assignment thereof; and although the then solicitor for the original ground landlord was always from the time of such sale hitherto ready and willing to, and did afterwards, to wit, on, &c., at, &c., furnish and prepare an assignment of the said lease; and although the plaintiff was always ready and willing to execute such assignment, and thereby to assign the said lease to the defendant at the expense of the defendant, on his paying the said purchase-money according to the said terms and conditions of sale, to wit, at, &c.; and although the plaintiff was always after the said sale ready and willing to perform the said conditions of sale in all things therein contained on his part to be performed and fulfilled; whereof the defendant then and there had notice; yet the defendant, not regarding the said terms and conditions of sale, nor his said agreement, or promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiff in that respect, did not nor would, although he was afterwards, to wit, on, &c., at, &c., requested so to do, accept such assignment of the said lease or pay or cause to be paid to the plaintiff the residue of the said purchase-money or any part thereof; but then and there wholly neglected and refused so to do, and then and there wholly refused then or at any other time to complete the said purchase. That thereupon the plaintiff afterwards, to wit, on, &c., according to and by virtue of the said conditions of sale, again exposed the said tenements to sale by public auction, under and subject to certain terms and conditions of sale, and the same were then and there at such last-mentioned exposure to sale as aforesaid resold for a much less price or sum of money than the said price or sum for which the same had been sold to the defendant, to wit, for the sum *of 194*l.* 5*s.*; whereby there then and there was a deficiency between the said price for which the tenements were so sold to [*424] and agreed to be purchased by the defendant, and the said price for which the same were so sold on such resale, to a large amount, to wit, to the amount of 246*l.* 15*s.*; and the charges attending such resale as aforesaid, then and there amounted to a certain other large sum of money, to wit, the sum of 28*l.* 0*s.* 10*d.* yet the defendant, further disregarding the said conditions of sale, and his said promise and undertaking, had not, although he was afterwards, to wit, on, &c., at, &c., requested by the plaintiff so to do, as yet paid the said sums of 246*l.* 15*s.* and 28*l.* 0*s.* 10*d.*, or either of them or any part thereof, but so to do had hitherto wholly refused, and still did refuse, to wit, at, &c.

The defendant pleaded the general issue, on which issue was joined.

At the trial before PARK, J., it appeared that the defendant had purchased the premises for 441*l.*, at an auction, on the 3d of December, 1833; that he signed a memorandum of the purchase, but being known to the auctioneer was not required to pay any deposit. On the 12th of December, the vendor's solicitor sent him an abstract of the vendor's title, when the defendant, saying he had only bid at the vendor's request, refused to complete the purchase, and returned the abstract. An assignment of the lease, prepared by the solicitor of the ground landlord, was then sent to the defendant; this he also returned, still refusing to complete the contract, but making no objection to the title.

The vendor thereupon sold the premises again for 194*l.* 5*s.*, and brought this action to recover the difference between that sum and 441*l.*, the price which the defendant had agreed to pay.

The plaintiff proved that he had himself occupied the *premises [*425] under an assignment of the original lease: the execution of this assignment he proved by an attesting witness, but no proof was offered of the execution of the lease itself, the plaintiff relying on *Thompson v. Miles*, 1 Esp. 184, where, in an action for refusing to complete the purchase of a house with a right of way, it was held that the plaintiff should not be put to prove the execution of the deeds

granting the right of way. But *Crosby v. Percy*, 1 Campb. 303, being cited in answer to this, the learned Judge directed a nonsuit, on the ground that proof of the due execution of the lease was essential to the plaintiff's case.

Bompas, Serjt., having, pursuant to leave given at the trial, obtained a rule nisi to set aside this nonsuit and enter a verdict for the plaintiff instead,

Wilde, Serjt., and *Busby* showed cause. The plaintiff's occupation under the assignment was not sufficient to exonerate him from proving the execution of the lease of which he had averred himself to be in possession. Even the acknowledgment of the lessor that he had executed it, would not have dispensed with the regular proof of execution: *Johnson v. Mason*, 1 Esp. 89. In *Vacher v. Cocks*, 1 B. & Adol. 245, it was held that a party producing, at the trial of a cause, a deed which had been some months in his possession, was not excused from proving the execution because he received such deed from the adverse party, who formerly claimed a benefit under it. And in *Crosby v. Percy*, which is subsequent to *Thompson v. Miles*, it was held that an assignee of a lease, to show his interest in the premises, was bound to prove the execution of the lease, and all the mesne assignments. **Purvis v. Rayer*, 9 Price, [426] 488, is also an authority that, in an action on the sale of a lease, the execution of the lease must be proved; and it may be inferred that the plaintiff in this case contracted to give such proof, since he stipulates not to be called on to prove any title prior to the lease. The only exceptions to the strict rule as to the proof of deeds are where the instrument is more than thirty years old, and where, upon the requisition of one party, it is produced by his adversary, who takes an interest under it: *Pearce v. Hooper*, 3 Taunt. 60.

Bompas and *Steer* in support of the rule.

The question in *Purvis v. Rayer* was, whether the plaintiff should produce, not whether he should prove the instrument in question. In *Thompson v. Miles*, Lord KENYON said, "He would never allow it, that where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession had accompanied them;" he therefore admitted them without proof of the execution. And that case was not referred to in *Crosby v. Percy*: nor was *Nash v. Turner*, 1 Esp. 217, where it was held, that where there had been an assignment by deed, it was sufficient to prove the assignment by the subscribing witness, without calling the witness to the original deed; and Lord KENYON said, "that it was sufficient to prove by the subscribing witness the execution of the assignment, for the assignment having adopted the original deed in all its parts, it became as one deed, and proof of it was therefore sufficient for the whole."

*The authority of *Thompson v. Miles* is adopted in the treatises, as [427] furnishing the true rule of practice, 2 Phill. Evid. 87 (2d edit.).

TINDAL, C. J. This case may be decided on the simple circumstances before the jury, without laying down any general rule as to the proof in cases of this kind, or militating against the doctrines laid down in any of the cases that have been cited.

Generally speaking, on occasion of purchases of this nature, an abstract is delivered, on which a correspondence or communication by word of mouth takes place; and in most cases, the question, if any arises, is on the law as it affects the title disclosed. Under such circumstances, a party having admitted the deeds to be authentic, and the legal effect of them as to title being the only matter in dispute, is not permitted to turn round at the trial and require proof of the genuineness of the deeds themselves.

In the present case, nothing has taken place but a bare delivery of the abstract; no correspondence or communication on points of title; nothing which shows an intention or has the legal effect on the part of the defendant of admitting the genuineness of the deed.

The question, therefore, is, whether when the defendant is called on to complete the purchase of a lease of which the plaintiff declares himself to be in possession, the plaintiff is not bound to substantiate that allegation by the ordinary mode of proof.

In actions on the sale of chattels, bare possession is, generally speaking, *prima facie* evidence of property; but in the case of leasehold estates, the lease is only a symbol of possession; and according to the rules of our law the genuineness of that symbol must be established *in a particular way, [*428] namely, by calling the attesting witness to prove the due execution, unless the deed be of a certain age. If the plaintiff fails to do that, he loses the very stepping-stone of his ground of action.

It would have been easy for the plaintiff to have provided in the conditions of sale, that no such proof should be required; but as he has imposed no such condition, his case falls within the general rule which regulates the proof of deeds. To that rule there appear to be but two exceptions: one I have already adverted to; the other is, that where an adverse party produces, on notice, a deed under which he claims an interest it may be read in evidence against him, without proof of execution. Here the deed is not produced as evidence against the plaintiff, but as the only evidence for him.

VAUGHAN, J. My mind has fluctuated during the argument, but I think we may decide in this instance on the circumstances of the particular case, without reference to the decisions which have been cited on either side. No doubt there are great authorities both ways; *Magno se judice quisque tuetur*; Lord KENYON having said, "he never would allow it, that where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds, deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession had accompanied them;" and MANSFIELD, C. J., having held that the lease and all the mesne assignments must be proved.

But here the plaintiff has failed to establish the first allegation in his declaration, the possession of a valid lease.

*BOBANQUET, J. This case is not without its difficulties, arising out of the decisions which have been referred to. But it is not necessary [*429] for us to decide the point discussed in those cases. The instrument which the plaintiff here has failed to establish in proof is the foundation of his action—the very thing sold. In an action arising out of a sale, the plaintiff must commence by showing his possession of the thing sold. Here he has sold a lease; he ought, therefore, to have shown, in the ordinary way, that he was possessed of the lease he proposed to sell. We do not say that where he holds the lease himself he is bound to prove all the mesne assignments; but he ought to show that the lease is a valid subsisting instrument, that being the very subject of the sale. I think he ought to have shown this independently of the conditions of sale, which appear to me to have only the effect of dispensing with the production of the landlord's title.

PARK, J. The cases which have been cited from Espinasse and Campbell are unsatisfactory, the circumstances under which they were decided not being fully stated. But when a party seeks to recover on the sale of a lease of which he avers himself to be in possession, if he fails to show, in the usual way, that he is legally in possession of a valid instrument of demise, he fails to establish the very groundwork of his declaration, and must then submit to a nonsuit. And I confess, that in this case, I place considerable reliance on the language of the conditions of sale; production means legal production by legal proof; and when the plaintiff stipulates that he shall not be called on to produce title prior to the lease, the inference is, that he consents to produce and prove the lease and title subsequent.

Rule for entering a verdict for the plaintiff

Discharged.

*Bompas then prayed for a new trial on payment of costs, referring to Atkinson v. Bell, 8 B. & C. 277, where in an action for the price [*430]

of goods bargained and sold, the plaintiffs were nonsuited, on the ground that the defendant never accepted the goods, and a rule for setting aside the nonsuit and entering a verdict for the plaintiff was discharged: the Court, nevertheless, upon payment of costs, allowed the plaintiffs to set aside the nonsuit, add to the declaration counts for not accepting the goods, and have a new trial.

TINDAL, C. J., said the Court would consider the matter,—and, a few days after, acceded to the application.

CARNE, Demandant; NICOLL, Tenant. Jan. 17.

Statements of a deceased occupier, touching his title, are admissible in evidence generally, without reference to the particular effect they may produce in the cause.

UPON the trial at bar of this writ of right,

Mercuether, Serjt., on the part of the demandant, was about to interrogate an aged witness as to expressions which had fallen from a deceased occupier of the premises in question, touching the party under whom he held them; the demandant claiming title through that same party.

Wilde, Serjt., for the tenant, objected to the evidence. Statements of a deceased occupier which show that he was not seised of the freehold are received as admissions against his own interest, or to rebut the inference of adverse possession; but they are not evidence to show the title of another.

[*431] *TINDAL, C. J. The expressions in question, which fell from a person in possession of the premises, and so as to cut down his own title, are clearly admissible in evidence: the effect of them, when admitted, is a different question.

Holloway v. Raikes, cited in 2 T. R. 55, and *Peaceable v. Watson*, 4 Taunt. 16, have decided the point.

DUNCAN v. SUTTON and Others. Jan. 19.

Defendant after he had become bankrupt, was discharged out of custody on a ca. sa. upon executing a warrant of attorney with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should prove his debt under the commission.

The plaintiff having proved his debt, but no dividend having been paid, the Court refused on summary application to exonerate the sureties.

THE defendant Sutton being in custody under a ca. sa. issued against him by the plaintiff, became bankrupt on the 4th of July.

Upon the 7th, he was discharged out of custody, upon executing a warrant of attorney, with two sureties, for the amount endorsed on the ca. sa. Defeasance conditioned for payment the 7th of October.

At the same time one of the sureties, in the presence of all parties, consented that the plaintiff should prove his debt under the commission, in order to lessen the sureties' liability; and this the plaintiff did, on the 25th of August, at the request of the defendant Sutton.

No payment having been made on the 7th of October, and no dividend being expected under the bankruptcy, the plaintiff entered up judgment on the warrant of attorney, which

Atcherley, Serjt., on the part of the sureties, obtained a rule nisi to set aside, [*432] on the ground that the plaintiff by *electing to prove under the commission had exonerated the sureties.

Andrews, Serjt., who showed cause, contended, that the fifty-ninth section of 6 G. 4, c. 16, under which creditors of a bankrupt are put on election, applies only to demands arising prior to the bankruptcy; here, the demand arose on a warrant of attorney executed after the bankruptcy of Sutton. At all events, the proof having been made with the consent of the sureties, and in reduction of their

liability, they were estopped from raising the objection. *Linging v. Comyn*, 2 Taunt. 246, which might be cited for the sureties, was a case of bail, and the judgment against the principal was signed before he became bankrupt.

Atcherley. The warrant of attorney having been given in respect of the claim under which the defendant Sutton was in custody at the time of his bankruptcy, this is in effect a demand accruing prior to the bankruptcy; and the consent of the parties, if such consent was ever given, cannot defeat the express provision of an act of parliament.

The plaintiff must be deemed to have taken the security subject to the provisions of the act; and the bankrupt, after proof against his estate, ought not to be liable to the same demand at the hand of his sureties.

TINDAL, C. J. I have great doubt, whether this case comes at all within the act of parliament; which applies to demands occurring prior to the bankruptcy. This was a new undertaking after the bankruptcy; and though it was for the old debt, it cannot be said to constitute the same demand.

But even if it did so, the sureties having consented *that the proof [*433] should be made in reduction of their liability, cannot now call upon the Court to interfere, in its discretion, upon a summary application. If they have any legal right, let them pursue it in the regular course. Rule discharged.

PHILLIPS v. BARLOW. Jan. 20.

The assignment of a bail-bond must be executed in the presence of two witnesses, but it is not necessary that they should both subscribe their names in the presence of the officer assigning.

THIS was an action by the assignee of a bail-bond; and a verdict having been obtained for the plaintiff on an issue that the bond had not been duly assigned,

Martin moved for a new trial, on the ground that the assignment had not been sufficiently proved.

The statute 4 & 5 Anne, c. 16, prescribes that the sheriff shall assign the bond, "by endorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses."

The sheriff endorsed this bond, and put his seal to it, in the presence of two persons: one of whom attested the endorsement by signing his name as subscribing witness at the same time; the other signed his name at a subsequent period, and when the sheriff was not present.

Martin contended that the intention of the legislature was not satisfied unless both the witnesses subscribed their name in the presence of the sheriff.

TINDAL, C. J. I think, on the true construction of this statute, there is no ground for the objection that has been raised. All that is required is, that the sheriff *shall assign the bail-bond to the plaintiff in the action, "by endorsing the same, and attesting it under his hand and seal in the pre- [*434] sence of two or more credible witnesses." That, he has done: he has endorsed the bail-bond, and has attested such endorsement by putting his seal to it in the presence of two credible witnesses. We are not to superadd to this that the witnesses shall both attest the endorsement in his presence. When the legislature has required such a course, it has been expressly enacted; as in the case of devises of land, which, according to the fifth section of the statute of frauds, must be signed by the party devising the same, or by some other person in his presence, and by his express directions, and be attested and subscribed in the presence of the deviser, by three or four credible witnesses. And this statute was passed only about twenty-six years before the statute of Anne. So that it may safely be inferred, that if it had been thought material the witnesses to the sheriff's endorsement should subscribe their names in his presence, such a mode of proceeding would have been expressly pointed out.

PARK, J. It is observable, that in the statute of Anne the word attested is not applied in the ordinary sense to an attestation by a witness : the endorsement is to be attested by the hand and seal of the party endorsing.

The rest of the Court concurred.

Rule refused.

[*435]

*PRINCE v. BRUNATTE. Jan. 21.

To a declaration against the acceptor of a bill of exchange, alleged to have been drawn and endorsed by Sarah Ellwood, defendant pleaded that she was the wife of Thomas Ellwood, who was still alive.

Replication, that she drew and endorsed the bill by the authority of her husband : Held, no departure.

THE declaration stated, that one Sarah Ellwood, on the 23d of July, 1834, made her bill of exchange in writing, directed the same to the defendant, and thereby required him to pay to the order of the said Sarah Ellwood, 17*l.* 10*s.* 10*d.*, one month after the date thereof, which period had now elapsed; that the defendant then and there accepted the said bill; that the said Sarah Ellwood then and there endorsed the same to the plaintiff; and that the defendant then and there promised the plaintiff to pay him the amount of the said bill, according to the tenor and effect thereof and of the said acceptance and endorsement.

Plea, That the said Sarah Ellwood, the supposed drawer, payee, and endorser of the said bill of exchange, before and at the time of the supposed drawing, acceptance, and endorsement thereof, was, and from thence hitherto hath been and still is, the wife of and married to a male person of the name of Thomas Ellwood, who then was, and from thence hitherto hath been, and still is, the husband of the said Sarah Ellwood; and that the husband of the said Sarah Ellwood, before and at the time of the said drawing, accepting, and endorsing of the said bill, and before and at the time of the commencement of this suit, was, and still is, living; and this the defendant was ready to verify, &c.

Replication, That the said Sarah Ellwood at the time of her drawing and endorsing the said bill of exchange did draw and endorse the same as the agent and by the authority of the said Thomas Ellwood, her said husband; and that, the plaintiff was ready to verify, &c.

[*436] *Demurrer and joinder.

The causes assigned for demurrer were,

That a bill of exchange cannot be drawn and endorsed by a married woman unless she be the agent, or act under the authority, of her husband; that such agency or authority should be averred in the count, as it is an essential preliminary to the creation of any interest on which an endorsee can be entitled to sue; and the omission of such averment in the count cannot be supplied or remedied by averment in the replication, such averment in the replication being a departure from the count, in which the bill is alleged to have been drawn and endorsed by a person who appears to be a principal and not an agent.

Talfourd, Serjt., in support of the demurrer. The endorsement of a married woman confers no title, *Barlow v. Bishop*, 1 East, 432, unless she acts with the authority of her husband; and though such authority has been presumed from the acceptor's promising to pay subsequently to the endorsement, *Cotes v. Davis*, 1 Campb. 484, no such subsequent promise is stated in this declaration. At all events, the replication is a departure from the declaration. The plaintiff, after claiming on a bill drawn by Sarah Ellwood, as principal, cannot afterwards say that the bill was drawn by her as agent. He cannot say first that it was her bill, and then that it was her husband's. In *Prestwick v. Marshall*, 7 Bingh. 565, where it was held that an endorsee might recover against the acceptor of a bill of exchange drawn and endorsed by a married woman with the consent of her husband, it appears, upon referring to the record, that there was

a second *count in the declaration, alleging the bill to have been drawn [*437] by the wife as agent of her husband.

Comyn. The defendant having accepted the bill as drawn by Sarah Ellwood, is estopped to dispute that it is her bill. By his acceptance he admits her authority to draw; and the plaintiff may show her authority to endorse. He might have shown it under the general issue, upon a declaration like this, before the new rules of pleading were promulged—*Cotes v. Davis*, *Prestwick v. Marshall*—and the new rules permit him to put on the record what he might before have given in evidence. *Prestwick v. Marshall* was decided on the principle that upon proof of the husband's consent, the endorsement of a wife communicates title to the endorsee; and neither the bar nor the Court adverted to the second count of the declaration.

Talfourd. The argument for the plaintiff begs the whole question, which is, whether upon a declaration framed like the present, evidence of the wife's agency could have been given under the general issue.

The existence of the second count rendered it unnecessary to raise that question in *Prestwick v. Marshall*; and for aught that appears to the contrary the declaration in *Cotes v. Davis* might have averred the wife's agency.

TINDAL, C. J. This is an action on a bill of exchange, which is stated, in the declaration, to have been drawn by one Sarah Ellwood upon, and accepted by, the defendant, payable to the order of Sarah Ellwood, and by her endorsed to the plaintiff.

The defendant has pleaded that Sarah Ellwood, at the time of the drawing, acceptance, and endorsement of the bill, was the wife of Thomas Ellwood, who is still *alive: to which the plaintiff replies, that Sarah Ellwood drew [*438] and endorsed the bill as the agent, and by the authority, of her husband.

In this state of the pleadings it is contended on the part of the defendant, that there has been a departure from the declaration. Undoubtedly, where a replication does not consist with or fortify the declaration, it is a departure in pleading; for a plaintiff is not entitled to declare in respect of one right, and then to set up another in his replication. The only question here, is, whether this replication does set up a title inconsistent with that disclosed in the declaration: and we think it contains nothing that falls within the objection of a departure. The declaration sets out a derivative title through Sarah Ellwood the drawer, and the title set out in the replication is equally derived from her. It is true, that she being a married woman, had no right to draw the bill without the authority of her husband; but the defendant, after accepting the bill, is precluded from denying her authority to draw, and the replication alleges that she had the authority of her husband to endorse as well as to draw. Now, although Lord KENYON said in *Barlow v. Bishop*, "That the delivery of the note to the wife, vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had endorsed the note in the name of her husband, he was not prepared to say that that would not have availed; as many acts of this nature may be done by a power of attorney, and the jury might have presumed what was necessary in favor of an authority from her husband for this purpose; but the endorsement being in her own name, it was quite impossible to say that she could pass away the interest of her husband by it;" it is clear, that if the husband had given an express authority, there would have been no occasion for the jury *to raise any presumption; and this case is distinguished from *Barlow v. Bishop*, by the circumstance that the wife had [*439] express authority to endorse. But *Cotes v. Davis* appears to tally exactly with the facts of the present case. There, the endorsee sued the maker of a promissory note for 24*l.* 1*7s.*, payable to "Mrs. Carter, or order," and endorsed by her in the name of "M. Carter." At the trial it appeared, that when the note was presented for payment by a notary, with the endorsement upon it, the defendant said, it should be paid in a few days; and that he afterwards asked for

further time when the action was commenced, and the declaration had been delivered. The defendant offered to prove that Mrs. Carter, the payee, was the wife of a man of the name of Cole, who was still alive. Lord ELLENBOROUGH said, "the husband may authorize the wife to endorse bills of exchange or promissory notes, as his agent; and, after the acknowledgments and promises of the defendant in this case, it may reasonably be presumed against him, that Mrs. Carter had authority from her husband to endorse the note in question." And upon its being objected that the endorsement ought to have been in the name of the husband, Lord ELLENBOROUGH said, "we may fairly carry the presumption one step farther, and presume, that the husband authorized her to endorse notes in the name by which she herself passed in the world. The defendant is now estopped from contesting her authority for this endorsement." So that he puts the determination of that case on the presumption that the authority to endorse might be implied from the maker's promise to pay; here the authority to endorse is express. *Prestwick v. Marshall* was decided on the same principle, and not on any particular statement that might have been contained in the second count. The replication in this case, therefore, showing, like the [*440] declaration, a title derived to the plaintiff through *Sarah Ellwood, there is no departure, and our judgment must be for the plaintiff.

PARK, J. I had some doubt at first, but I am now satisfied that this case falls within the principle of the decisions adverted to by his Lordship, particularly *Prestwick v. Marshall*. The authority of *Cotes v. Davis* has never been questioned, and is not to be distinguished from the present case, except in the circumstance, that the authority there was presumed,—here it is express. In *Prestwick v. Marshall* I said, and now repeat, "it is remarkable, that in *Cotes v. Davis*, the wife endorsed the bill in the name by which she was known to the world; and although in that case there was a subsequent promise, Lord ELLENBOROUGH refers to a presumed authority."

VAUGHAN, J. I am of the same opinion. At first, I thought there was a departure. But there is no foundation for the objection, because Sarah Ellwood is identified with her husband, and we cannot decide against the plaintiff without overruling *Prestwick v. Marshall*.

Before the new rules, the plaintiff would clearly have been entitled to recover under the circumstances disclosed on these pleadings, and those rules, which require the plaintiff to plead what he would before have proved under the general issue, do not alter the principles on which he would be entitled to recover.

BOSANQUET, J. I think this replication may be supported. It was not the object of the new rules to introduce any alteration in the material averments of a declaration, or to deprive a defendant of any defence he might have resorted to before. If the plaintiff, before the promulgation of those rules, would have [*441] been entitled, after designating a married woman as the *drawer of a bill, to show under the general issue that she drew and endorsed it with the consent of her husband, he may now show that fact in his replication. *Cotes v. Davis* is in point, and that case was confirmed on full discussion in *Prestwick v. Marshall*. And though the declaration in the latter case, now produced to us, contained a second count in which the wife was alleged to have drawn the bill as agent to her husband, that circumstance was not adverted to by the bar or the bench, but the case was decided expressly on the principle laid down in *Cotes v. Davis*. Judgment for plaintiff.

MOORE v. STRONG. Jan. 22.

A conversation at the time of a purchase, is admissible in evidence for the defendant, in an action for the price of the goods, although it may let in a set-off otherwise barred by the statute of limitations.

DEBT for goods sold. The defendant pleaded a set-off to a greater amount than the debt claimed; to which plea the plaintiff replied the statute of limitations.

The goods in respect of which the plaintiff sought to recover were sold to the defendant in June, 1830, and subsequently. The articles in respect of which the set-off was claimed were all delivered to the plaintiff in October, 1825. There were no mutual accounts between the plaintiff and defendant till 1830.

The action was commenced in 1833.

The plaintiff having proved the delivery of goods to the defendant in 1830, the defendant called a witness, whom he proposed to examine respecting a conversation which, at the time of the sale of the goods in 1830, passed between the plaintiff and defendant touching the debt due to the defendant from the plaintiff for the articles delivered in 1825.

An under-sheriff, before whom the cause was tried, *rejected this evidence, on the ground that the set-off was barred by the statute of limitations. [*442]

A verdict having been given for the plaintiff,

Cottingham obtained a rule nisi for a new trial, on the ground that this evidence had been improperly rejected, the defendant's set-off coming within the description of merchant's accounts, which are excepted from the operation of the statute of limitations.

Humfrey, who showed cause, contended that merchants' accounts do not fall within the exception of the statute, unless they are mutual, *Cotes v. Harris*, Bull. N. P. 149; and here there was no mutual account before 1830. In *Catling v. Skoulding*, 6 T. R. 189, and *Cranch v. Kirkman, Peake*, N. P. C. 164, the accounts were mutual. But it is doubtful whether even those cases would have received the same decision if they had occurred after Lord TENTERDEN's act, 9 G. 4. At all events, the defendant should have rejoined that these were merchants' accounts.

TINDAL, C. J. I think this case may be determined without reference to the statute of limitations. The under-sheriff rejected a statement of what passed at the sale of the plaintiff's goods to the defendant in 1830, because it might indirectly have the effect of taking the defendant's set-off out of the statute of limitations.

The defendant had furnished the plaintiff with goods in 1825; and the conversation at the time of the dealing in 1830 should have been received in evidence, as it might have shown that the plaintiff's goods were furnished by way of payment for the defendant's, and so have barred the plaintiff's action.

The rest of the Court concurring, the rule was made

Absolute.

*COPPIN v. POTTER. Jan. 22.

[*443]

The Court will not exonerate bail for a variance between the declaration and affidavit of debt, where they have consented to a stay of execution, and apply late for relief.

Wilde, Serjt., had obtained a rule nisi to exonerate the bail in this cause, on the ground of an alleged variance between the declaration and the affidavit to hold to bail; but, upon cause shown, it appeared that the defendant, on the 14th of May last, had withdrawn his plea and suffered judgment by default upon condition of obtaining a stay of execution till July; and that the bail, one of whom was the defendant's attorney, had at the same time given their written consent that the delay conceded to the defendant should not affect their liability for debt and costs; further than this, the bail, when sued on their recognisance previously to last Michaelmas term, pleaded a sham plea, and abstained from applying for relief till the present term; under these circumstances,

The Court, without deciding the question of variance, held, that—looking to the consent given, after declaration, by bail, one of whom was the defendant's

attorney; the plea they had put in to the proceeding against themselves; and the time they had permitted to elapse,—the present application to the discretion of the Court came too late.

Rule discharged.

Talfourd, Serjt., and Robinson showed cause.

[*444]

*ATKINSON v. BAYNTUN. Jan. 23.

M. being in custody on execution pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, defendant, in consideration that plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution.

Held, that defendant's was a valid contract.

THE declaration stated, that before the making of the memorandum of agreement and the promise of the defendant hereinafter mentioned, certain persons, to wit, one George Pearce Manley and Mary Manley, on the 10th of January, 1829, mortgaged certain premises to the plaintiff for 8000*l.*, with a proviso for redemption on payment of the principal on the 10th of January, 1834, and interest half-yearly in the mean time: that the said G. P. M. and M. M. covenanted to pay the plaintiff interest, half-yearly, at the rate of five per cent. per annum, and also to pay to Michael Clayton and Alexander William Grant, certain trustees in the deed of mortgage mentioned, or the survivor of them, their or his executors, administrators, or assigns, during such time as the said sum of 8000*l.*, or any part thereof, should remain unpaid, 5*l.* per cent. per annum, on the same sum of 8000*l.*, or on so much thereof as should from time to time remain unpaid, by even portions, half yearly, by way of a sinking fund, toward the liquidation of the principal; that for the further securing the said sum of 8000*l.* the said G. P. M. and M. M. executed a warrant of attorney, bearing date the day and year first aforesaid, to confess judgment forthwith for the sum of 16,000*l.*, which warrant of attorney was subject to a defeasance as follows:—That no execution should issue upon the said judgment until default should be made in payment of the said sum of 8000*l.*, or the interest thereof; or the annual sum to be paid to Clayton and Grant; but in case default should be made in any such payment as aforesaid, that it should be lawful for the [*445] plaintiff, his executors, *administrators, or assigns, at any time from time to time thereafter, to issue execution, or cause execution to be issued upon the said judgment, for the whole or any part or parts of the said sum of 8000*l.*, and the interest thereof, and all costs, charges, and expenses occasioned by the non-payment thereof, without the necessity of reviving the said judgment, notwithstanding there should have been no prior proceeding thereon, or no proceeding within one year immediately preceding the issuing of such execution:

That, before the making of the memorandum of agreement and of the promise of the defendant hereinafter mentioned, the plaintiff caused judgment to be entered up upon the said warrant of attorney, against the said G. P. M. and M. M., for the said sum of 16,000*l.*, together with his costs of suit, amounting to the further sum of 3*l.* 5*s.*: that afterwards and before the making of the memorandum of agreement and the promise of the defendant hereinafter mentioned, the said G. P. M. and M. M. made default in the payment of the said annual sum of money so covenanted to be paid by them to the said Clayton and Grant as aforesaid; and thereupon the plaintiff for having execution upon the said judgment against the said G. P. M. and M. M., for a certain sum of money, to wit, the sum of 802*l.* 2*s.* afterwards and before the making of the memorandum of agreement and the promise of the defendant hereinafter mentioned, sued and prosecuted out, &c., a certain writ, called a *testatum capias ad satisfaciendum*, founded on the said judgment so entered up under and by virtue of

the said warrant of attorney as aforesaid, against the said G. P. M. and M. M., directed to the sheriffs of the city of Bristol; by virtue of which said writ the sheriffs of the city of Bristol took and arrested the said G. P. M. and M. M., and kept and detained them in custody until, and at, and after the time of the making *of the memorandum of agreement and the promise of the defendant hereinafter mentioned: of all which premises the defendant, [446] afterwards and before the making of the memorandum of agreement and the promise of the defendant hereinafter mentioned, had notice:

That thereupon, in consideration of the premises, on the 12th of November, 1833, by a certain memorandum of agreement, in writing, then made between the plaintiff and the defendant, and then signed by the defendant, it was agreed by and between the plaintiff and the defendant, that upon payment to the undersheriff of the expenses of the execution under which the said G. P. M. and M. M. were then in custody, they the said G. P. M. and M. M. should be discharged; the defendant then engaging that they should be forthcoming at any future period within twelve months, in case it should appear to the plaintiff to be necessary to issue another execution against the said G. P. M. and M. M.; and the defendant pledging himself on the part of the said G. P. M. and M. M. that they should without delay execute a deed of trust for sale, and that steps should be taken as soon as conveniently might be, to effect a sale of the mortgaged property: that the defendant also agreed that the said G. P. M. and M. M. should pay or be charged with all proper costs and charges incurred by the sheriff of Devonshire and the plaintiff, relative to an execution issued against them in the month of March then last:

That the said agreement being so made as aforesaid, to wit, on, &c., in consideration thereof, and that the plaintiff at the special instance and request of the defendant, had then promised the defendant to perform and fulfil the said agreement in all things on the plaintiff's part and behalf to be performed and fulfilled, the defendant promised the plaintiff to perform and fulfil the said agreement in all things on the *defendant's part and behalf to be performed [447] and fulfilled:

That although after the making of the said agreement, to wit, on, &c., the plaintiff, confiding in the said promise of the defendant, and in hopes of his faithful performance thereof, did suffer and permit the said G. P. M. and M. M. to be discharged out of the custody of the sheriffs; and the said G. P. M. and M. M. were then discharged out of the said custody accordingly; and although it afterwards, and before the commencement of this suit, and within the space of twelve months from the time of the making of the said memorandum of agreement and the said promise of the defendant, appeared to the plaintiff to be necessary to issue another execution against the said G. P. M. and M. M., and although the plaintiff did within such time as aforesaid, and after the 10th of January, 1834, and before the commencement of this suit, issue another execution against the said G. P. M. and M. M. upon the said judgment so entered up as aforesaid, for a large sum of money, to wit, the sum of 721*l.* 9*s.* 1*d.*, then remaining due from the said G. P. M. and M. M. to the plaintiff upon the said indenture of mortgage, whereof the defendant afterwards and before the commencement of this suit, on, &c., had notice; nevertheless the defendant, not regarding the said memorandum of agreement or his said promise, did not at any time after the said last-mentioned execution against the said G. P. M. and M. M. was issued, cause or procure the said G. P. M. and M. M., or either of them, to be forthcoming, but wholly neglected and refused so to do: by reason whereof the plaintiff was hindered and prevented from enforcing his said last-mentioned execution against the said G. P. M. and M. M., or either of them, and was likely to lose the said sum of money so remaining due to him from the *said G. P. M. and M. M. as last aforesaid upon the said indenture of mortgage, and all means of enforcing payment of the same: To the [448] damage of the plaintiff of 10,000*l.*, and therefore he brought his suit, &c.

capias ad satisfaciendum, and also at the time of the taking and arresting of the said G. P. M. and M. M., by virtue of the same writ, and also at the time of the making of the said supposed agreement and promise, as in the declaration was mentioned, the said sum of 8,000*l.* was not, nor was any part thereof, nor was any interest upon the same, or upon any part thereof; due or payable from the said G. P. M. and M. M. to the plaintiff; nor had any costs, charges, or expenses been occasioned by the non-payment thereof, &c.

Replication: that at the time of the suing out and prosecuting of the said writ of testatum capias ad satisfaciendum, and also at the time of the taking and arresting of the said G. P. M. and M. M. by virtue of the same writ, and also at the time of the making of the said agreement and promise as in the declaration was mentioned, a certain sum of money, to wit, 800*l.* of lawful money, &c., for interest upon the said sum of 8,000*l.*, and also in respect of the said annual payments so by the said indenture covenanted to be made, as in the declaration was mentioned, was due and payable from the said G. P. M. and M. M. to the plaintiff; and that, the plaintiff prayed might be inquired of by the country, &c.

General demurrer, and rejoinder.

Manning, for the defendant, appeared in support of the demurrer; but the Court expressing an opinion against the sufficiency of the plea, he proceeded to impugn the declaration.

[*449] The declaration is bad upon three grounds. 1st, The *particular stipulation contained in the agreement upon which this action is brought, is void,—as amounting to an undertaking to do that which it was legally impossible the defendant should do. By the discharge of the Manleys out of execution, the judgment on which they had been taken was *satisfied*; and, therefore, any agreement that they should be forthcoming to answer another execution on the same judgment would be nugatory. In *Blackburn v. Stupart*, 2 East, 243, the defendant had been discharged out of custody under a ca. sa., upon an agreement that the judgment should stand as a security for the payment of the residue of the debt in three months, when it was to be enforced by execution against his person and goods: after the three months the plaintiff issued a ca. sa. and took the defendant, who paid the residue of the debt in order to procure his discharge: the Court made a rule absolute, that the money, which was in the sheriff's hands, should be refunded to the defendant; and GROSE, Justice, said, "that it would be very dangerous to permit the law to be unsettled in this respect; which is, that a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not; and, therefore, though the defendant's conduct had been very scandalous, yet the rule must be made absolute." In *Vigers v. Aldrich*, 4 Burr. 2482, to debt on judgment, the defendant pleaded that he had been taken under a ca. sa., and afterwards discharged out of custody by consent of the plaintiff, upon an agreement to pay certain sums at stipulated times. Upon demurrer, the Court held that the plaintiff could not bring an action upon the judgment after the defendant had been taken in execution and discharged by the plaintiff's own consent. *Da Costa v. Davis*,

[*450] 1 Bos. & Pull. 242, was an action on a bond given by *the defendant to the plaintiff to procure the release of May, who was in execution at the plaintiff's suit. The condition was, that the defendant or May should pay 780*l.* on or before the 10th of January, 1798, or that in case of default, May should be rendered on that day at a certain place, so that he might be again taken in execution. The Court was of opinion, on the authority of *Vigers v. Aldrich*, that the latter part of the condition was void, being to render a prisoner in execution who had once been discharged: and the plaintiff had judgment only on the ground that where the condition of a bond is to do one of two things, the showing that one cannot be performed, is no reason for not having performed the other: but in the present case, the stipulations in the memoran-

dum of agreement are cumulative, not alternative; and there is no ground for saying that the defendant has not performed every other branch of the agreement. In *Jaques v. Withy*, 1 T. R. 557, *ASHHURST, J.*, says, "I know of only one case where a debtor, in execution, who has obtained his liberty, may afterwards be taken again for the same debt, and that is, where he has escaped. But the reason of that is, that he was not legally out of custody." To the same effect are *Tanner v. Hague*, 7 T. R. 420; *Clarke v. Clement*, 6 T. R. 525; *Whitacres v. Hamkinson*, Cro. Car. 75; *Walker v. Alder*, Style, 117; *Price v. Goodrick*, Style, 387; *Dallam v. Price*, 2 B. M. 235. And according to the principle established by those authorities, even the stipulation in the defeasance of the warrant of attorney, that execution should issue from time to time, does not supersede the rule of law that a party shall not be taken a second time under the *same judgment. [TINDAL, C. J. What do you say to executions under the stat. of W. 3, for instalments or interest accruing [*451] after judgment?] They issue by express statutory enactment, which was rendered necessary by the strictness of the rule of law. But even under the stat. of 8 & 9 W. 3, c. 11, if the defendant being in execution for any instalment, were discharged out of custody by the consent of the plaintiff, the whole judgment, or at all events the sum for which the defendant was in execution, would be considered as satisfied. Here, though the declaration does not state how much the sheriffs of Bristol were commanded on the body of the writ to take the Manleys for, yet the Court will assume that the writ was in the usual form for 16,003*l.* 5*s.*, as the execution would otherwise be irregular in not pursuing the judgment. [TINDAL, C. J. The Court can make no presumption either the one way or the other.]

Again, the second execution is alleged to have issued for 721*l.* 9*s.* 1*d.*; but it could never have been the intention of the defendant to become responsible for more than the 802*l.* 2*s.* in respect of which he procured the Manleys' discharge; and for aught that appears to the contrary, the former sum of 802*l.* 2*s.* may form part of the 721*l.* 9*s.* 1*d.*, which in the declaration is said to be the debt then remaining due. So that the Manleys would not only have been arrested a second time on the same judgment, but in respect to the same identical sum for which they had been in custody before.

Lastly, the declaration should have averred notice of the place or county to which the second execution was directed, for without such notice, the defendant could not tell where to produce the Manleys. It is true that, upon an issue expressly on the point of notice, or upon a plea of non-assumpit, under the old law, the Court after verdict, would presume that a sufficient *notice had [*452] been proved, *Vide* 1 Mann. & Ryl. 285, n. But no such presumption arises upon demurrer. [The Court intimated that there was no weight in the two last objections.]

With respect to the plea, the defendant by negotiating for the discharge of the Manleys from arrest is not precluded from averring that the claim for which they were in custody was unfounded; because, if it were so, his own promise is without a consideration. A promise made in consideration of the discharge of persons who are illegally imprisoned is not binding; as if one seeing a highwayman with a pistol at the traveller's breast, promises to pay 100*l.* for the release of the traveller: upon being sued for the amount he may show the circumstances attending the promise.

Wilde, Serjt. The plea is ill. For even if the plaintiff's claim against the Manleys were of a doubtful nature, their abandoning their security at the defendant's request is a sufficient consideration to entitle them to enforce his undertaking: *Staroy v. Bank of England*, 6 Bingh. 754; *Longridge v. Dorville*, 5 B. & Ald. 117.

And the declaration is sufficient; for it is plain that the second execution was not issued from the same portion of the debt as the first. The principal sum due being 8000*l.*, if the first execution issued for 802*l.* 2*s.*, the residue

with the costs of the former execution would be about 7215*l*. And by express agreement, as under the defeasance of the Manleys' warrant of attorney, several and successive executions may issue for several instalments of the same debt, independently of the statute of 8 & 9 W. 3. For in *Austerbury v. Morgan*, 2 Taunt. 195, it was held, that where judgment was entered on a warrant of attorney, though a bond also was given, it was not necessary *under 8 & 9 [*453] W. 3 to suggest breaches. *Cox v. Rodbard*, 8 Taunt. 74, *Tilby v. Best*, 16 East, 163, and *Lewridge v. Forty*, 1 M. & S. 706, support the same position. In *Vigers v. Aldrich*, *Jaques v. Withy*, and *Tunner v. Hague*, there was an agreement for a second execution. In *Blackburne v. Stupart* the first execution was for the entire debt; in *Da Costa v. Davis* there was no engagement by May, the debtor, to subject himself to a second execution. And in all the cases which have been cited for the defendant the principle will be found to be laid down too broadly. These cases are founded upon a misapprehension of the true principle, which is, that where the defendant is discharged out of execution by the consent of the plaintiff, the law presumes that the plaintiff has been satisfied by payment. Here the agreement of the debtor rebuts any such presumption.

Manning, in reply. The decisions which preclude a second execution by ca. sa. under the same judgment do not turn on the presumption of satisfaction, but on the principle that the plaintiff, after having resorted to the highest species of satisfaction, the seizure of the defendant's person, cannot resort to any other remedy, or to the same again, after he has released the defendant. At common law, if the defendant died in execution the judgment was satisfied and the plaintiff's remedy wholly gone. There it would be impossible to presume actual satisfaction; yet the case of death and the case of a discharge with the assent of the creditor are both considered as equally standing upon the principle of legal satisfaction by imprisonment; *Foster v. Jackson*, Hob. 52; *Lincoln's case*, 1 Leon. 230. It is true that, by *express agreement, [*454] several and successive executions may issue from instalments under the same judgment; but they must be executions by fi. fa. or elegit, or by ca. sa. after the two former; or if by ca. sa. in the first instance, the creditor must not consent to his debtor's discharge. No instance has been cited, in which a defendant being in custody for one instalment the plaintiff has consented to his discharge out of custody, and has retaken him either for the same or even for a subsequent instalment. This might have been done under the provisions of 41 G. 3, c. 64; but those provisions were enacted only for three years, and have been suffered to expire perhaps because they are inconsistent with the principle of law. As the Court appears to have overruled the objection of the replication which raises the question as to the sufficiency of the consideration for the agreement, it is not intended to urge defect of consideration as an objection to the declaration; but the defendant contends, that the plaintiff complains of the non-performance of an undertaking to do that which was not only nugatory but illegal; for if the judgment was satisfied by the discharge of the Manleys from the first execution, the producing of the Manleys to the second execution, and the taking of them under that execution, would be an indictable offence, as well in the producer as in the taker.

TINDAL, C. J. This question comes on upon a demurrer to the replication; but as we think the plea is bad in law, it is unnecessary to consider the replication. The declaration states facts from which it appears that a certain agreement, which is the subject-matter of the action, was made at the time when two persons of the name of Manley were in execution for the sum of money stated in the declaration. And the declaration proceeds to state, that in con- [*455] sideration that the plaintiff would *permit the sheriffs of the city of Bristol to let those two persons go at large, the defendant undertook that he would afterwards procure them to be forthcoming, if it became necessary that a second execution should issue.

The only answer suggested to that undertaking, by the plea, is, that no sum of money was due to the plaintiff at the time the Manleys were taken: but the defendant, by entering into an agreement to induce the plaintiff to discharge the Manleys, admits that they were, at that time, really in execution, which, under the circumstances, is also an admission that the validity of the execution ought not to be disputed between the plaintiff and defendant: after the defendant has obtained, for his friends, the benefit he proposed by their enlargement, he is estopped to object that the writ under which they were detained was not valid.

The defendant then says, that the declaration is bad, as disclosing an agreement which is void in law. But upon looking at the statement in the declaration we see no necessity for coming to such a conclusion. The state of the case is, that on the 10th of January, 1829, a mortgage was made, by two persons of the name of Manley, to the present plaintiff, by which they assigned to him a certain leasehold property, the mortgage being redeemable on payment of 8000*l.* on or before the 10th of January, 1834, with interest at 5 per cent. in the mean time. There was also a covenant on the part of the Manleys, the mortgagors, that they would create a sinking fund, at the rate of 5 per cent., during the intervening five years that the money was allowed to remain out on mortgage; which payments for the sinking fund and interest at five per cent., give, by an easy calculation, an amount of 800*l.* a year.

It was thought fit that these payments should be further assured by a warrant of attorney, and that warrant of attorney, after reciting the mortgage, proceeds, *in the defeasance, to state, that if, at any time, default should be made, [*456] either in the payment of the interest, or in the payment of the sums of money which were so stipulated to form a sinking fund between these parties, that *from time to time* it should be lawful for the plaintiff to issue executions against the defendants in that action, the two Manleys, until the whole was satisfied. Therefore the judgment entered up under that warrant of attorney for the sum of 16,000*l.* was a judgment entered upon an express understanding and agreement between the parties, that from time to time different executions should issue, until the whole sum of money that was made payable and secured by that instrument was actually received by the plaintiff.

Then the declaration goes on to state, that it did become necessary that the plaintiff should issue execution, and that such execution was issued, upon the judgment, "for a certain sum, to wit, the sum of 802*l.* 2*s.*;"—not for the whole sum mentioned in the judgment.

Now that being the position of the parties,—the two Manleys being, at that time, actually in custody of the sheriffs of the city of Bristol,—then comes the agreement which is the subject of this action, by which the defendant says, in effect to the plaintiff, "in consideration that you will release and discharge them out of the custody of the sheriffs, I will undertake, if it shall become necessary at any time that another execution shall issue, that these two persons shall be forthcoming;" and then the declaration proceeds to state, that it did become necessary that another execution should issue; and that at a long period subsequent, viz. at the end of May, 1834, the plaintiff did issue an execution for the sum of 7215*l.*

This state of facts, according to the argument for the *defendant, [*457] amounts to an agreement that a debtor should be subject to a second execution for the same debt, and is, therefore, void in law. Admitting, for the sake of argument, that where there has been no engagement by the debtor to that effect, an agreement by a third party, that a debtor who has been already in custody for an entire debt shall be forthcoming for a second execution in respect of the same sum, would be a void agreement, still the present case does not, in law, or in fact, fall within such a principle.

There is no statement here from which we can infer that the debtor was to be charged a second time in respect of the same sum for which he had al-

ready been in custody. On the contrary, by pursuing the calculation suggested by the agreement, it appears that the second execution was for a sum and a subject-matter different from the original one. And the defendant should not have left it in doubt, but, if such were the case, should have expressly averred that the second execution was for the same sum as the first. But it is sufficient for us to say, that it does not appear on this record that such was the case.

Supposing, however, that it was issued in respect of the same sum, or a part of the same sum, the defendant has not given any answer to the cases in which it has been held that successive executions may, by agreement of the debtor, be issued for several portions of an entire debt: *Tilly v. Best*, *Leveridge v. Forty*, *Austerley v. Morgan*, and *Cox v. Rodbard*. Indeed, without the aid of authority, good sense would establish such a principle: and no authority has been cited to show even that a second execution for the same debt is absolutely void: if it were so, the sheriff would be a trespasser, and no application to a Court would be necessary to discharge a defendant. It has always been the practice, however, to make such an application. Now if such an execution would not be void even where there has been no agreement to [*458] warrant it, why are we to say that it is void when it has been issued pursuant to the terms of an express agreement? at all events, the case where there is an agreement by the debtor for successive executions is essentially different from cases where there has been no such understanding. Our judgment, therefore, must be for the plaintiff, and the jury must say what injury he has sustained by his debtors not being forthcoming at the proper time.

PARK, J. His Lordship having gone so fully into the facts and circumstances of this case, it is unnecessary that I should take up much time in giving my opinion in concurrence with his. If it be taken, that in *Jaques v. Withy*, *ASHHURST, J.*, laid down the rule as generally as the counsel for the defendant has been inclined to state it to-day, *BULLER, J.*, said, on the other hand, that he could not agree in the generality of the position laid down by *ASHHURST, J.* There are various cases where the Court has declined to interpose, even where the second execution is for the same entire debt: as where there is anything which looks like fraud. In *Baker v. Ridgway* the defendant, who had been taken in execution, became a bankrupt; it was necessary before the plaintiff could prove his debt under the commission to consent to the defendant's discharge: some time afterwards the commission was superseded, and the plaintiff took the defendant again: he applied to this Court to be discharged, and, according to the generality of the rule, he ought to have been discharged: I was inclined to that opinion, and so was the rest of the Court upon general principles; but they said that the rule does not apply if there be any suspicion of fraud in the case, and they doubted very much whether there were not circumstances of fraud sufficient to warrant the detention of the defendant, [*459] or, at least, to drive him to his **audita querelâ*: I did not feel upon the affidavits that were then produced that there was sufficient ground to warrant the judgment; but the Court could not discharge the defendant. But at all events the defendant here, ought, on his pleadings, to have made it quite apparent that the second execution was for the same debt,—the same subject-matter. Now he has not done so, and it appears to us, upon taking the figures altogether, that it was not for the precise debt for which he had been arrested before. There was nothing illegal in an agreement to pay from time to time in the manner stated in the defeasance to this warrant of attorney. It was the duty of the defendant to make it clear that the second execution was for the same sum, as much as if there had been an actual recaption, and the defendant had come before a judge to be discharged on account of a second arrest. Not having done so, it appears to me to be clear that the plaintiff is entitled to judgment.

VAUGHAN, J. I am of the same opinion. The cases which have been cited for the defendant apply to a different state of facts; that is, where the body

has been taken a second time for the same debt. I can perceive no illegality in a party's agreeing to pay a debt by instalments, and, with that view, to subject himself to successive executions; it is for the convenience of the party, and clearly in ease of a debtor. Here a third party has stepped in: after assenting to such an agreement he cannot be permitted to question the existence of the debt; and it is clear that the second execution was not in respect of the same sum as the first.

BOSANQUET, J. I am of opinion that the judgment of the Court ought to be for the plaintiff; but the question having been so fully discussed by my Lord Chief Justice, *I shall only add a few words. I waive the point which has been raised for the defendant, as to the liability of the Man- [*460] leys to be taken a second time for the same debt; it is unnecessary also to consider the case of *Da Costa v. Davis*, which proceeded on the assumption that the debtor was not liable to be taken on the second execution for the same debt; but here I consider the defendant liable under his own agreement to the plaintiff's claim, because it does not appear on this record that the Manleys were taken in execution a second time for the same debt as on the first occasion. It was incumbent on the defendant, in order to raise any appearance of an answer to the plaintiff's claim, to show that the two sums were the same. Not having done that, and it being compatible with the whole of his statement that the sums should be different, our judgment must be for the plaintiff.

Judgment for the plaintiff.

DAVY v. BROWN. Jan. 24.

Where, upon a matter decided at chambers, a Judge has entertained the question of costs, an appeal to the Court on the subject of such costs ought not to be made.

The plaintiff's attorney, having signed judgment, was summoned before PARK, J. at chambers, to show cause why it should not be set aside for irregularity, when, to avoid further contest, upon a suggestion from the judge, he consented to waive it. The defendant's attorney then asked for the costs of setting aside the judgment, but the plaintiff's attorney contending that his judgment, though strict, was regular, PARK, J. declined to make any order. Whereupon,

Miller obtained a rule calling on the plaintiff's attorney to show cause why he should not pay the costs *of setting aside the judgment, and of the [*461] present application.

Wilde, Serjt., who showed cause, pointed out the inconvenience to suitors, if, after a judge at chambers had exercised his discretion on the point, a party should be permitted to come to this Court for a review of the decision, and create an expense of 8*l.* or 10*l.* to recover costs to the amount of a few shillings.

Miller, insisting that the judgment was irregular, and that the plaintiff's attorney had admitted this by waiving it, contended that the defendant was entitled to his costs; and that if a judge declined to grant them at chambers, the party had no remedy but to come to the Court.

TINDAL, C. J. As this matter began before a judge at chambers, so it ought to have terminated there. There is no ground for an application to this Court. When the plaintiff's attorney waived his judgment, the defendant had obtained the object of his summons, and there the matter should have ended. However, costs being mentioned, the plaintiff's attorney said, "Though I have waived the judgment, I still contend that it was regular;" upon which the judge declined to make any order as to costs. Common humanity requires that when such matters have been decided at chambers they should not be further questioned at such a heavy expense to the parties. The rule must be discharged with costs.

PARK, J. Few judges at chambers will entertain the question of costs; but [*462] when the point has been *considered, and a decision pronounced, it is too bad for a party to come here at an expense of 8*l.* or 10*l.* to demand 13*s.* 4*d.* costs.

VAUGHAN and BOSANQUET, Js., concurred.

Rule discharged with costs.

¹As to the power of a Judge at chambers to order costs, see *Read v. Lee*, 2 B. & Ad 415, where a rule nisi for discharging such an order was made absolute. That case, however, was reconsidered in *Doe dem. Prescott v. Roe*, 9 Bingh. 104. In the latter case, and in the more recent one of *Hughes v. Brand*, 2 Dowl. Pr. Rep. 181, this Court and the Court of Exchequer acted on the principle that a Judge at chambers has the power to order costs. In *Hughes v. Brand*, it was intimated by BAYLEY, B., that since the Uniformity of Process Act, in consequence of which "a great deal of new business is now thrown upon the Judges at chambers," there are many cases in which this power should be exercised; e. g. "where a declaration is in vacation and irregular," he asks, "Cannot an application be made to a Judge to set it aside with costs?"

ABBOTT and Others, Assignees of BAKER, a Bankrupt, v. POMFRET and Others. Jan. 24.

Defendants, B.'s bankers, had discounted for B. a bill payable Jan. 10th, drawn by B., and guaranteed by L.

On the 8d of Jan., B., being in embarrassed circumstances, gave L. a cheque on defendants for the amount of the bill: the defendants on receiving the cheque handed the bill over to L.—B. became bankrupt Jan. 9th:

Held, that his assignees could not sue defendants as having received the amount of the cheque by way of fraudulent preference.

THE plaintiffs, by this action for money had and received to their use as assignees of Baker, sought to recover 200*l.*, which they alleged to have been paid to the defendants by Baker the bankrupt, in the way of fraudulent preference.

The facts were as follows:—One Lawrence, a friend of Baker, in order to assist him in his difficulties, had accepted a bill drawn by him for 184*l.*; Lawrence had [*463] also, for the same purpose, guaranteed the payment of a bill for 200*l.*, drawn by Baker and accepted by one Mills.

These bills, which were payable on the 8th and 10th of January, 1834, were in the possession of the defendants, who had discounted them for Baker.

The defendants were Baker's bankers. Baker was arrested on the 2d of January; and being in embarrassed circumstances, but having placed in the defendants' hands enough to cover these two bills, went to the defendants on the 8d of January, 1834, accompanied by Lawrence, to whom he gave two cheques on the defendants, one for 184*l.* 2*s.* 4*d.*, the other for 200*l.* Lawrence presented the cheques, and with the amount took up the two bills.

Baker became bankrupt on the 9th of January, 1834.

The plaintiffs thereupon sued Lawrence for the 384*l.* 2*s.* 4*d.*, as having been paid to him by way of fraudulent preference; but recovered only 184*l.* 2*s.* 4*d.*, the amount of the bill for which he was liable as acceptor, LITLEDALE, J., who tried the cause, thinking, on the authority of *Guthrie v. Crossley*, 2 Car. & P. 301, that there was no fraudulent preference of Lawrence in respect of the 200*l.* bill, for which he was only a surety. Whereupon

The plaintiffs now sought to recover the amount of that bill from the defendants.

However, there was a nonsuit at the trial, on the ground that the defendants were primarily creditors of Mills in respect of this bill, having made it their own by discounting it, and that therefore no fraudulent preference of a creditor of Baker's had been established.

Spankie, Serjt., having obtained a rule nisi for a new trial,
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**Wilde, Serjt., Thesiger, and Channell* showed cause. After much contest as to the question of fact, whether or not Baker contemplated bankruptcy when the transactions of the 3d of January, 1834, occurred, upon which the Court pronounced no opinion, they contended that, at all events, the defendants were creditors of Mills and Lawrence in respect of this bill; and that having received the amount of it from Lawrence, who was ultimately liable, they were not, within the meaning of the bankrupt act, parties who had obtained a fraudulent preference from Baker.

Spankie and Platt in support of the rule. A preference of a particular creditor having been clearly intended by Baker, the person who obtains the benefit, and retains the money, must be esteemed the party preferred within the meaning of the statute. The object of the statute was to prevent the fund for the creditors being robbed, no matter by whom, and the assignees are entitled to recover the money in whose hands soever it may be found. It is no matter that the bankrupt intended to prefer A.; if the preference lights on B., B. must take the consequences. If it were otherwise, the law against fraudulent preferences might always be defeated by the employment of an intermediate receiver.

TINDAL, C. J. The argument for the plaintiffs has taken the same course as if this had been a payment after the act of bankruptcy; for it has been contended that whoever receives money from a trader under embarrassment, and likely to become bankrupt, is liable to be sued as having obtained, by a fraudulent preference, property which belongs to the assignees. The property, however, which the plaintiffs seek to recover never passed to the assignees; and the sole condition on which **this* action can be maintained is, that there has been a fraudulent preference of the defendants in contemplation of bankruptcy. But this is the first time we have heard of a fraudulent preference of one, accompanied by payment to another. A fraudulent preference, in general, proceeds from motives arising from consanguinity, or friendship, or other reasons inducing a payment to a particular creditor, in derogation of the rights of the general body of claimants. But it is contended here, that if the preference be for A., and the money finds its way to the hands of B., the assignees may sue B. That would be carrying the doctrine of fraudulent preference to an alarming extent. The question, therefore, is, whether there is any evidence here that Baker intended a fraudulent preference of the defendants. And it seems to me that no such evidence exists. Baker, having procured his bankers to discount two bills, one for 184*l.* 2*s.* 4*d.*, the other for 200*l.*, both payable early in January, pays into his bankers enough, with a sum which was previously there, to defray both bills. He then goes to the bankers with Lawrence, who having accepted one of the bills, and having guaranteed the payment of the other, was immediately liable on the one, and collaterally on the other. If Baker were in danger of becoming bankrupt, it is natural he should wish to assist Lawrence, who was his friend, by enabling him to take up the bills about to become due: he had a motive for preferring Lawrence, none for preferring the defendants. That being so, he gives Lawrence a cheque, which Lawrence, on receiving the bills, hands over to the defendants. There is no reason, therefore, for thinking that Baker meant to prefer the defendants, and there is a reason for thinking he meant to prefer Lawrence. And the plaintiffs themselves have put this construction on his conduct, for they have sued Lawrence, and have recovered in respect of one of the bills. **If* Baker had intended to prefer the defendants, he would simply have paid in so much money to their account; the bringing Lawrence to them would have been merely an idle ceremony.

I think, therefore, that the nonsuit was right, and that this rule must be discharged.

PARK, J. It is a strong fact that the plaintiffs themselves never looked to the defendants till the action against Lawrence failed as to one part of their case. I think the rule ought to be discharged.

VAUGHAN, J. I am of the same opinion. The plaintiffs have been nonsuited on the ground that they failed in proving all that is requisite for the support of an action of this sort: that the trader was in insolvent circumstances; that he contemplated bankruptcy, and that he fraudulently preferred the defendants. The question here is, whether the money passed to the defendants by way of fraudulent preference. We are not called on to say whether Lawrence was the person preferred, although it is probable that such was the case: but no motive can be suggested which should have induced Baker to prefer the defendants, and, therefore, the nonsuit ought to stand.

BOSANQUET, J. I can see no sufficient ground for disturbing this nonsuit. The money having been paid in the course of business before the act of bankruptcy, the defendants are *prima facie* entitled to retain it, and it is incumbent on the other side to make out that there has been a fraudulent preference. This, however, is not a case of that description. The defendants had discounted bills for Baker, and Baker, contemplating bankruptcy, pays into their hands a [*467] sum sufficient to enable Lawrence, to whom he had given a cheque for *the amount, to purchase the bills which were then in the possession and the property of the defendants. Lawrence presents the cheque and receives the bills. For whose benefit? undoubtedly for his own; since he was liable immediately on one of the bills, and ultimately on the other. Baker, therefore, had no intention to prefer the defendants, who are entitled to retain the sum they have received upon the sale of their own bills. Rule discharged.

WOODS v. POPE. Jan. 26.

Plaintiff having recovered a verdict under 20*l.* as damages for his inability to let a house for six weeks in consequence of defendant having omitted to do certain repairs to which he was liable as tenant, the Court refused to disturb the verdict, notwithstanding the substantial repairs were to be done by plaintiff.

THE plaintiff sought, by this action, to recover against the defendant—who had been tenant from year to year, of premises belonging to the plaintiff,—a sum due for rent; a sum paid for certain repairs for which the defendant was liable as such tenant; and 4*l.* 5*s.* damages occasioned to the plaintiff by his inability to let the premises from Lady-day, 1834, to the 15th of August following, in consequence of the state of dilapidation in which the defendant had quitted them at Lady-day.

The defendant paid into Court the sums claimed for rent and repairs; and it appearing at the trial, before GASELEE, J., that the plaintiff had been occupied six weeks in repairing the house, the jury gave a verdict, on the third demand, for 13*l.* 10*s.* notwithstanding the substantial repairs of the premises were to be done by the plaintiff.

HUMFREY, by leave of the learned Judge who presided at the trial, now moved to set aside this verdict, and enter a nonsuit, on the ground that the [*468] plaintiff, having recovered the sum expended on the repairs *which the defendant was liable to perform, could not, in addition, make any demand in respect of the premises having remained for a time unoccupied; and the less, as the plaintiff himself was bound to do the substantial repairs.

TINDAL, C. J. Unless this is a verdict against law we ought not to interfere, the sum recovered being less than 20*l.*, and I cannot see that it is clearly against law. The amount for which the defendant was liable, in respect of the repairs he was bound to perform, having been paid into Court, the only question the jury had to consider was, what time it would occupy the plaintiff to lay out that money. If the defendant had laid out that money before he quitted the premises, the plaintiff might have occupied them himself; the delay, therefore, was a consequential injury: it would take the plaintiff some time to effect the repairs, which ought to have been done by the defendant; and if there were any fact to go to the jury, we ought not to disturb the verdict.

The only answer has been, that the plaintiff was bound to do the greater part of the repairs: but he might have consented to occupy the premises himself if the defendant had completed his portion of the repairs, although further repairs might be requisite before the premises could be let to a tenant. I think, therefore, that this verdict is not so clearly against law as to authorize us to disturb it, the amount being under 20*l*. The rest of the Court concurred.

Rule refused.

BRAMAH and Another v. E. M. ROBERTS, L. ROBERTS, CLARE, BAKER, J. FOSTER, H. FOSTER, LYALL, and BLAKSLEY. [*469]
Jan. 21.

To a plea by the acceptor of a bill of exchange, that it was, to the knowledge of the holder, negotiated by fraud, and that no consideration was given for the endorsement to the holder, it is sufficient for the holder to reply generally, that he had no notice of the fraud, and that the bill was endorsed to him for a good consideration.

THE declaration stated that one Wm. Clare, on the 22d of October, 1833, made his bill of exchange in writing, and thereby required the defendants to pay to the order of him, W. Clare, 500*l*. three months after the date thereof, which period had now elapsed: that the defendants then accepted the said bill, and W. Clare then endorsed the same to the plaintiffs: of all which the defendants then had due notice, and then promised the plaintiffs to pay them the amount of the bill according to the tenor and effect thereof, and of the defendant's acceptance thereof: yet they disregarded their promise, and did not, nor did any or either of them pay.

The defendants Baker, J. Foster, G. H. Foster, Lyall, and Blaksley pleaded, first, the general issue:—secondly, that there was not, at any time, any consideration or value for the defendants accepting the said bill of exchange, or paying the amount thereof, or any part thereof: that the said bill, endorsed by W. Clare, was afterwards, to wit, on the 4th of January, 1834, delivered on behalf of the defendants to one Thomas Hunt, for a special purpose only, to wit, that the said T. Hunt should keep and take care of the said bill, for and on behalf of the defendants, and for their use and benefit, and not for the purpose of being negotiated or delivered over by him to any other person or persons whatsoever: that the said T. Hunt then took and received, and from thence until the plaintiffs became possessed of the same as thereafter mentioned, held the *said bill for the special purpose aforesaid; that the said T. Hunt, [*470] in violation of good faith, and contrary to the said special purpose for which he so received and held the said bill as aforesaid, heretofore, and whilst he held and had the same in his possession for the special purpose aforesaid, to wit, on the day and year last aforesaid, fraudulently, and without the authority of the defendants, and with intent to defraud the said defendants in the introductory part of the first plea named, negotiated and parted with the said bill for his own use and benefit, and then delivered the said bill so endorsed as aforesaid to the plaintiffs: that the said bill was not, at any time, endorsed to the plaintiffs otherwise than by the said T. Hunt so delivering the same, so endorsed by the said W. Clare as aforesaid, to the plaintiffs: that the plaintiffs, at the time when the said bill was so delivered to them as aforesaid, by the said T. Hunt as aforesaid, had notice of the premises, and well knew that the said T. Hunt had no power or authority to negotiate or part with the same on his own account; and that there was not, at any time, any consideration or value given in good faith for the said endorsement of the said bill of exchange to the plaintiffs, as in the said declaration mentioned.—Thirdly, that the said bill never was accepted by the defendants, except by the said E. M. Roberts, for and on account of himself and all the other defendants in this action mentioned, under and by virtue of an authority from the last-mentioned defendants, to the said E. M. Roberts, to accept bills of exchange on behalf of himself and the

other defendants for particular purposes only, that is to say, for the purposes of discharging claims against certain persons composing a certain company, called the South Metropolitan Gas Light and Coke Company, or upon the said E. M. Roberts and the other defendants, as directors of the said company; but that the said E. M. *Roberts, on the 22d of October, 1833, in breach of good [*471] faith, fraudulently and wrongfully, and without the consent or authority of the defendants in the introductory part of the first plea named, and with intent to defraud them, accepted the said bill on behalf of himself and all the other defendants in this action, not on account of any of the purposes for which he was so authorized to accept bills on behalf of himself and the other defendants as aforesaid, but for another and different purpose, to wit, for the private purposes of the defendant W. Clare (who drew the same, and who then had no claim or demand whatever on the other defendants), and of himself the said E. M. Roberts, and the defendant L. Roberts. And that the defendants, in the introductory part of the first plea named, received no consideration or value for the said acceptance.

The plaintiffs replied to the second plea,—that after the making of the said bill, and before the same had become due and payable, to wit, on the 4th of January, 1834, the said bill was endorsed and delivered to the plaintiffs fairly and bona fide, and for a good and valuable consideration, that is to say, for moneys advanced by, and due and owing to them, the plaintiffs. And that, at the time when the said bill was so endorsed and delivered to them as aforesaid, they had not, nor had either of them, notice of the premises in the last-mentioned plea mentioned; nor did they, or either of them, know that the said T. Hunt had no power or authority to negotiate or part with the said bill on his own account; and this they were ready to verify, &c. To the third,—that the said E. M. Roberts was duly authorized to accept the said bill on behalf of himself and all the other defendants in this action. That after the making of the said bill, and before the same had become due and payable, to wit, on the said 4th [*472] of January, 1834, the said bill was endorsed and *delivered to the plaintiffs, fairly and bona fide, and for a good and valuable consideration, that is to say, for moneys advanced by, and due and owing to them, the plaintiffs. And that, at the time when the said bill was so endorsed and delivered to them as aforesaid, they had not, nor had either of them, notice of the premises in the last-mentioned plea mentioned; nor did they, or either of them, know for what purposes the said E. M. Roberts was authorized to accept the said bill of exchange, nor for what purpose he accepted the same: and this they were ready to verify, &c.

The defendants in the introductory part of the first plea named, demurred to the replication to the second plea, for the following causes:—That the plaintiffs had not, in their said last-mentioned replication, stated or set forth, with sufficient certainty, what consideration or value was given by them for the said endorsement of the said bill to them, but had merely stated that the consideration for the said endorsement to them was moneys advanced by, and due and owing to them, without stating with sufficient certainty when or to whom such moneys were advanced, or by whom the same were due or owing, or whether they were advanced at the time when the said bill was endorsed to them, or whether they had been previously advanced, and were due before the said bill was endorsed; and that, although the replication was intended as an answer to the second plea, and to support the whole of the plaintiffs' claim to the full amount of the bill, yet it did not aver or state, with sufficient certainty, that the moneys so advanced by, and due and owing to them, were equal to the amount of the said bill, or entitled them to recover to the full extent of the said bill, which, according to the rules of pleading, ought to have been shown in the said replication to the said second plea: that the plaintiffs, who were parties to the endorsement *of the said bill, and knew what consideration they gave [*473] for the same, ought to have set forth in the said last-mentioned replication

with more certainty than they had done the nature and extent of the consideration which they gave for the said endorsement, and when that consideration was given, to have enabled the defendants, who were no parties to the endorsement, or to the alleged consideration for the same, to ascertain what that consideration, if any, was; and also to have enabled the Court to decide, as a point of law, whether such consideration was or was not sufficient to support the plaintiffs' claim to recover the full amount of the bill against the defendants under the circumstances mentioned in the second plea, which was a mixed question of law and fact.

They also demurred to the replication to the third plea, for the following causes:—That whereas the last-named defendants had in their said third plea alleged that the said bill never was accepted by the said defendants, except by the said E. M. Roberts for and on account of himself and all the said other defendants in this action, under and by virtue of an authority from the last-mentioned defendants to the said E. M. Roberts to accept bills of exchange on behalf of himself and the other defendants for such particular purposes only as in the said last plea mentioned, but that the said E. M. Roberts accepted the said bill on behalf of himself and all the other defendants in this action, not on account of any of the purposes for which he was so authorized to accept bills on behalf of himself and the other defendants as aforesaid, but for another and different purpose; yet the plaintiffs, in their replication to the said last-mentioned plea, had not confessed and avoided the said allegations in the said last-mentioned plea, or directly traversed the same or either of them; but by alleging that the said E. M. Roberts was duly authorized to accept the said bill on behalf of himself and the other defendants in this action, had, [*474] contrary to the rules of pleading, denied the said allegations by an argumentative traverse thereof. That the plaintiffs, if they had intended to raise the question whether or not the said bill was duly accepted by the said E. M. Roberts, ought to have distinctly taken issue upon some one of the facts mentioned in the plea, or have alleged that it was accepted for the purposes for which the said E. M. Roberts was authorized to accept bills as mentioned in the said last plea. That the plaintiffs did not in their replication confine themselves to traversing the last plea in manner above alleged, but also by their said replication proceeded to plead by way of avoidance of the matters alleged in the last plea, by stating and alleging in their said replication thereto, that after the making of the said bill, and before the same had become due and payable, the said bill was endorsed and delivered to the plaintiffs fairly and bona fide, and for a good and valuable consideration; and that when the said bill was so endorsed and delivered to them, they had not nor had either of them notice of the premises mentioned in the said last plea, which premises they had actually traversed in the commencement of their replication. That the last-mentioned replication was double and multifarious, and attempted to answer the last plea both traversing the substantial allegations contained in it, and also by attempting to show matters in avoidance of the plea without confessing it. That the plaintiffs did not in their last-mentioned replication show with sufficient certainty when or to whom the moneys therein alleged to have been advanced by and due and owing to them were advanced; or by whom they were due and owing, or what was the amount of such moneys. That the said last-mentioned replication should have concluded to the country as being a traverse of the last plea, and not *with a verification. Also that it was [*475] uncertain whether the last replication was intended as an answer to the plea by way of traverse, or of confession and avoidance thereof: and that the replication was in other respects uncertain, informal, and insufficient, and no certain issue could be taken thereon.

Joinder.

Bompas, Serjt., in support of the demurrer, in addition to the grounds above set forth, urged, that the new rules, requiring the defendant in actions on bills

of exchange to plead what he would before have given in evidence under the general issue, these actions are no longer an exception to the general principles of pleading, and the plaintiff ought to reply with at least as much particularity as he would have declared in other actions; that is, by showing the nature of the consideration for the contract. When suspicion was cast upon a transaction, it was always incumbent on the plaintiff to show affirmatively in evidence a good consideration: *Heath v. Sansom*, 2 B. & Adol. 291; *Roser v. Roser*, 2 Vent. 361; now, it is incumbent on him to plead it. A replication ought to be more particular than a count; and in a count, an averment of money paid as a consideration for a promise would not be sufficient, even after verdict, without adding, "for the defendant's use," or "at his request." *Hayes v. Warren*, 2 Str. 933; *Oliverson v. Wood*, 3 Lev. 366. So, in actions on guaranties, it was necessary to set out the precise consideration for the promise: *Marriot v. Lister*, 2 Wils. 141. [TINDAL, C. J. The third plea contains no averment that the plaintiff had notice of the circumstances from which you raise the presumption of fraud.] It would have been unnecessary, before the new rules, for [*476] the *defendant to give such notice in order to raise the objection at the trial, and therefore, it is unnecessary now to plead it.

Kelly, contra, being relieved by the Court, as to the third plea, contended that the replication to the second was sufficient. The law as to bills of exchange is not altered by the new rules; and before they were promulgated, if a defendant in an action on a bill made out a *prima facie* case of fraud, it was a sufficient answer for the plaintiff to show he gave consideration for the bill. It was immaterial whether that consideration passed to the endorser. So here, if the plaintiffs, as they allege, advanced money for this bill, or took it for money due to them, it is immaterial to whom they advanced the money, or from whom it was due. They have, therefore, shown a specific consideration. But it was not necessary for them to have alleged more than that they gave a consideration for it, without specifying what. It would place the paper currency under great difficulties, if the holders of bills were always bound to disclose before trial the precise consideration they may have given for their bill.

Bompas. Cases of fraud present an exception to the general rule; they can only be answered by specific statements; and the statement here is too general.

TINDAL, C. J. The third plea in this case, which is pleaded to an action brought by the endorsees against the acceptors of a bill of exchange, is in effect no more than this,—that the defendants were defrauded of the bill of exchange, and that the acceptance was given by them without consideration. Now, inasmuch as the endorsee of a bill of exchange is by law *prima facie* assumed to [*477] hold it for consideration; inasmuch as *we are not to presume a notice which would make him a fraudulent agent in taking a bill of exchange; and inasmuch as this plea is silent upon the subject of want of consideration on the part of the endorsees, or of notice of the fraud, we are to ask ourselves whether upon the transfer of a bill of exchange, the circumstance of the acceptor having been defrauded at the time when he gave the acceptance, is an answer against an innocent endorsee for a valuable consideration without notice;—it seems to me that it is not a sufficient answer.

The second plea, upon which greater reliance is placed by the defendants, comprehends those two circumstances in which the third plea is deficient. The second plea does, in effect, allege that the defendants, the acceptors, had been defrauded of the acceptance which they had given to a third person to hold; that notice of the fraud was given to the plaintiffs; and that the plaintiffs received the bill by endorsement without a full and valuable consideration. Now the answer to that in the replication, is the point upon which objection has been taken. The answer in the replication to the second plea is, that after the making of the bill, and before the time it had become due and payable, it was endorsed and delivered to the plaintiffs fairly and *bona fide*, and for a good and

valuable consideration, that is to say, for money advanced by, and due and owing to them the plaintiffs, and that they had no notice whatever of the premises in the plea mentioned. Therefore it is, in effect, a denial that they ever had any notice, and an assertion that the bill was given to them for a full and valuable consideration. The question is, whether they are bound to go into the matter more fully, and state a more particular consideration. The objection made to the replication is, that there is not a sufficient consideration affirmatively stated to have passed between the endorser of the bill and the endorsees who have brought *the action. Taking the replication in the terms in [*478] which it is stated, that the bill was received *bonâ fide* and for a full and valuable consideration, for money advanced by, and due and owing to the plaintiffs, it seems to me that it was unnecessary for the plaintiffs to allege a more distinct consideration. It was sufficient to show that there was a good consideration. If money passed from the present endorsees, it appears to me sufficient as against the acceptors of a bill of exchange, to allege that the bill was received for money advanced by and due and owing to them, although that might not be sufficient for maintaining an action against another person. The consideration seems to me to be sufficiently averred in the replication, so as to leave the minds of the defendants in a general degree of certainty upon the nature of the consideration upon which the plaintiffs mean to rely. As in the case referred to in Com. Dig. Pleader, F. 17, where in trespass for three loads of oats, the defendant justified for damage feasant; the plaintiff replied that *tempore quo et diu antea* he was parson, and took for tithes; though he did not say that he was parson at the time of the severance, yet it should be intended: and a person of plain understanding will interpret this in the same way, that there has been a money consideration passing from the plaintiffs. That appears to me to dispose of the objection which has been made. If, upon the face of the record, we are satisfied affirmatively that there is a consideration shown, it seems to me to be sufficient to dispose of the objection. Upon the case itself I am disposed to go further, and to declare my opinion to be, that if the replication had contained a simple denial of the allegation of want of consideration, it would appear to my mind to be sufficient. It seems to me to bear a resemblance to a case where an executor, defendant, pleaded two outstanding judgments, to each of which the plaintiff replied fraud, and traversed *that the debts recovered were due for just debts: the replication was [*479] holden good on a special demurrer, the Court observing, that the plaintiff might traverse the special matter, or rely on the fraud generally at his election: see *Trethewy v. Ackland*, 2 Saund. 49. No case can be cited in which the contrary has been expressly decided. It seems to me, therefore, that with reference to the principle, as well as the particular circumstances of this case, the replication to the second plea is a good replication; and, upon the whole, I think there must be judgment for the plaintiffs.

PARK, J. I quite agree that the third plea is bad. With respect to the main point, it seemed to me, at the beginning of the argument, that it was sufficient to reply generally that there was a fair and *bonâ fide* consideration, without proceeding to state specifically what the consideration was. The great difficulty now arises upon the new rules: as the defendant is obliged to put upon the record what the defence is, what ought the replication to be in an action upon a bill of exchange? It seems to me to be of importance to the commercial transactions of this country, that there should be a great allowance made for the generality of replication upon bills of exchange; otherwise it would lead to inconvenience, and would cramp and restrain the negotiability of such instruments. Therefore, I am the more inclined to concur with my Lord Chief Justice in thinking that a general allegation of consideration would have been sufficient in this case. That is my opinion, because it seems to me to be a sufficient and specific statement. When the defendants aver that they lost this bill of exchange, and that it was got from them by fraud, and all those circum-

[*480] stances which tend to show *that it was taken without sufficient consideration, and the replication states that it was taken for a full, fair and bonâ fide consideration, it seems to me that it is not necessary there should be such further particularity as has been insisted on. If the bill of exchange was endorsed and delivered to the plaintiffs for a good and valid consideration, that is to say, for money advanced by, and due and owing to the plaintiffs, and they say that at the time it was endorsed to them, they had no notice whatever of the fraud, it must be taken that the bill was given for some antecedent debt. According to the plain import of the words, it would lead any man to conclude that, at the time of the endorsement, there was a full, fair, and bonâ fide consideration given for this bill of exchange. Therefore, I am of opinion there ought to be judgment for the plaintiffs.

VAUGHAN, J. I am of the same opinion. I think we should cramp transactions in the commercial world, and do considerable mischief, if we were to come to any other conclusion.

BOSANQUET, J. I am of the same opinion upon both points. With respect to the third plea, I think it is insufficient; and I shall make no further observation on that head. With respect to the replication to the second plea, it appears to me, as it does to my brothers, that the replication is good. I think, in the first place, that a good and sufficient consideration has been alleged in this replication. I am also disposed to concur with the rest of my brothers upon this point,—that it is sufficient for the plaintiff, in his replication, to aver generally that a good and valuable consideration was given. I am disposed to think that the replication would have been quite sufficient if it had not added the [*481] words “for money advanced by, and due and owing *to the plaintiffs,” thereby setting out the nature of the consideration; but that it was sufficient to say “that after the bill was made, and before it became due and payable on a specified day, the bill was endorsed and delivered to the plaintiffs fairly and bonâ fide, and for a full and valuable consideration.” Upon the whole, therefore, I think there must be judgment for the plaintiffs.

Judgment for plaintiffs.

BRAMAH and Another v. ROBERTS and Others. Jan. 31.

(See ante, p. 469) and where upon demurrer judgment was given for plaintiff on such a replication, the Court refused to allow defendant to withdraw the demurrer on payment of costs.

THE Court having given judgment as above,

Bompas, Serjt., obtained a rule nisi for leave to the defendants to withdraw their demurrer, and rejoin, on payment into Court of 500*l.*, the amount of the bill for which the action was brought.

This rule was granted on an affidavit by the defendants' attorney, that he had been informed and believed that the bill had been negotiated by Hunt, the secretary of the company to which the defendants belonged, in violation of a trust reposed in him.

That the plaintiffs, who had discounted the bill for Hunt, made up the amount by deducting 57*l.* due to them from Hunt.

That Hunt, previously to this, although furnished with cheques on the company's banker, had given to the plaintiffs, cheques on his own private banker, in payment of debts due to them from the company; that some of those latter cheques had been dishonored; that the plaintiffs had never apprised the company [*482] of the *circumstance, but had given Hunt time, and finally adopted the balance remaining due (57*l.*), as a debt due to them from Hunt in his private capacity. Lastly, that the demurrer had been pleaded upon the advice of counsel, and that deponent was advised and believed that the defendants had a good defence upon the merits.

The plaintiffs' clerk, in answer, denied that the plaintiffs had knowledge of any fraud committed by Hunt; asserted that they had given full value for the bill; and further, that Hunt having come to them, a few days before the bill was due, with another bill of the defendants for 1000*l.*, and having requested plaintiffs to discount the same, retaining for themselves the 500*l.* due on the former bill, their suspicions were excited, they detained the 1000*l.* bill, apprised the defendants of the circumstances, and Hunt absconded.

Wilde, Serjt., who showed cause, contended, that upon this state of facts, the defendants had no claim to the indulgence for which they had applied, and objected to the absence of an affidavit from the defendants themselves, that they had a good defence upon the merits.

Bompas, in support of the rule, insisted that the plaintiffs had implicated themselves in Hunt's misconduct, by omitting to apprise the defendants in the first instance, that Hunt had been paying the company's debts with cheques on his own private banker, and that some of those cheques had been dishonored: it was essential to the defence, therefore, that the plaintiffs should show on their replication the precise consideration given for the bill; the demurrer had been pleaded under the advice of counsel; the sufficiency of the replication was a nice question, arising for the first time on the construction of the new rules; and, therefore, upon *payment of costs, and depositing the amount of [*483] the bill in Court, it was a fit case for the Court in its discretion to allow the demurrer to be withdrawn.

*TINDAL, C. J. The law of Westminster Hall, I believe, ever since it stood in the place in which it now stands, has been, that if a party thinks proper to rest his defence or his case upon a point of law raised upon the record, he must either stand or fall upon the point so raised. I do not mean to say that a case may not arise where a point being so taken, a party may, even after judgment, apply to the Court to amend; but according to the advice of Lord COKE, Butler and Baker's case, 3 Rep. 25, you ought never to rely upon a point of law when the facts are in your favor. Now, here it was very easy to have raised the question of fact, whether or not the bill was received for a valuable consideration; and not to have to put the right of the plaintiffs upon a special point of pleading. Although there are excepted cases which will always be attended to, I should expect, after an argument has been heard and judgment given for the plaintiff, at least a distinct affidavit of merits from those who make the application. It does not appear, however, that there is any such affidavit here. Nor are the facts deposed to such as bring the case within the usual grounds of such applications: those facts only raise an argumentative case: from what I have heard, if I had been a jurymen, I should think the discount of this 500*l.* bill, minus the 57*l.*, showed a confidence in the integrity of this transaction rather than any collusion between the plaintiffs and Hunt: and when I heard further that a 1000*l.* bill was brought to them and they refused to have anything to do with it, that would have corroborated in my mind the fairness of the transaction. Therefore it is *that I think this is an application which ought [*484] not to have been made, and the rule must be discharged.

The rest of the Court concurring, the rule was

Discharged.

JONES v. BROWN and Others. Jan. 26.

In trespass, defendants, after alleging that M. had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: plaintiff replied that the goods belonged to him and not to defendants: Held, that upon this issue it was not incumbent on defendants to give formal proof of M.'s bankruptcy and their appointment as assignees.

TRESPASS for breaking and entering plaintiff's close, and taking his goods.

The defendant suffered judgment by default as to breaking and entering the close; but as to taking the goods, pleaded,

First, not guilty; secondly, that the goods were not the goods of the plaintiff; and, thirdly (in substance), that before the said time when, &c.; in the declaration mentioned, a commission of bankrupt issued against one Medcalf, a trader, under which all his goods, chattels, and effects were transferred to his assignees, Cornthwaite and Mills, of Liverpool; that the goods, chattels, and effects in the declaration mentioned were the goods, chattels, and effects of Cornthwaite and Mills, as such assignees as aforesaid; that whilst the said George Medcalf remained and continued such bankrupt as aforesaid, the said goods and chattels of Cornthwaite and Mills, as such assignees as aforesaid, were in the possession of the said George Medcalf: that the said goods, chattels, and effects, so being the goods, chattels, and effects of Cornthwaite and Mills as such assignees as aforesaid, and Medcalf remaining such bankrupt as aforesaid, the plaintiff claiming title to the said goods, chattels, and effects, under color of a certain gift having [*485] been thereof made to him by Medcalf (whereas *nothing of or in the said goods, chattels, or effects in the declaration mentioned, ever passed by virtue of that gift), afterwards and before the said time when, &c., and whilst the said goods, chattels, and effects in the declaration mentioned, were the goods, chattels, and effects of Cornthwaite and Mills as such assignees as aforesaid, and whilst Medcalf remained such bankrupt as aforesaid, to wit, on the 20th of March, 1834, in the declaration mentioned, became and was possessed of the said goods, chattels, and effects in the declaration mentioned: and thereupon the defendants, on the day and year in the declaration in that behalf mentioned, as the servants and by the command of Cornthwaite and Mills as such assignees as aforesaid, seized, took, and carried away the said goods, chattels, and effects in the declaration mentioned, so being in the possession of the plaintiff as aforesaid, as they lawfully might for the cause aforesaid; which were the same supposed trespasses in the introductory part of the first plea mentioned, and whereof the plaintiff had complained against the defendants; and that they were ready to verify, &c.

The plaintiff joined issue on the first and second pleas: and as to the third, replied that the goods, chattels, and effects in the declaration mentioned, at the time when, &c., were not the goods, chattels, and effects of Cornthwaite and Mills as assignees as aforesaid, in manner and form as the defendants had above alleged, but were the goods, chattels, and effects of the plaintiff as in the declaration mentioned.

At the trial before PARK, J., last Warwick assizes, the plaintiff attempted, by witnesses and writings, to show that Medcalf was carrying on business with the sanction of his assignees; that a transfer of the goods in question by him to the plaintiff had been made *bonâ fide*; and that the plaintiff being so in possession, the defendants seized the goods.

[*486] *The defendants' counsel, conceiving this to be the whole of the plaintiff's case, called no witnesses; but, commenting on the facts proved, contended that, even according to the testimony for the plaintiff, the transfer to him was a fraud.

PARK, J., directed the jury to consider whether Medcalf was carrying on business with the sanction of his assignees, and whether the transfer of the goods to the plaintiff was made *bonâ fide*; when

The plaintiff's counsel interposed, and urged, that as the defendants, without proof of title, were wrongdoers, the plaintiff, who was in possession of the goods, was entitled to a verdict, unless the defendants gave some proof of their being Medcalf's assignees. But

The learned Judge thought that, after the case was closed on both sides, this objection came too late; and that the plaintiff, by traversing only the defendants' allegation of property in the goods, admitted the allegation that they were Medcalf's assignees; and

The jury being satisfied that the transfer was a fraud, found a verdict for the defendants on the pleas, and one farthing damages for the plaintiff on the judgment by default. Whereupon,

Hill obtained a rule nisi for a new trial, on the ground that, on these plead-

ings, the plaintiff had not admitted the defendants to be assignees of Medcalf; and as they had called no witnesses, they must be taken to be wrong-doers, against whom, under any circumstances, the party in possession of the goods was entitled to a verdict.

Goulbourn, Serjt., *Humfrey* and *Mellor* showed cause. They insisted that the plaintiff's case had been conducted solely with a view to prove the bona fides of the transfer, in support of which, various writings were *produced, and witnesses examined; that after this, it was not competent to [*487] him to recur to and rely on a mere possessory title: *Sheriff v. Cadell*, 2 Esp. 617; that according to *Abbott v. Parsons*, 7 Bingh. 563, the Court would not permit a party to move for a new trial on an objection to the applicability of evidence, unless the objection were taken before the judge commenced his summing up; and that in *Robinson v. Cook*, 6 Taunt. 336, it was held, that where the plaintiff's counsel acquiesces in the judge's ruling at the trial, whereby the defendant takes a verdict without going into his case, the plaintiff will not be afterwards permitted to move for a new trial on the ground of a misdirection.

Hill and *Amos* in support of the rule, maintained, that upon the issues raised in this cause the plaintiff, as possessor of the goods, ought to have judgment. In trespass, unless the defendants prove a title, possession is sufficient, as against a wrong-doer: per *ELLENBOROUGH*, C. J., in *Chambers v. Donaldson*, 11 East, 69. *Sherriff v. Cadell* was an action of trover, where the plaintiff must establish a title. The defendants' title not being admitted on these pleadings, they were never released from their obligation to prove it, although the objection was not taken till late in the cause.

TINDAL, C. J. I abstain from adverting to that part of the case which relates to the time when the objection was taken at the trial by the counsel for the plaintiff, although I entertain a strong opinion on the subject; but shall decide this rule upon the pleadings in the cause.

This is an action of trespass for breaking and entering the plaintiff's house, and for taking his goods.

*As to entering the house, the defendants have suffered judgment to go by default; as to the goods, they plead, first, the general issue; [*488] secondly, that the goods did not belong to the plaintiff; and thirdly, in substance, that a commission of bankrupt had issued and was still in force against one Medcalf, under which his goods, being the goods mentioned in the declaration, passed to his assignees; that those goods so belonging to the assignees were left in the possession of Medcalf, when the plaintiff took them, claiming by color of a gift from Medcalf; whereupon the defendants, as servants of the assignees and by their command, took the goods from the plaintiff, as being in truth the goods of Medcalf's assignees.

The plaintiff only replies that they were not the goods of the assignees, but the goods of the plaintiff.

The third plea contains several matters which were capable of being denied, and which, if not denied, show title in the assignees.

But it is contended on behalf of the plaintiff that, having taken issue on a single allegation, he is not to be considered as having therefore admitted all the other allegations of the plea, and that the defendants ought to establish by proof the truth of those other allegations. I think, however, that this is not the result of such a state of the pleadings; but, on the contrary, that, as the plaintiff, who might have denied all the allegations, has singled out only one to be put in issue, he must be taken, for the purpose of this cause, to have admitted the rest.

Nothing is more common than in actions of trespass for the defendants to allege that a writ of *fi. fa.* issued against A. B.; that the goods in respect of which a trespass is supposed to have been committed, were the goods of A. B., and that the defendants took them by virtue of the writ. If the plaintiff simply denies that the goods in question were the goods of A. B., he is

[*489] *not allowed to say that he has never admitted the judgment and execution against A. B.

Here the plaintiff might have shown that the goods were not the identical goods to which the commission of bankruptcy against Medcalf applied. That would have entitled him to a verdict. Or he might have shown that the assignees had so long suffered Medcalf to carry on business with the stock of his assignees, that goods sold by him must be taken to have been sold with their assent. No such evidence, however, was given; but the whole case showed that the transfer from Medcalf to the plaintiff had been made for the purpose of fraud. Are we then in such a case to say that the plaintiff can avail himself of the bare fact of possession, where he might have disputed, but has not ventured to dispute, the title pleaded by the defendants?

I think that the plaintiff, having omitted to contest the defendants' title at the proper season, cannot now object that it was not supported by evidence at the trial. The rule must be discharged.

PARK, J. The replication, by denying only that the goods in question belonged to the assignees, admits, in effect, that the assignees were entitled to the goods of Medcalf. That brings us to the matter of fact, whether Medcalf had the authority of the assignees to transfer them to the plaintiff. That was the case set up by him, and never was a case supported by more reprehensible witnesses.

VAUGHAN, J. It is not disputed that possession is *prima facie* evidence of property. But the plaintiff here has not disputed the title of the assignees to Medcalf's goods; and it was for the jury to say whether there had been any lawful transfer from Medcalf to the plaintiff.

[*490] *BOSANQUET, J. I think the bankruptcy of Medcalf and the proceedings under the commission are admitted on these pleadings. If so, it is impossible to doubt that the verdict is correct. Rule discharged.

WILKINSON v. OLIVEIRA. Jan. 27.

The declaration stated, that in consideration plaintiff, at the request of defendant, had given defendant a letter written by O., since deceased, by means of which letter defendant was enabled to, and did determine controversies, and obtain a large portion of O.'s effects, defendant promised to give plaintiff 1000*l.*: Held, that a sufficient consideration was disclosed to sustain an action on the promise.

THE declaration stated, that divers disputes and controversies had arisen between the defendant and divers other persons, respecting the disposition of the estate and effects of one Dominick Oliveira, then late deceased, and the right of the defendant to the possession of any and what part thereof; in which disputes and controversies it became and was necessary, for the termination thereof in favor of the defendant, that the defendant should prove that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien, and a native of Portugal: that the plaintiff was lawfully possessed of a certain writing and paper, being a letter written by the said Dominick Oliveira, in his lifetime, to the plaintiff, which said letter showed, declared, and proved that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien and a native of Portugal; that the plaintiff, at the request of the defendant, gave to the defendant the said letter, to be used and employed by the defendant for the purpose of proving that the said Dominick Oliveira was such alien and native of Portugal at the time he made his will and at the time of his death: that the defendant used and employed the said letter for the said purpose: and that, by means of the said letter and of [*491] the matters *therein contained, the defendant was enabled to, and did cause the said disputes and controversies to be determined in favor of him, the defendant, and did, by means of the said letter and of the matters

therein contained, become lawfully possessed of and acquired a large portion of the estate and effects of the said Dominick Oliveira, of great value, to wit, of the value of 100,000*l.*, &c. And thereupon, to wit, on, &c. at &c., in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there given the said letter to the defendant, the defendant then and there undertook and faithfully promised the plaintiff to give him, the plaintiff, a certain sum of money, to wit, the sum of 1000*l.*

Breach,—refusal to give the 1000*l.* in conformity with the promise.

Plea, that the defendant was not by means of the letter enabled to, and did not by means thereof cause the said disputes to be determined in favor of the defendant, and that the defendant did not, by means of the letter, become possessed of a portion of the estate of Dominick Oliveira, of the value of 100,000*l.*

Demurrer,—for putting in issue matter not properly issuable, and for not denying, or confessing and avoiding, the breach of promise. Joinder.

Kelly, for the plaintiff, was called upon by the Court to support the declaration. The consideration though past, is alleged to have arisen at the defendant's request, which renders it sufficient to impart validity to the defendant's promise; and though the letter in question is alleged to have been given to the defendant, the statement amounts to this,—that, in consideration the plaintiff had put the defendant in possession of a document by which the defendant was enabled to recover 100,000*l.*, the defendant undertook to give the *plaintiff in return 1000*l.* For such an undertaking the delivery of the docu- [*492] ment was ample consideration.

Talfourd, Serjt., *contra*, contended that, taking the whole declaration together it appeared plainly the letter had been handed to the defendant by way of a spontaneous gift; and such a gift was no consideration for a promise to pay.

TINDAL, C. J. What would you say to the case of a man who, entering a shop, should say, I'll give 10*l.* for such an article. Here the word give is used on both sides. It is a gift upon mutual consideration.

Per Curiam. There must be

Judgment for the plaintiff.

HODGES v. Earl of LITCHFIELD. Jan. 27.

Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages, expenses incurred previously on entering into the contract; nor the expense of a survey of the estate; nor the expense of a conveyance drawn in anticipation of a completion of the purchase; nor the extra costs of a chancery suit touching the purchase, in which the vendor is defeated; nor losses sustained by the purchaser, in the resale of stock prepared for the estate. But he is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose; and interest on his deposit money.

THIS was an action of assumpsit, brought by the plaintiff to recover from the defendant damages for a breach of special contract for the sale of an estate by the defendant to the plaintiff.

The declaration stated, by way of inducement (amongst other things), that before the making of the promise and undertaking of the defendant thereafter mentioned, to wit, on the 7th of November, 1828, by certain articles of agreement, made and entered between Robert *Harvey Wyatt, as agent [*493] for and on behalf of the defendant (then Viscount Anson), his heirs, executors, and administrators, of the one part, and the plaintiff for himself, his heirs, executors, and administrators, of the other part, the said R. H. W. agreed to sell, and the plaintiff agreed to purchase, the free and exclusive fishery of the defendant in the River Trent, as advertised to be sold by auction

on the 21st of October, then last, with the right and privilege of landing nets upon, and angling from the lands of the landowners adjoining the river, and the several farms, lands, and hereditaments, described in the schedule to the said articles of agreement, for the sum of 21,500*l.*, of which the sum of 1500*l.* was then paid and the sum of 20,000*l.*, the remainder thereof, was to be paid on the 25th of March, then next; and if the payment should be delayed after that time, and such delay should be occasioned by the plaintiff, the plaintiff should pay lawful interest on his purchase-money from thence, until the time of final payment, and should be entitled to the rents and profits of the premises from the said 25th of March then next, to which time all outgoings would be cleared by the defendant; and it was thereby declared that an abstract of the title should be ready for delivery to the plaintiff, on or before the 25th of December then next, at Mr. Keen's office in Stafford; and if the plaintiff, or any person on his behalf, should object to the defendant's title, or require any act, matter, or thing to be done, procured, or executed, for the completion thereof, notice in writing of the particular objection or matter required should be given to Mr. Keen on or before the 21st of February then next, or otherwise the plaintiff and all persons claiming under him should waive the same, and should be held to have accepted the title: of which articles of agreement the defendant had notice. That thereupon, in consideration of the *premises, [*494] and also in consideration that the plaintiff at the defendant's request had undertaken and faithfully promised the defendant to perform and fulfil all things in the said articles of agreement contained on his part and behalf to be performed and fulfilled, the defendant then and there consented to and approved of the said articles of agreement, and then and there undertook and faithfully promised the plaintiff, that the defendant would make, or procure to be made, a good title to the said estate, free of tithes, on or before the said 25th March then next; and would perform and fulfil all things in the said articles contained on his part and behalf to be performed and fulfilled. The plaintiff then averred that an abstract of the title to the said estate being afterwards, and before the said 25th of December then next, to wit, on, &c., delivered to the plaintiff, one R. H. W. Ingram, a conveyancing counsel, employed by and on behalf of the plaintiff, did thereupon object to the defendant's title, and required certain acts, matters, and things to be done, procured, and executed, for the completion thereof. That although notice in writing of the particular objections and matters so required was afterwards, and before the said 21st of February then next, to wit, on the 17th of February, 1829, given to the said Keen in the said articles of agreement in that behalf mentioned; and although the plaintiff was afterwards, to wit, on, &c., ready and willing, and often offered to pay the said sum of 20,000*l.*, the remainder of the said purchase-money, and to complete the purchase, on having a good title to the said estate to be sold free of tithes; and had always from the time of making the articles of agreement well and truly performed and fulfilled all things therein contained on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof; yet the defendant, not regarding the said articles of agreement, did not nor would, on or before the said 25th of March in the [*495] year last aforesaid, or at any time afterwards, make or procure to be made a good title to the said estate free of tithes, but wholly refused and neglected so to do. By reason of which said several premises, the plaintiff not only lost and was deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the completion of the said purchase, but was put to great charges and expenses, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, in and about the negotiating and agreeing for the purchase of the said estate, and having the same surveyed; and about the investigating the title to the said estate, and the existence and effect of the said supposed modus in the said articles mentioned, and in and about his defence of and in a certain suit commenced and prosecuted

by the defendant against the plaintiff in the Court of Chancery, for compelling a specific performance by plaintiff of the said articles of agreement, and in which suit the bill filed by the defendant against the plaintiff was dismissed by the same Court; and in and about the making and performing of divers journeys, and otherwise respecting the said purchase: and also thereby the plaintiff lost and was deprived of a great part of the gains and profits which he might and would otherwise have made and acquired, from using and employing the said sum of 1500*l.*, so paid by him as aforesaid, and other moneys provided and kept by plaintiff for the completion of the said purchase; and suffered and sustained divers losses, to a large amount, to wit, to the amount of 200*l.*, on the resale of certain sheep, bricks, and hurdles, purchased by the plaintiff for the stocking of the said farms, lands, and hereditaments, and improving the same with a view to the completion of the said purchase.

The defendant pleaded the general issue, and afterwards, *under an order of nisi prius, a verdict was entered for the plaintiff; but such ver- [*496] dict was to be subject to the opinion of the Court, after an award should have been made by an arbitrator, who was thereby empowered to ascertain and settle the amount which would be properly payable to the plaintiff on each and every of the following heads of claim stated in the declaration, in case the Court should be of opinion that the plaintiff was entitled to recover thereon respectively: that is to say, the plaintiff's charges and expenses,—first, in and about the negotiating and agreeing for the purchase of the estate agreed to be sold, and having the same conveyed:—secondly, in and about investigating the title to the said estate, and the existence and effect of a supposed *modus* in lieu of tithes:—thirdly, in and about the defence of the suit in Chancery mentioned in the declaration:—fourthly, in and about the making and performing of divers journeys, and otherwise respecting the purchase:—fifthly, the plaintiff's loss in being deprived of the gains and profits he might have made from using the 1500*l.* mentioned in the declaration. The claim in respect of loss on the resale of sheep, &c., was abandoned.

The arbitrator found, that 6*l.* 1*l.* 8*d.* would be properly payable by the defendant to the plaintiff for his expenses in negotiating and agreeing for the said purchase; the sum of 4*l.* 9*s.* 8*d.*, parcel thereof, being expenses incurred by the plaintiff with his own agent in and about the said negotiation, and prior to the execution of the articles of agreement. And that 10*l.* 10*s.* would be properly payable for the expense of having the estate surveyed.

As to the second head of claim, the arbitrator found that the sum of 128*l.* 10*s.* 10*d.* would be properly payable in respect thereof, which sum was composed of the following particulars: the sum of 87*l.* 1*s.* 10*d.* for the charges of the solicitor of the plaintiff in the investigation* of title, allowed on taxation; [*497] 7*l.* 12*s.* 6*d.*, the expenses and coach-hire of the said solicitor in a journey to and from Stafford relating to the same matter, and also allowed on taxation; 6*l.* 17*s.* 2*d.*, the fees paid in searching for judgments and other incumbrances, which searches were made on the 27th of February, 1829; 1*l.* 11*s.* 4*d.* fees paid in other necessary searches; and 25*l.* 8*s.* expended in fees to counsel. But of the said sum of 87*l.* 1*s.* 10*d.*, the arbitrator found that 6*l.* 17*s.* 2*d.* were for solicitor's charges in attending to make the searches first above-mentioned; 16*l.* 9*s.* 4*d.* for solicitor's charges in preparing conveyances on the 27th of February, 1829; and of the said sum of 25*l.* 8*s.*, the sum of 10*l.* 10*s.* was for counsel's fees in settling the same conveyances: and he also found that of the said sum of 87*l.* 1*s.* 10*d.*, the further sum of 10*l.* 18*s.* was for charges incurred after the date of the filing of the bill by the defendant to compel the specific performance above mentioned.

As to the third head of claim, the arbitrator found that the said bill was dismissed with costs; that the plaintiff's costs in defending himself against the said bill were taxed as between party and party; and that the amount of such taxed costs had been duly paid to him; but that there remained the sum of

194*l.* 4*s.* 11*d.*, which had been paid by him to his solicitors for the extra charges as between solicitor and client in the course of such defence; and the arbitrator found that the said sum of 194*l.* 4*s.* 11*d.* would be reasonably payable to the plaintiff under the third head.

As to the fourth head of claim, the arbitrator found, that in the course of the negotiation for and about the purchase, and of the defence of the plaintiff in the said suit, it became reasonable and prudent for the plaintiff to take certain journeys and to incur certain expenses, and that the sum of 45*l.* would be properly payable to the plaintiff in respect thereof.

[*498] *And as to the fifth head of claim, the arbitrator found that, upon the dismissal of the defendant's bill in equity, with costs, the deposit of 1500*l.* theretofore advanced by the plaintiff, was ordered to be returned; that the plaintiff thereon applied to the Court of Equity for an order for the allowance of interest thereon; and that an order was made, and had been performed, for the payment of interest at the rate of 4 per cent., from the 7th of November, 1828, to the 23d of June, 1832, when the said deposit was returned: and if the Court should be of opinion that the plaintiff was entitled to recover any further compensation for the loss of the use of the said 1500*l.* during the period last mentioned, the arbitrator found that the sum of 54*l.* 3*s.* 8*d.* would be properly payable to him in that behalf.

The question for the opinion of the Court was, whether the plaintiff should retain the verdict; and if so, whether for the sum of 439*l.* 0*s.* 8*d.*; or for what other sum.

Thesiger, for the plaintiff, and *Talfourd*, Serjt., for the defendant, discussed and received the judgment of the Court upon each head of the charges separately.

Upon the first head, with respect to the 4*l.* 9*s.* 8*d.* incurred by the plaintiff with his agent prior to the execution of the articles of purchase, and 10*l.* 10*s.* for the survey of the estate.

TINDAL, C. J. said,—The expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit, at a time when it is uncertain whether there will be any contract or not.

The charge for a survey must also be disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out.

[*499] *Upon the second head, *Thesiger* abandoned the claim of 16*l.* 9*s.* 4*d.* for the charges of preparing a conveyance, and 10*l.* 10*s.* counsel's fees thereon: and *Talfourd* objected to the charge of 7*l.* 12*s.* 6*d.* for the journey to Stafford to investigate title, and 6*l.* 17*s.* 2*d.* for searching for judgments, on the ground that the investigation (which could only be the comparing of deeds with the abstract), and the search for judgments, was made too early in the proceedings. The plaintiff should not have incurred those expenses till he knew whether or not the defendant could answer the objections to his title.

TINDAL, C. J. I think both these charges may be allowed. Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily; and, for the same reason, the comparison of deeds with the abstract should be made early.

Upon the third head, *Talfourd* objected to the payment of 194*l.* 4*s.* 11*d.*, the plaintiff's costs as between attorney and client, ultra the costs as between party and party, taxed and paid to him in the suit in Chancery. In *Hathaway v. Barrow*, 1 Campb. 151, it was held, that in an action for malfeasance, whereby the plaintiff incurred costs in judicial proceedings, if there was an order of another court for the defendant to pay the costs of those proceedings to the plaintiff, he could neither recover, as special damage, the sum at which they were taxed, nor the extra costs as between himself and his attorney.

Sinclair v. Eldred, 4 Taunt. 7, and *Jenkins v. Biddulph*, 4 Bingh. 160, are to the same effect.

**Thesiger*, in support of the claim, relied on *Sandback v. Thomas*, 1 Stark. 306, where, in an action for maliciously holding the plaintiff to [*500] bail, he was held entitled, in the calculation of damages, to recover, not merely the taxed costs, but the costs as between attorney and client.

And in *Jones v. Dyke* and others, Sugd. Vend. & Pur. Append. 8,—an action for the recovery of deposit money and damages upon the refusal of a vendor to complete a sale of an estate in Wales,—the plaintiff had a verdict by consent for the following charges, the Judge, M'DONALD, C. B., thinking them reasonable:—"costs of plaintiff's solicitor, 47*l.* 19*s.* 4*d.*; journeys to London and Llandilo, 21*l.*; journey to London, 15*l.* 15*s.*"

Sandback v. Thomas was not cited in *Jenkins v. Biddulph*: and in *Webber v. Nicholas*, Ry. & Moo. 419, BEST, C. J., thought *Sandback v. Thomas* right, although, as it was only a nisi prius decision, he could not adhere to it in opposition to decisions in banc.

There can be no reason on principle, why a party should not be indemnified for all the lawful expenses he has incurred in a successful suit. In the present case, these extra charges are a damage to the plaintiff consequential on the defendant's breach of contract. [TINDAL, C. J. If the Court of Equity had thought so, it would have ordered costs to be taxed as between attorney and client. BOSANQUET, J. Are not costs beyond taxed costs to be considered as incurred voluntarily, beyond what is absolutely necessary?] The extra costs here may be considered as one branch of the expense of investigating title, which, it has been decided, the plaintiff has a right to recover.

TINDAL, C. J. We all think that the extra costs in Chancery are not a damage which is a necessary consequence *of the breach of this contract. [*501] Every expense which is a necessary consequence of the breach of contract, ought to be allowed; but the filing a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases. Upon this principle, and in adherence to the cases cited for the defendant, we think this claim ought not to be allowed.

PARK, J. I am of the same opinion. If the claim be allowed in this case, I do not see why, in all cases, a separate action should not be brought for costs which the officer of the Court disallows on taxation.

VAUGHAN, J., concurred.

BOSANQUET, J. I think the plaintiff had his compensation in the costs allowed by the officer of the Court.

Upon the fourth head of charges, 45*l.*, for journeys and expenses which it was reasonable and prudent for the plaintiff to take and incur in negotiating the purchase and defending the Chancery suit, it appeared that some of the journeys had been taken before the contract: the expense of them, therefore, was disallowed pursuant to the decision under the first head. So, likewise, as a result of the decision on the third head, was the expense of such of those journeys as were undertaken in the course of the Chancery suit.

The fifth head of charges was not contested, and
Per Curiam. It ought to be allowed.

Judgment accordingly.

*WEBB, Assignee of WALTER, an Insolvent, v. WEATHERBY. [*502]
Jan. 28.

To a plea of payment of 8*l.* 8*s.* 2*d.* in satisfaction and discharge of defendant's promise. Replication, that defendant did not pay it in satisfaction and discharge, nor did plaintiff receive it in satisfaction and discharge. Held, on demurrer, unobjectionable.

To a declaration in assumpsit for goods sold, lodging provided by, and on an account stated with, the insolvent before his insolvency,

The defendant pleaded, first, the general issue; and, secondly, as to the sum of 3*l.* 8*s.* 2*d.*, parcel of the sums in the declaration mentioned, that after the making of the promise in the declaration mentioned as to that sum, and before Walter became insolvent, to wit, on, &c., the defendant paid Walter the said sum of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of the said promise by him, the defendant, made in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by Walter by reason of the non-performance of the said promise as to that sum; and that Walter accepted, had, and received of the defendant the said sum of 3*l.* 8*s.* 2*d.*, in full satisfaction and discharge of the said promise in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by Walter by reason of the non-performance of the same promise.

To the second plea, the plaintiff replied, that the defendant did not pay Walter the said sum of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of the said promise by the defendant so made as aforesaid in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damages sustained by Walter by reason of the non-performance of the same promise as to that sum, nor did Walter accept, have, and receive of defendant the said sum of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of the said promise in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage [*503] sustained by Walter by reason of the non-performance *of the same promise in manner and form as the defendant had, in his last plea in that behalf alleged.

The defendant demurred, assigning for causes of demurrer, that the issue attempted to be raised by the replication was multifarious and complex, inasmuch as the replication had not merely denied that the defendant paid Walter the said sum of 3*l.* 8*s.* 2*d.*, but also that Walter accepted, had, and received the same of the defendant in full satisfaction and discharge of the said promise as to the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by the said Walter by reason of the non-performance of the same promise; both of which facts were material, and either of which would be sufficient to bar the plaintiff from maintaining his action against the defendant. And also for that both the said facts constituted two distinct and different propositions.

Joinder.

Chandless, for the defendant, contended that the replication was ill. The plaintiff, in an action of assumpsit, seeks to recover damages; and, in an action for damages, it may well be, that the defendant has paid something, and yet that the plaintiff has not accepted it in satisfaction of his entire demand, or vice versa. It is necessary, therefore, in such an action, for the defendant to aver acceptance in satisfaction as well as payment: *Paine v. Masters*, 1 Str. 573; *Drake v. Mitchell*, 3 East, 256 (per LAWRENCE, J.); and both the payment and the acceptance being material allegations, the plaintiff ought to elect on which of them he will tender an issue. In the case of unliquidated demands, acceptance of less than the entire claim in satisfaction of the entire claim, is an answer to the action: *Wilkinson v. Byers*, 1 Adol. & Ell. 106, 3 Nev. & Mann. 853; [*504] and a defendant may *be able, by letters or oral admissions, to prove the acceptance in satisfaction in cases where he may have no evidence to prove the payment in satisfaction; or he may be able to prove the payment only, and satisfaction may be implied from the conduct of the plaintiff: the defendant ought not, therefore, by any form of pleading, to be called on to establish both. The old books of entries always add to the allegation of payment, acceptance in satisfaction, from which it may be inferred that both allegations were deemed material; and replications to pleas of the delivery and acceptance of an article in accord and satisfaction of the plaintiff's demand, protest the delivery and traverse only the acceptance of the article in satisfaction. A departure from forms so long established will weaken the foundation and shake the whole fabric of the law of England.

Theobald, contra, was stopped.

TINDAL, C. J. I hope the law of England will not be much disturbed if we overrule this demurrer. This is not a plea of accord and satisfaction, but of a payment received in satisfaction of the plaintiff's demand; the receipt in satisfaction virtually implies that the payment was made in satisfaction; and I cannot see how the defendant is injured by the plaintiff's taking issue on the entire allegation. In *Peytoe's case*, 9 Rep. 80, a, Lord COKE says, "Nota reader, the best and most secure form of pleading of an accord is to plead it by way of satisfaction, and not by way of accord; for if he pleads it by way of accord, he ought to plead the precise execution thereof in the whole, and if he fails of any part thereof, his plea is insufficient; but by way of satisfaction he shall plead no more than that the defendant *paid the plaintiff 6l. 10s. in full satisfaction of the same action, which the plaintiff received," &c.: and in *Pinnell's case*, 5 Rep. 117, a, he says, that payment and acceptance before the day, of parcel, in satisfaction of the whole, would be a good satisfaction in regard of circumstances of time. In *Young v. Rudd*, 5 Mod. 86, to *indebitatus assumpsit* on a quantum meruit, the defendant pleaded in bar, that he gave the plaintiff a beaver hat, which he accepted in satisfaction of the debt. The plaintiff replied by protestation, that the defendant did not give the hat in satisfaction, and traversed that he accepted it in satisfaction; and, upon demurrer, it was objected, on the behalf of the defendant, that that was an immaterial traverse, because the giving was the directing matter, which ought to have been traversed, and not answered by protestation. To which the answer was, either the giving or the acceptance of what was given in satisfaction might be traversed.

If a denial of acceptance in satisfaction implies a denial of payment in satisfaction, it is at all events no more than surplusage to say that the money was neither paid in satisfaction nor received in satisfaction. Where a creditor receives without objection what is offered by his debtor, *solvitur in modum solventis*, and it must be implied the debtor paid it in satisfaction; where the creditor objects, *recipitur in modum recipientis*, and issue taken on the receipt in satisfaction, is impliedly an issue on the payment in satisfaction.

The rest of the Court concurred.

Judgment for plaintiff.

*HUMPHREY v. WODEHOUSE, GOMME, FISHER, and STILLWELL. Jan. 30. [*506]

A policeman defendant who obtains a verdict is entitled to his costs under 10 G. 4, c. 44, notwithstanding the power given to the Judge to certify under 3 & 4 W. 4, c. 42.

THIS was an action for an assault, in which a verdict was given for the plaintiff against Wodehouse and Gomme; but the defendants Fisher and Stillwell, being police officers, and having acted on the occasion as such, were acquitted by the direction of the Chief Justice, who certified, nevertheless, under 3 & 4 W. 4, c. 42, that the plaintiff had sufficient ground for joining them in the action.

By that statute it is enacted, section 32, that "where several persons shall be made defendants in any personal action, and any one or more of them shall, upon the trial of such action, have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the judge before whom such cause shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action."

Busby obtained a rule, calling on the plaintiff to show cause why, notwithstanding the certificate of the Chief Justice, the defendants Fisher and Stillwell should not have their costs pursuant to 10 G. 4, c. 44, s. 41, by which it is enacted, for the protection of persons acting in the execution of that act, amongst other things, that "if a verdict shall pass for the defendant, the de-

defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, *unless the judge before [*507] whom the trial shall be tried, shall certify his approbation of the action and of the verdict obtained thereupon."

Wilde, Serjt., and *Humfrey*, who showed cause, contended, that the forty-first section of 10 G. 4, c. 44, must now be taken, subject to the judge's power to certify under 3 & 4 W. 4. That power was given without exception; and the act, which was passed to remedy the defects of 8 & 9 W. 3, c. 11, ought to receive a liberal construction.

Busby. It was not intended by 3 & 4 W. 4, to repeal the forty-first section of 10 G. 4, c. 44, but merely to extend to every form of action the provisions of 8 & 9 W. 3, c. 11, by which it is enacted, that "where several persons shall be made defendants to any action or plaint of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit, in like manner as if a verdict had been given against the plaintiff or plaintiffs and had acquitted all the defendants, unless the judge, before whom such cause shall be tried, shall, immediately after the trial thereof in open court, certify upon the record under his hand, that there was a reasonable cause for making such person or persons a defendant or defendants to such action or plaint." The power given, therefore, by 3 & 4 W. 4, must be exercised, subject to the exemptions created by 10 G. 4, c. 44.

TINDAL, C. J. Upon reconsideration, and having the statutes now before me, I think that the act under which I gave the certificate, does not authorize it in such a case as this. It appeared to me at the trial, that the statute [*508] *3 & 4 W. 4, with very general words, *did* override the forty-first section of 10 G. 4. But I think, now, that the only object of the statute of W. 4, was to remedy the defects in the statute W. 3.

That act was imperfect in three respects. It applied only to certain specified forms of action; to cases where a verdict had been given; and to 40s. costs; whereas the new statute embraces personal actions of all kinds, extends to judgments upon demurrer as well as upon verdict, and gives all the costs the party incurs.

As these were the principal objects of the act, I think it cannot be held to repeal the intermediate act of 10 G. 4. The forty-first section of that act contains no exception; and I think we cannot engraft an exception into it from the general words of 3 & 4 W. 4.

PARK, J. The 3 & 4 W. 4, was only passed to remedy the defects of 8 & 9 W. 3, and extend it to heavier costs, to every species of judgment, and to all personal actions. But the police act, 10 G. 4, stands on a very different footing: it applies to a particular class of men who are often placed in difficult and dangerous situations. The object was to afford those persons ample protection, by depriving the plaintiff of costs unless the Judge certifies his approbation of the action and verdict, and by giving the defendant, if successful, costs as between attorney and client.

We cannot hold, therefore, that this protection has been taken away by an act passed mainly to remedy defects in procedure.

VAUGHAN, J., and BOSANQUET, J., concurred.

Rule absolute.

[*509] *LEUCKHART v. COOPER and Another. Jan. 30.

Pleas in trover.

UPON a rule to plead several matters in trover, the Court allowed the following pleas, considering them to be essentially different defences.

1st, The general issue.

2dly, A general lien by custom for up-town warehousemen, in respect of their general balance against any individual housing goods with them; and that the goods in question were housed at the defendants' by one Heilbron, who was indebted to them on a general balance.

3dly, A lien against Heilbron by special agreement.

4thly, That the plaintiff sent the goods in question to Heilbron, with such powers as to give him all the indicia of property; and that therefore, the defendants had a right to insist on the custom mentioned in the second plea, as against Heilbron.

5thly, The custom in the second plea, set up as applicable to a debt due to the defendants from the plaintiff.

Richards in support of the rule.

W. H. Watson, contra.

BRIDGES v. FISHER. Jan. '30.

[*510]

Costs of commission to examine witness abroad, not allowed to the party who obtains the commission, although successful in the action, where the examination is more peculiarly for his benefit.

THE plaintiff and M'Donald were commissioners for the distribution of certain military prize-money.

The defendant, who was M'Donald's clerk, was furnished with a list of the persons entitled to share in this prize-money;

But, under the directions of M'Donald, he gave cheques for a portion of it to persons whose names were not in the list of claimants, and the plaintiff became liable for the money so misapplied.

M'Donald having become bankrupt, the plaintiff brought an action on the case against the defendant, on the ground of his having improperly lent himself to the purposes of M'Donald, whereby the plaintiff was injured.

After the action was commenced, and a few days before the declaration was delivered, M'Donald retired to France; whereupon

The plaintiff, in his particulars of demand, having omitted to give credit for a considerable sum paid by M'Donald, the defendant obtained a commission under 1 W. 4, c. 22, to examine M'Donald in France.

This examination was attended and conducted as well by counsel for the plaintiff as for the defendant.

The defendant, however, did not give the minutes of it in evidence at the trial of the cause, the jury having found a verdict in his favor, apparently on the ground that he was M'Donald's clerk at a small salary, and had done no more than obey the directions of his employer. Under these circumstances,

**Adams*, Serjt., obtained a rule nisi to refer it to the prothonotary, to tax the defendant's costs of this commission. [*511]

Wilde, Serjt., and Sir *J. Claridge* who showed cause, contended that it was doubtful whether or not the minutes of M'Donald's examination could have been received in evidence for the defendant, M'Donald being so directly interested in the result of the suit. As the minutes were never produced at the trial, and as it was manifestly for the advantage of the defendant that M'Donald should not be exposed to a cross-examination in open court, the defendant himself ought to defray the expense of the commission, the costs of which were, under the statute, in the discretion of the Court.

Adams and *Nicholl* in support of the rule maintained that M'Donald would have been a competent witness: *Whytt v. M'Intosh*, 8 B. & C. 317; that, by way of precaution, it was necessary the defendant should be prepared with his testimony, particularly as to the sums which he had actually paid; and that, therefore, the expense of the commission ought, like the expense of any witness for the defendant, to be defrayed by the losing party.

TINDAL, C. J. It is unnecessary for us to discuss the question whether or not M'Donald would have been a competent witness for the defendant, because this case may be decided by the clause of the statute which makes it discretionary in the Court whether they shall allow the costs or not.

The application is made under the statute 1 W. 4, c. 22, s. 1, and on the [*512] recital of that section may be *seen the object of the legislature. Every one knows that before that act passed, a party who wanted the testimony of a witness abroad filed his bill in Chancery for a commission to examine him, and the cause was hung up till the suit in Chancery was at an end. It was therefore a great boon to the subject to enable him to avoid this expense and delay by applying at once to the Court of Law. That power is given by sect. 1 of the recent act, and, by a subsequent section, the costs of the commission are placed in the discretion of the Court from which it issues.

When we are called on to exercise that discretion, our first duty is to consider how the costs were paid before. Now in the Court of Equity, the party applying paid the costs himself; it was considered a sufficient advantage that he so obtained the testimony of a witness who must otherwise have been wanting to his cause. However, the question where the burden shall fall, must ultimately depend upon the peculiar circumstances of each case.

Looking at the circumstances of this case, we think the defendant had a great advantage in examining M'Donald abroad, without bringing him publicly before a jury. The defendant was M'Donald's clerk; and the claim made against the defendant arose out of M'Donald's application of money with which he had been intrusted on the part of the plaintiff. Without impeaching the conduct of the defendant, it is clear there would have been a great bias on the part of M'Donald, to shelter the person who had been instrumental to the misapplication of the money in question; and the knowledge of that bias might have operated unfavorably upon a jury. I think, therefore, the defendant has already had a sufficient advantage in obtaining this evidence, without pro- [*513] ducing the witness *before a jury, and that we ought not to call on the other party to contribute to the expense.

PARK, J. I am of the same opinion. This is a case in which the Court is not hampered in the exercise of its discretion. Before the recent statute, the party who sued out the commission incurred all the expense. And a main object of that act was, to give the Court a discretion as to costs. For the reasons given by the Chief Justice, I think the circumstances here are so ambiguous, that the costs ought not to be allowed.

VAUGHAN, J. Under all the circumstances, I think this commission was a boon that the defendant ought to pay for.

BOSANQUET, J., concurred.

Rule discharged.

GEORGE v. ELSTON, EVELEIGH, and COOK. Jan. 31.

Where a verdict was found against one of three defendants, and in favor of the other two, the Court deducted the costs of the two out of plaintiff's costs and damages against the one, without regard to the plaintiff's attorney's lien.

In trespass on the case for an excessive distress, the plaintiff obtained a verdict against Cook with 45*l.* 10*s.* damages, but failed as to Elston and Eveleigh: whereupon,

Wilde, Serjt., upon an affidavit that the plaintiff was unable to pay, obtained a rule nisi for the prothonotary upon the taxation of costs in this cause to deduct from the plaintiff's damages and costs against Cook, 37*l.* 10*s.* the costs of Elston and Eveleigh in this action, and also 13*l.* 3*s.* costs due from the plaintiff in respect of an action of trespass against Elston and Eveleigh, in which he had been nonprossed.

**Kelly*, who showed cause, objected to this, on the ground that it would interfere with the lien of the plaintiff's attorney for his own costs. [*514]

In *Schoole v. Noble and Others*, 1 H. Bl. 23, where there were many defendants, and some went to trial and obtained a verdict, but others suffered judgment by default, the Court permitted the costs and damages on the judgment by default to be deducted from the costs taxed on the postea to those defendants who had a verdict; and held, that an attorney had only such a lien on the costs as was subject to the equitable claims of the parties in the cause. But it is doubtful whether the attorney's lien is so qualified; and in *Hall v. Ody*, 2 B. & P. 28, Lord ELDON said the rule should be reconsidered. In *Mitchell v. Oldfield*, 4 T. R. 123, and *Randle v. Fuller*, 6 T. R. 456, the Court of King's Bench would allow no set-off of the costs of one cause against the costs of another, even between the same parties, to the prejudice of the attorney's lien. Here, the parties to the action of trespass are not the same as the parties to this action. In *Nunez v. Modigliani*, 1 H. Bl. 217, *O'Conner v. Humphrey*, 1 H. Bl. 657, and *Bourne v. Benett*, 4 Bingh. 423, the set-off was allowed, but the parties were substantially the same. However, in *Mordecai v. Nutting*, Barnes, 145, the plaintiff sued four defendants, got a verdict against one, and the other three were acquitted. On an affidavit that plaintiff was an itinerant Jew and poor, the defendants who were acquitted obtained a rule to show cause why their costs should not be deducted out of what the prothonotary should allow the plaintiff for costs against the defendant who was found guilty. On showing cause the Court declared the motion to be unprecedented, and discharged the rule.

*That is expressly in point, and the general rule of Hil. 2 W. 4 (93), provides that "no set-off of damages or costs between parties" [*515] shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

Wilde. The attorney's lien under that rule has always been considered subject to the equitable rights between the parties. *Schoole v. Noble* and *Nunez v. Modigliani*, therefore, are in point for the defendant. As for *Mordecai v. Nutting*, it is answered by *Roberts v. Biggs*, Barnes, 146, in the next page: and there is an affidavit here that the plaintiff is unable to pay.

TINDAL, C. J. I think the rule of Hil. 2 W. 4, applies to cases where there is a cross claim for costs in separate actions. In this cause the two defendants who make the application are brought into Court by the plaintiff, and the verdict being in their favor, I see no reason why they should not have their costs. *Schoole v. Noble* is in point.

Rule absolute as to setting off 37*l.* 10*s.*, the costs of Elston and Eveleigh in this cause.

*TROTTER v. BASS. Jan. 31.

[*516]

A Judge has no jurisdiction to amend the endorsement on a writ of summons.

THE writ of summons in this case was originally endorsed for the recovery of 25*l.*, but with a view to send the cause before the under-sheriff, the plaintiff, by order of a Judge at chambers, amended the endorsement by substituting 15*l.* for 25*l.*

Sevell obtained a rule nisi to rescind this order, on the ground that the Judge had no jurisdiction to amend the endorsement on the writ; and

The Court being of that opinion, the rule was made

Absolute.

Talfourd, Serjt., showed cause.

GREEN v. GLASSBROOK. Jan. 31.

Money paid into Court in lieu of bail, but under a protest against the sufficiency of the affidavit to hold to bail, will not be paid out of Court to defendant on the ground of the insufficiency of the affidavit.

THE defendant, upon being arrested, paid into Court the amount of the debt, and 20*l.* in lieu of putting in special bail, pursuant to 7 & 8 G. 4, c. 71, but protested at the same time against the sufficiency of the affidavit to hold to bail, and

Taddy, Serjt., obtained a rule nisi for the defendant to take the money out of Court, on the ground of a defect in that affidavit.

* *Wilde*, Serjt. showed cause. The statute 7 & 8 G. 4, c. 71, enacts, [*517] s. 2, that "in all cases where any defendant shall have been arrested, and shall have given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such defendant, instead of putting in and perfecting special bail, to deposit and pay into court the sum endorsed upon the writ, together with the amount of the king's fine, if any, upon the original writ, and a further sum of 20*l.* as a security for the costs of the action, there to remain to abide the event of the suit; and thereupon the said defendant may, and he is hereby required to enter a common appearance, or file common bail in the action, within such time as he would have been required to have put in and perfected special bail in the action according to the course of the said court." The defendant, therefore, after paying the money into court, must be taken to stand in the same situation as if he had put in and perfected special bail, and had entered an appearance. In such cases it is too late to object to the sufficiency of the affidavit to hold to bail.

Taddy. As the defendant has no option given him, but is required to enter an appearance, it could not have been the intention of the legislature to divest him of the power of making objections which, but for appearance he would be entitled to make. At all events, he is entitled to make them in this case, having paid the money under a protest.

TINDAL, C. J. This statute is very beneficial to defendants; it imposes no duty on them, but gives them an option instead of putting in and perfecting special bail, to pay into court the sum endorsed upon the writ, together with the amount of the king's fine, if any, and 20*l.* as a security for costs, upon [*518] entering a common *appearance within such time as they would have been required to put in and perfect special bail.

The defendant in this case has made his option; instead of putting in and perfecting special bail, he has paid into Court the sum required; he must take that act with all its consequences; and among others, the consequences of having entered an appearance. Rule discharged.

SOUTHGATE and Others, Executors of THOMAS CLARK,
v. CROWLEY and Another. Jan. 31.

The circumstance, that an executor has commenced and conducted an action properly, is not sufficient to exempt him from costs, if he fails.

A VERDICT having been given in favor of the defendants in this cause.

Acherley, Serjt., obtained a rule nisi calling upon them to show cause why the plaintiffs should not under 3 & 4 W. 4, c. 42, be exempted from the payment of costs.

The action was brought by the plaintiffs to recover a balance of 917*l.* 18*s.* 10*d.* which they alleged to be due from the defendants for the use of a wagon and three horses hired by them of the testator Clark at various intervals from 1827 to 1833; of a cart and two horses hired at intervals from 1829 to 1833; and for cartage done by Clark for the defendants between 1826 and 1833.

Clark died in 1833, having appointed the plaintiffs his executors.

In support of the present application the plaintiffs' attorney deposed that, from the examination of Clark's books and bookkeeper, he believed the defendants to be indebted to Clark to the amount of 917l. 18s. 10d.

That he applied to the defendant Crowley for the amount, when Crowley stated that he owed Clark no more than 535l., and objected to pay more, but refused *to disclose the nature of his objection, referring applicant to defendants' attorney, who declined in like manner to give any reason [*519] for the refusal to pay.

That a tender of 535l. was afterwards made to the plaintiffs; but the party making it refused to disclose the nature of the defendants' objection to pay more, except that Clark had agreed to pay the wages of the men who drove the wagon and cart.

That at the trial an offer made by the plaintiffs to refer to arbitration all matters in difference, was refused by the defendants; that the defendants then admitted that the cartage charged for, had been done, and that the charges were correct; also, that the wagon and horses, and cart and horses, had been employed by them for the time alleged: but they called a witness who proved that Clark had expressly agreed to furnish two horses for the cart, and charge for one only, whereupon the balance which but for such agreement would still have been in favor of the plaintiffs, being turned against them, the verdict was found for the defendants.

That the plaintiffs were wholly ignorant that Clark had made any such agreement, and that the deponent would not have advised them to proceed if the defendants' attorney had informed him they were in a condition to prove it.

Upon production of Clark's books at the trial it appeared that, for a period of three years, a blank was left for the amount of the charge in respect of the cart and horse: and Clark's servants were called to establish a *quantum meruit*.

The plaintiffs had had the assistance of an accountant before commencing the action; and the defendants had refused to say, whether or not there was any agreement in writing.

Wilde, Serjt., appeared to show cause: when the Court observing, that as a general rule executor-plaintiffs were *now bound, where the verdict goes [*520] against them, to pay costs; that the onus of making out an exception was cast on them; and that there did not appear in the present case to have been any misconduct on the part of the defendants; called on

Atcherley and *Hayes* with him, to support the rule. They contended, that the ground on which executors were formerly exempted from costs, was the difficulty they lay under of knowing what was the contract of their testator. *Hayworth v. Davies*, Cro. Jac. 429; *Bull v. Palmer*, T. Jones, 47. And the Court ought to exercise its discretion under the new act with a view to that principle. Here, the plaintiffs had discharged a duty cast on them by law, and had discharged it in an unobjectionable manner, proceeding with due caution, and calling in the aid of an accountant; but they could not reasonably have anticipated that a contract for supplying three horses would turn out to be a contract for supplying one of them without any charge: they ought not, therefore, to be subjected to costs which they might have to pay *de bonis propriis*, while, on the other hand, if they had omitted to sue they might have been liable for a *devastavit*. In *Wilkinson v. Edwards*, 1 New Cases, 301, the administrator commenced the action with temerity, and prosecuted it recklessly, occasioning the defendant a great deal of unnecessary expense. Here no blame attached to the plaintiffs; and the defendants had been the occasion of all the expense by refusing to say what their agreement with the testator was. Some precise rule ought to be laid down for the exercise of the discretion of the Court.

TINDAL, C. J. This question comes before us on the construction of the

statute 3 & 4 W. 4, c. 42, by which it is enacted, "that, in every action brought by any *executor or administrator in right of the testator or [521] intestate, such executor or administrator shall, unless the Court in which such action is brought, or a judge of any of the superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff; and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for costs, and they shall be recovered in like manner."

According to the general rule, therefore, established by that act, an executor, when unsuccessful, is liable to costs; his occasional exemption is an excepted case, and, like other exceptions, must be made out clearly. Before the recent act, when executors sued in right of their testator, they were not liable to costs although they should fail in their action. I had always thought that this arose, not from express exemption by any law, but owing to the particular mode in which the language of the statutes giving costs to a defendant is expressed. By 23 H. 8, c. 15, s. 1, costs are given to a defendant where the plaintiff is nonsuited, or a verdict passes against him, in actions or contracts immediately with, or for wrong immediately done to, the plaintiff. That statute was extended to all personal actions by 4 Jac. 1, c. 3; which being framed on the model of 23 H. 8, c. 15, it was held, that executors and administrators are neither within the one nor the other, inasmuch as the contract on which they sue is not made immediately with themselves, but with their testator or intestate. And certainly this was no new doctrine of mine; for in *Tattersall v. Groote*, 2 B. & P. 258, [522] Lord ELDON says, "on a review of the cases, we think that *the sound doctrine to be collected from them is, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to the payment of costs, though the cause of action arose after the death of the testator or intestate. This doctrine seems to be founded on the act of parliament of which all the cases are an exposition, namely, the 23 H. 8, c. 15. Attending to the language of that act, perhaps we may be authorized to say, that the sound principle on which the exemption of executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie; but that the exemption founds itself on the description of the actions contained in the statute by which costs are to be paid." And though cases have been cited of an earlier date in which the practice is ascribed to a different cause, yet the modern doctrine is that which I have pointed out, and results from a view of all the decisions.

However, it is not very material to inquire what was the origin of the rule; it was found to be clearly a grievance which the late statute was passed to remedy. For no good reason could be assigned for making a difference between executors and other parties to suits. When the defendant succeeds against an ordinary party he is entitled to his costs; and if the general rule, *Victus victori in expensis condemnandus est*, is sound, it is for the executor to show the special circumstances under which he is to be excepted from the operation of the rule. One occasion for the exercise of the discretion of the Court in favor of the executor, no doubt would be, where having proceeded with every caution, he has been led on to incur the expense of a trial by misrepresentation or deception in the adverse party. But such is not the fair result of the evidence in this case. The action is brought for a specific sum claimed in respect of an alleged [523] contract between the *testator and the defendants, for the hire of a wagon and three horses, a cart and two horses, and on a demand for jobs.

It is evident from the nature of the demand, that the executors proceeded on the supposition of some express contract; but they produced none at the trial; and if they had consulted the testator's clerk, he would have informed them, that so far from there being any express contract, a blank was left in the tes-

tator's books in respect of the amount due for hire, during a period of three years; upon that, any lawyer would have told them that their case rested entirely upon a quantum meruit; and yet they called no witness but the testator's servants. They therefore sued on a quantum meruit, without having prepared themselves with that species of evidence which would have rendered success probable.

I do not blame them: perhaps they were placed in difficult circumstances: but has there been anything in the conduct of the defendants to entitle the plaintiffs to say, that upon this occasion they ought to be excepted from the general rule respecting costs? It is said, the defendants refused to disclose the nature of their defence. I should be sorry if a defendant could be called on to disclose it except, perhaps, where he has a testator's receipt in his pocket, or the question turns upon the production of a forged instrument.

Looking at the whole of the evidence, I see no ground for the plaintiffs alleging they were taken by surprise, and I think they have not shown any cause for their being exempted from the operation of the general rule.

PARK, J. This being the last day of term, I shall only add my entire concurrence in what has fallen from his Lordship. It is impossible to lay down, as the plaintiffs' counsel requires, any precise rule for the exercise of the discretion of the Court. It must depend *upon the circumstances of the particular case. As a general rule the recent act intended to put executors on the same footing as other parties; and there is no reason why they should stand on a different footing. In *Wilkinson v. Edwards*, which I continue to think a right decision, there was great misconduct on the part of the executor: but though the present action were never so properly conducted, that is not the sole question; another question to be considered is, whether the defendants have done anything to deprive themselves of their general right to costs. Giving the plaintiffs credit for meaning to act fairly by the testator's estate, it is but just that the estate should defray the defendant's costs if the defendants are exempt from blame. But I am not prepared here to say that the plaintiffs, though they acted *bonâ fide*, proceeded with due caution: and I think the defendants could not be expected to disclose the nature of their case.

VAUGHAN, J. It is my misfortune to differ from the rest of the Court. The payment of costs by an executor being now left in the discretion of the Court, the first question I put is, "Was it the duty of the executor, with reasonable caution, to present this case to the jury?" If it was, he ought to be protected. Otherwise, in what situation is an executor placed!—liable to costs *de bonis propriis*, if there be not sufficient assets to defray them. And this is one of the class of cases in which I think a defendant should disclose the nature of his defence; for the parties litigant are not upon equal terms; and if the defendant refuses, he ought not to complain if the Court in the exercise of its discretion declines to call on the executor to pay his costs. Here, upon looking at the testator's accounts, the executors had a *prima facie* case which they could not abandon without going before a jury, and they would *have obtained a verdict if the defendant had not shown a special contract, of which the plaintiffs could have no knowledge. In *Wilkinson v. Edwards*, the executrix commenced the action with temerity, and prosecuted it recklessly, so that the case has no resemblance to the present.

BOSANQUET, J. I concur with my Lord and my Brother PARK. Upon whatever grounds an executor has been exempted from costs heretofore, I am of opinion that, by the last act, he is placed in the same situation as any other party, unless he makes out, affirmatively, a case for the interposition of the Court. And I do not think the mere circumstance of his commencing the action *bonâ fide* sufficient; for if that had been the intention of the legislature, the act would have been framed differently, and the Court would have been directed to order the payment of costs, if the action were improperly commenced. My opinion turns on this,—that as the act stands, the executor must show a special ground for exemption. The only thing that struck me, in

the first instance, in this case was, that the defendants, I do not state the ground of their refusal to pay. But they paid it into court, and their calculation was found to be refusing to disclose whether or not the agreement on writing, I can very well conceive they might be under a reluctance of giving an answer. Something might depend on something on oral testimony; and they could not be in defence.

When their case comes into Court, it stands now on its own merits; and the defendants, having succeeded, are entitled to judgment.

[*526]

*ROUX v. SALVADOR. Jan. 8

Hides insured from Valparaiso to Bordeaux free of particular average, were stranded, arriving at Rio Janeiro on their way to Bordeaux in a state of great putridity, occasioned by a leak in the ship, were sold at Rio. The ship was stranded on her passage from Rio to Bordeaux. The plaintiff received the news of the damage to the hides and of their being stranded. He held, that the stranding was not such as to make the underwriter liable for the loss; and that the assured could not recover as for a total loss.

THIS was an action of assumpsit upon the policy mentioned, which had been subscribed by the defendant. The defendant pleaded the general issue: and upon the trial before the judges at the sittings after last Hilary term, the jury found a verdict against the defendant for the sum of 27*l.* 15*s.* 6*d.*, subject to the opinion of the Court.

The policy on which the action was brought, was on General La Fayette, and other ship or ships, at and from all places in the Pacific Ocean, Valparaiso, to any port or place in the United Kingdom of Great Britain; with leave to call, to stop, to touch, at any port or ports, place or places, bays, rivers, and settlements, whither or whencesoever; to effect all transshipments; and including the cargo, from the vessel or vessels. The usual perils were insured, and the policy was for 700*l.*, had the following memorandum: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, or the ship be stranded. Sugar, tobacco, hemp, and other goods are warranted free from average under 5 per cent.; and the ship and freight are warranted free of average under 5 per cent., or the ship be stranded." The policy was on

[*527] specie, or bullion, as interest might appear: to pay for the loss of any species of goods by following landing numbers of goods, as if separately insured: cocoa and hides free of particular average, if the ship or ships were stranded: in case of average on the hides, to pay for the expense of washing and drying in full.

The plaintiff, on the 6th of May, 1831, caused to be shipped on board the ship Roxalane at Valparaiso, for Bordeaux, in France, 1000 hides, of the value of 1117*l.* his property, which hides were covered by the said policy, and were duly declared thereupon, and signed by the captain in the ordinary form: 5928 other goods were on board the same vessel for the same voyage. The Roxalane, having the hides on board, departed on her voyage on the 13th of May, 1831, for Bordeaux; and on the 5th of June, in the course of her voyage, meeting with bad weather, sprung a leak, of which, it was found necessary for the safety of the ship, she was put into Rio Janeiro, being the nearest convenient port, for repairs. She arrived on the 7th of July. The whole of the cargo was sold for the gross sum of 273

stated in evidence taken at Rio Janeiro on interrogatories. From that evidence it appeared, that the hides upon their arrival at Rio Janeiro, were in a state of incipient putrefaction, occasioned by humidity in the bottom of the vessel; they were all, as it is termed, *greased*, the hair coming off in the fingers of those who handled them, and had they been reshipped, the captain must have thrown them overboard before his arrival in Europe, on account of their extreme putridity.

The said ship *Roxalane* being repaired, and the leak stopped, she sailed on the 28d of July, 1831, from Rio Janeiro without the said 1000 hides, but with such part *of her cargo as had not been sold, on her voyage to Bordeaux. [*528] And in the course of her voyage from Rio Janeiro to Bordeaux, the ship was stranded at the entrance of the River Garonne, on the 29th September, 1831. But the portion of the cargo not sold in Rio, was delivered without damage at Bordeaux.

The question to be decided was, whether the underwriter was liable for the loss on the hides. If the Court should be of that opinion, the verdict was to stand for 27*l.* 15*s.* 6*d.*, being 88*l.* 14*s.* 4*d.* per cent. on the sum of 1117*l.*, the value of the 1000 hides.—If not, a nonsuit was to be entered.

This case was argued in Trinity term, by *Maule* for the plaintiff, and *Coleridge* Serjt., for the defendant: and a second time in this term, upon the question of abandonment.

Argument for the plaintiff, 1st. This was a total loss; or, 2dly, if a partial loss, the ship was stranded, and the underwriter's exemption from partial loss is therefore, by his own contract, rescinded.

1. A loss may be predicated as total, where, by a peril insured against, goods are prevented from arriving at the destination appointed by the insurer. *Dyson v. Rowcroft*, 3 B. & P. 474. There, in the course of the voyage, fruit insured was so much damaged by sea water, that it became rotten, and stank; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo: the ship also being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard; and it was held, that the assured were entitled to recover for a total loss. See also *Emerigon*, c. 12, s. 46.

*Here, the hides could never have arrived at Bordeaux, their place of destination; they must have been thrown overboard, or have arrived in [*529] a state of decomposition, and not as hides. And the underwriter is not the less liable, because, ultimately, there may be a salvage: *Manning v. Nunham*, 8 Dougl. 130, Park Ins. 260, 2 Campb. 624, n. In *Anderson v. Wallis*, 2 M. & S. 246, *Hunt v. Royal Exchange*, 5 M. & S. 47, and *Glennie v. London Assurance Company*, 2 M. & S. 371, the goods were not of a perishable nature, and might have been transmitted to their destination. But in *Burnett v. Kensington*, 7 T. R. 222, Lord KENYON said he could not subscribe to the *dictum* of Lord MANSFIELD in *Cocking v. Fraser*, Park Ins. 181, "that if the commodity specifically remain, the underwriter is discharged."

And the loss in the present case being actually, and not merely constructively, a total loss, abandonment was not necessary; *Mellish v. Andrews*, 15 East, 13. The hides upon arriving at Rio, being no longer fit to be used as hides, were necessarily sold, and so, put out of the power of the underwriter. If the hides had continued to subsist as hides, if there had been any *spes recuperandi*, it may be conceded abandonment would have been necessary; but after decomposition has commenced, a perishable article may be considered as destroyed. It may be urged that as abandonment is necessary when an adventure is put in great peril, it is also necessary where there is a total loss of the adventure to the assured, if anything be rescued from destruction; that abandonment, which must be prompt where the thing insured continues to subsist, must be equally prompt where it has been converted into money. But that argument proves too much; for if a ship were dashed to *pieces, it is clear that abandonment would not be necessary, even though the tim- [*530]

bers should afterwards be sold. It is, indeed, a common practice to abandon such a salvage; but this is merely as a matter of courtesy, for the assured may either keep the salvage, or bring his action as for a total loss. Here, the news of the loss, of the sale, and of the payment to the assured, arrived at the same time, so that there was nothing to abandon; nothing of which the underwriter could avail himself; and the adventure was lost to the assured. In *Mullett v. Shedden*, 13 East, 804, where an American properly licensed to export salt-petre from Calcutta to America, having insured it for the voyage, the ship was seized by the captain of a British ship of war at the Cape of Good Hope, and the cargo condemned, unshipped, and sold by order of the Court of Admiralty there, which sentence was afterwards reversed by appeal here, and the property ordered to be restored, or its value paid to the owner, it was held, that the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the Cape, under the order of the court there. So in *Cambridge v. Anderton*, 2 B. & C. 691, it was held that where a ship was so much injured by the perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured might recover for a total loss without giving notice of abandonment. In *Doyle v. Dallas*, 1 M. & Rob. 48, where a ship being wrecked, was sold by the owner and master, and soon after got off by the purchaser, and repaired, though at a great expense, it was held, in effect, that the owner might treat it as a total loss, if the sale at the time, in the exercise of a sound judgment, appeared most beneficial to all parties. In *Hodgson v. Blakiston*, Park Ins. 281, n, [*581] and *Martin v. Crockatt*, 14 East, 465, where it was held there ought to have been an abandonment, the thing insured was still in existence, and in *Bell v. Nixon*, Holt's N. P. C. 423, the ship was not sold at the time the news of the loss arrived. In *Allwood v. Henckell*, Park Ins. 280, the plaintiff could only have recovered the difference between the loss and the sum he had received, whether the loss were considered a total or a partial loss: he had no interest, therefore, in contesting the question of abandonment.

But if the Court hold the loss in this case to be a partial, and not a total loss, then the underwriter is rendered liable by the stranding before arrival at Bordeaux. The liability to average loss is here dependent on a condition,—the condition that the ship be stranded,—and if the condition be fulfilled, the liability attaches. A condition must be taken strictly; and the assured having thought fit to impose it, it is immaterial whether it be connected with the loss or not. In *Burnett v. Kensington*, 7 T. R. 210, where the insurance was effected on fruit, and the policy contained the usual memorandum, "Corn, fruit, &c., warranted free from average, unless general, or the ship be stranded," the ship having been stranded in the course of the voyage, the underwriters were held liable for an average loss arising from the perils of the sea, though no part of the loss arose from the act of stranding.

Argument for the defendant.

First, as to the stranding. That is, no doubt, a condition, in the event of which the assured stipulates that the underwriter's liability shall attach. But the condition, though construed strictly, must be construed according to the intention of the parties. And the parties *must be taken to mean a [*532] stranding in the course of the adventure. A stranding which takes place before the goods are put on board, could not be contended to be within the meaning of the parties: if so, why should a stranding after the adventure has terminated? Here the plaintiff's adventure in respect of the hides was terminated at Rio, although the voyage of the ship was not at an end till she arrived at Bordeaux. In *Burnett v. Kensington*, the adventure as to the fruit was not terminated when the ship was stranded; and though in *Nesbitt v. Lushington*, 4 T. R. 787, Lord KENYON said, "where a ship is stranded, the underwriters agree to ascribe the loss to the stranding," yet in order that

they should so ascribe it, the stranding must take place in the course of the adventure.

And, secondly, this was a partial, not a total loss, although it is difficult to reconcile all the authorities. In order to style it a total loss, the earlier cases required an actual destruction of the thing insured; but, even according to later decisions, if the thing insured continue to subsist in specie, the loss is only an average loss, notwithstanding the damage sustained be irretrievable. Here the hides arrived at Rio in specie; and if the assured had taken proper precautions, as by tanning them, might have arrived at Bordeaux. If they had arrived at Bordeaux in the state in which they arrived at Rio, it never could have been contended that the loss was total, when the thing insured was still in existence; and that principle, which seems a sound one, does not rest on *Cocking v. Fraser* only, but on *Mason v. Murray*, Park Ins. 191, where peas had arrived at the place of destination, but being much damaged, the produce of them was less, by about three-fourths, than the freight, which, on account of the ship's arrival at the port of *discharge, became due. The defence [*533] set up by the underwriter was, that if the goods mentioned in the memorandum arrive at the market, the underwriters are not liable, though a loss, amounting to a total one, may have happened; and, under the direction of Lord MANSFIELD, the jury found for the defendant. In *Dyson v. Rowcroft*, there was a total physical loss, by the article being thrown overboard; and the authority of *Manning v. Nunham* is much shaken by the decision in *Glennie v. London Assurance Company*. On the other hand, in *Thompson v. Royal Exchange Assurance Company*, 16 East, 214, where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the insured, it was held that the underwriters on the goods, who were freed, by the policy, from particular average, could not be made liable, as for a total loss, by a notice of abandonment. And Lord ELLENBOROUGH said,—“All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average, may as well be struck out of the policy. We can only look to the time when the loss happened, and the goods were landed; and then it was not a total loss, however unprofitable they might afterwards be.” That decision is confirmed by *Glennie v. London Assurance Company*; *Davy v. Milford*, 15 East, 559; *Headburg v. Pearson*, 7 Taunt. 154; *M'Andrew v. Vaughan*, Park Ins. 185.

At all events, if the loss be deemed total, there ought to have been an abandonment; for this was at the utmost a constructive, not an actual total loss and the facts which constitute it a constructive loss are not *altered by [*534] the circumstance that the news of the loss and of the sale arrived at the same time. An abandonment is necessary where any portion of the adventure remains; and it should be made promptly, in order that the parties may know their respective rights. Here the hides remained the property of the assured till they were sold; the money obtained by the sale represents the goods; the property in that money is not changed by the assured's commencing this action and their mere demand in respect of a total loss does not supply the place of a formal abandonment. In *Parmeter v. Todhunter*, Park Ins. 281, Lord ELLENBOROUGH, says the word abandon must be used. In *Manning v. Nunham*, according to the report in *Douglas*, there was an abandonment; in *Alwood v. Henkell* where after a recapture the ship was sold under a decree of a Vice-Admiralty Court, Lord KENYON inclined to think that an abandonment was necessary. In *Hodson v. Blakiston*, where the ship and cargo were sold, it was held necessary. In *Read v. Bonham*, 3 Brod. & Bingh. 147, under the same circumstances, notice of abandonment was given. In *Mullett v. Shedden* no abandonment was necessary, because the loss was total at the time; but in *Martin v. Crockatt*, where the ship and cargo were sold for the benefit of all concerned, it was held there ought to have been an abandonment. *Bell v. Nixon* is in favor of the defendant; and the authority of *Cambridge v. Ander-*

ton is much weakened by *Gardener v. Salvador*, 1 Mood. & Rob. 116, where BAYLEY, J., said he did not know of such a loss as loss by sale.

In reply, it was insisted that the only test by which the Court can determine whether or not abandonment be necessary, is, the continuance or conclusion of the *adventure. If the adventure be concluded, as it was here, at Rio, [*535] abandonment is unnecessary even though a portion of the thing insured may subsist in specie.

Cur. adv. vult.

TINDAL, C. J. Upon the argument before us, the plaintiff has contended that he is entitled to recover, either for an average loss on the hides, upon the ground that there has been a stranding of the ship within the meaning of the policy, so that the warranty as to hides being free from particular average may be considered as altogether struck out of the policy; or, for a total loss, with benefit of salvage to the underwriters, on the ground that the loss is in its nature total. The defendant on the other hand contends, that the loss proved at the trial is an average loss only, and the stranding of the ship under the circumstances, and at the time stated in the case, cannot have the effect of opening the warranty; and the defendant further contends, that even if the loss is to be considered as a total loss, the plaintiff cannot recover it for want of an abandonment. The three questions, therefore, which have been discussed upon argument before us are these:—First, Whether there has been such a stranding of the ship as to entitle the assured to claim and recover an average loss. Secondly, If no such stranding has taken place, then, whether the loss can be considered to be a total loss. And, Thirdly, admitting the loss to be total, whether an abandonment was necessary in order to enable the plaintiff to recover. And upon these three points we proceed to give the opinions at which we have arrived.

The facts which relate to the stranding of the ship are shortly these:—The hides in question were shipped on board the *Roxalana* at Valparaiso, for Bordeaux in France. The ship sailed from Valparaiso on the voyage *insured, on the 18th of May, 1831, and was taken into Rio, in consequence of stress of weather, on the 7th of July. The hides insured were sold at Rio, such sale being necessary for the benefit of all concerned; and after the sale, the ship being repaired, departed on the 3d of October on her voyage to Bordeaux, not having any part of the hides insured on board, and was stranded at the entrance of the Garonne on the 29th of December.

The stranding of the ship, therefore, took place during the voyage which was described in the policy, but not until after the hides had been landed, and after the whole of the assured's adventure, and the whole of the risk of the underwriter upon the hides, that is, in effect, after the whole of the voyage insured had been determined and ended, by the act of the assured. And, under these circumstances, we think there is neither principle nor authority upon which it can be held that the subsequent stranding of the ship satisfies the condition upon which the warranty in the policy depends.

The general principle laid down in *Burnett v. Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed: the policy, after the stranding, must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place, in order to produce such effect. Now, every other clause in the policy relates to the voyage insured, and to that alone; the liability of the underwriter on goods commences with the putting them on board, and ceases upon their being discharged and safely landed, or with any other legal termination of the adventure. The clause in question, therefore, as it appears to us, ought to be construed with the same restriction; and the stranding, which is made the condition of letting in an average loss, ought, upon the ordinary rules of *construction, to be considered to mean a stranding which takes place after the adventure has commenced, and before it has terminated. If the ship should

be stranded (according to the legal construction of that word) in the harbor where she was lying for the purpose of receiving the goods, but before she takes the goods on board, that is, before the policy attaches, or the adventure commences; and, after the loading, the ship should sail, and an average loss be sustained; it would surely be unreasonable to contend, that the exception or condition of the warranty should have an operation, before the policy, that is, the warranty itself has attached. And a much greater difficulty opposes itself to the position that the stranding after the policy is at an end, shall have any operation on the clause of warranty. Indeed, there is no more reason why a stranding which takes place in a part of the voyage described in the policy, but at a time subsequent to the termination of the risk on the policy, should be deemed a stranding within the meaning of the parties, than a stranding upon a subsequent voyage altogether distinct from that named in the policy.

Again, the rights of the parties, the assured and the underwriter, were fixed and determined at the time of the sale at Rio. The loss was then, either a total loss with benefit of salvage, or an average loss. There is an end of any contingency, because the voyage is over which is the subject of the risk. We think, therefore, it would be a forced construction of the policy, not consistent with the ordinary rules of interpretation, and certainly not sanctioned by any decided case, to hold that the stranding in the Garonne in the month of December can affect the nature of the loss upon hides, which were unshipped and sold in the course of the voyage in the July preceding.

As to the second question, whether the loss upon the *hides is a total [*538] loss, we are all of opinion that upon the evidence stated in the case, the loss is a constructive total loss. For we take the necessary inference to be drawn from that evidence to be, that in consequence of damage from the perils of the sea, one of the perils insured against, it became impracticable to carry the hides, in specie, to the termination of the voyage for which they were insured; and that if it had been possible to have taken them to Bordeaux, they would have arrived in a state of putridity, having altogether lost the character of hides. We do not hold the loss to be total, upon the ground, that the hides, if carried to Bordeaux, would have arrived in so bad a state, that they would have sold for less than the freight and expenses, or would have been altogether unsaleable there; that state of circumstances might not be sufficient to make a constructive total loss where the underwriter has guarded himself from being answerable for average losses by a special clause in the policy: but we hold it to be total on the ground—and that ground only—that upon the evidence they never could have arrived as hides at all. The present case appears to agree so nearly with that of *Dyson v. Rowcroft*, 3 Bos. & Pull. 474, that no sound distinction in this respect can be made between them. And the judgment given by Lord ALVANLEY, appears to us to govern the case now under discussion. "Unless," says Lord ALVANLEY, "the consequence of the damage sustained, be the total loss of the commodity, the underwriter does not agree to be answerable; but if the commodity be totally lost to the assured, he undertakes to pay;" and afterwards, discussing what is a total loss, he says, "the commodity here was in such a state that it could not be suffered to remain on board consistently with the health of the crew; in consequence of this *necessity, therefore, the commodity was annihilated by being thrown [*539] overboard." We think the facts of the present case bring the hides into the same predicament, as the fruit there:—either they would have been annihilated by putrefaction or by being thrown overboard. And upon that supposition, a sale by the captain, which is found necessary and expedient for all concerned, made the loss not the less total.

If then the loss be a constructive total loss, the only remaining question is, Whether a notice of abandonment was necessary in order to enable the plaintiff to recover. The necessity of abandoning to the insurer all the right of the assured to what may be saved or recovered from the peril insured against,

arises out of the very nature of the contract of insurance, which is a contract of indemnity only: for the assured would obviously be more than indemnified, unless the underwriter is put into his place as to all the benefit that may be derived from what has been actually saved or recovered from the loss; hence it has prevailed as a general rule in the law of insurance, and that, from so early a time, that it is difficult to find a case in the books in which it is not taken as an admitted principle, that in order to recover for a constructive total loss, the assured must first abandon.

It is unnecessary, however, to refer to cases or authorities in support of this general principle, as it is admitted by the counsel for the plaintiff, that abandonment is necessary in all cases of a constructive total loss, where any part of the thing insured subsists or remains in specie, and it is only denied that it extends to a case like the present, where what was saved has been actually sold, and the money paid over to the agent of the assured before any notice of the loss. In such a case, where the adventure is at an end, and nothing remains to be performed by the underwriter, with respect to *the part saved, it is [*540] argued that an abandonment is altogether useless, and consequently must be considered in law as unnecessary; and it is contended that there is neither decided authority nor reason in support of a contrary position.

It will be convenient, therefore, to consider, first, what is the state of the authorities in the books on this precise point? and if the authorities show that an abandonment is necessary, we will next consider whether there is any reason or principle for holding the present case not to fall within the general rule.

That the assured must abandon before he brings his action, where the ship has been captured and recaptured and sold under the order of a Vice-Admiralty Court, and where, after payment of the salvage to the recaptors, the remainder of the price has been paid into court for the benefit of those who may claim as owners, appears clearly from the earliest case to be found in our books upon the subject of abandonment, viz., that of *Pringle v. Hartley*, 3 Atk. Rep. 195. In that case after the plaintiff had sued at law for a total loss, and after proving an offer to relinquish his interest to the insurers, had recovered a verdict, Lord HARDWICKE on a bill filed for an injunction, held there was no ground for it; but that the plaintiff being willing to relinquish his interest in the salvage to the underwriter, ought to have recovered the whole money insured. Now it must be admitted that this decision does not go the length of governing the present case: for in the case referred to, as Lord HARDWICKE, observes, "it is uncertain whether the insured will receive anything or not; and if anything be recovered, he must have an allowance for his expenses in recovering it." And there are even expressions used by Lord HARDWICKE in giving his judgment which would rather *lead to the inference, that if the money had [*541] been paid out of court to the owner before the action was brought, the jury might in his opinion have taken notice of it, and it might have been deducted out of the money recovered on the policy; so that the case of *Pringle v. Hartley* certainly cannot be advanced as an express authority that an abandonment was necessary here.

The case of *Mitchell and Others v. Edie*, 1 T. R. 608, carries the law farther, and indeed almost to the length contended for in the present case. There, the goods were sold and the price paid into the hands of Cruden, who was adopted by the assured as their agent. It was held that the plaintiffs were not entitled to recover for a total loss, because they had not abandoned in time. Both Mr. Justice ASHHURST and Mr. Justice BULLER use the most general terms, that in all cases where any part of the property is saved the assured must abandon. And they apply that rule to the case before them, where the goods had been sold for the benefit of all.

The case of *Allwood v. Henekell*, sittings after Michaelmas, 1795, reported in *Park on Insurance*, 280, goes to the full extent of that in *Atkins*. The ship had been sold under the order of the Vice-Admiralty Court of Antigua by a

prize agent, who received the proceeds and was to pay them over to those concerned, upon payment of one-eighth salvage to the captors. The question was Whether the abandonment was made in time: and it was thereupon contended by the plaintiff, that admitting there was no abandonment, yet as the property had been absolutely sold and converted into money before the parties knew where the ship was taken to, the loss was absolutely total in its nature, and therefore there was no occasion for an abandonment. Lord KENYON, though he did not give any decided opinion on **the point*, said he inclined to think "that an abandonment was necessary, and that the case was the same as [**542*] if the property had remained in specie at Antigua, and had not been sold." And as the plaintiff recovered upon the footing of an *average loss* only, it would seem that Lord KENYON's opinion was acquiesced in.

The next case in order of time is that of *Hodgson v. Blakiston*, 38 G. 3, (Park on Insurance, 281, n.) before the same noble and learned Judge, and this, like the last, though a nisi prius decision only, is a case directly in point, that a notice of abandonment is necessary though the ship and cargo have been sold, and converted into money, at the time when the notice of the loss is received. The opinion of Lord KENYON in this case must have been assented to as law at the time, as no motion appears to have been made to set the verdict aside. And, indeed, the case itself is cited and relied upon as authority by the Court of Common Pleas in their judgment upon the case of *Read v. Bonham*, 3 Brod. & Bingh. 147. That case again is a distinct and direct authority upon the present point. In that case, the ship had been sold, and the money paid to the captain, and after a verdict for the plaintiff for a total loss, a new trial was moved for on the ground that the sale of the ship was not necessary, and that the abandonment had not been made in time: the Court, however, refused to grant a new trial on either point, though Mr. Justice RICHARDSON wished both to be reconsidered by the jury. But it is evident from the report, that it was assumed as an undoubted principle by the whole Court, that abandonment was necessary in that case; the dissent of Mr. Justice RICHARDSON as to the *time* of the abandonment making the inference still more strong, that in the judgment of the whole Court an abandonment was necessary. And this statement of **the case* of *Read v. Bonham* removes in some degree the weight of the judgment of Mr. Justice BAYLEY in the case of *Cambridge v. Anderton*, as reported in 1 Carrington & Payne's Rep. 215, in note, in which Mr. Justice BAYLEY is made to say, "I take the legal principle to be, that if by any perils within the policy, the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment." For Mr. Justice BAYLEY proceeds to cite the case of *Read v. Bonham*, as an authority in support of his opinion, which case, although certainly an authority for the position that a sale of the ship in case of urgent necessity is justifiable, and constitutes a total loss, is no authority for the position that abandonment is unnecessary in that event, but an authority the other way. The case is afterwards reported in banc, 2 B. & Cres. 697. Again, the case of *Parry v. Aberdeen*, 9 B. & C. 411, is one that bears a strong resemblance to the present: the goods having been sold, as here, for the benefit of those concerned. But, in that case, there had been an abandonment, upon which Lord TENTERDEN relies strongly in various parts of his judgment. And as to the case of *Manning v. Nunham*, upon which considerable reliance was placed by the defendants, and in which it was supposed the plaintiffs had recovered without an abandonment, upon reference to the report of that case in 3 Dougl. 180, it appears an abandonment had been made.

The necessity of abandonment, therefore, in the present case, so far as it stands upon authority, rests on the generality of expression used in all the early cases, that wherever the assured claims for a total loss, there being anything saved, he must first relinquish to the underwriter all his interest in what remains. And upon the express authority of the cases above referred to,—**in* [**544*] opposition to which there is found no other decided case than that of

Cambridge v. Anderton, so that the balance of authority is clearly in favor of the position that abandonment is necessary in the present case,—and upon principle, if the matter were *res integra*, we should come to the same conclusion. For as the assured in no case is bound to consider the loss a total loss, but may always take what is saved, and recover for an average loss; if it is to be held that abandonment is unnecessary where there has been a sale, the underwriter can have no certainty as to his rights or his liabilities before the assured determines his election by bringing the action for a total loss. This uncertainty in itself, and if no other consequence follows, is highly prejudicial to the underwriter; it may be further prejudicial in its direct consequences; agents may fail in whose hands the proceeds are left; the rate of exchange may alter where delay in procuring the remittance of the price has taken place; and, still further, the right of the underwriter to dispute the validity of the sale with the purchaser of the ship or cargo, upon the ground of fraud, might, by the intervention of time, be impaired or entirely defeated.

As notice of abandonment, therefore, under the circumstances of this case, is an act of no difficulty to the assured; of great service to the underwriter; as it is well calculated to prevent fraud; as it is consistent with the general understanding which has prevailed in practice, and is sanctioned by the authority of decided cases,—we think it was a necessary preliminary to the plaintiff's right to sue for a total loss in the present case; and, therefore, for want of such notice of abandonment, we give our judgment for the defendant.

Judgment for defendant.

[*545] *BARNES v. JACKSON and Two Others. Jan. 31.

In quare impedit the writ was returnable Jan. 8, 1834. Defendants appeared Jan. 11, 1834. Plaintiff declared Jan. 10, 1835. The Court set aside the declaration as too late.

QUARE IMPEDIT against three. The writ was returnable on the 8th of January, 1834, and two of the defendants appeared on the 11th of January, 1834.

The sheriff having returned nihil as to Jackson the incumbent, an alias quare impedit was issued, returnable April, 15th, 1834, on which alias writ he was summoned and appeared.

The declaration, in quare impedit, not having been delivered till the 10th of January, 1835,

A rule nisi was obtained, calling on the plaintiff to show cause why the declaration should not be set aside for irregularity, on the ground that the writ on which two of the defendants had appeared, was returnable more than a year before the declaration was delivered. R. Hil. 2 W. 4, No. 35; Worley v. Lee, 2 T. R. 112; Cooper v. Nias, 3 B. & Ald. 272.

Coleridge, Serjt., showed cause. The rules of Hil. 2 W. 4 do not apply to real actions, among which quare impedit must be classed, but only to those kinds of action in which the Courts have concurrent jurisdiction; the express object of the rules being to render the practice uniform. But the practice of declaring within a year from the return of the writ, can only be applicable to personal actions; BULLER, J., in propounding the rule (2 T. R. 112), does not advert to real actions; and it is altogether incompatible with the delay, which, in those actions, was allowed by way of essoin.

[*546] *Then, the impossibility of serving the incumbent with the other defendants, affords a reason for the delay, sufficient to induce the Court to give the plaintiff time to declare till April: Wynn v. Bellman, 6 Taunt. 122.

At all events, the plaintiff may abandon his writ as to two of the defendants, and declare against the incumbent alone: Christie v. Walker, 1 Bingh. 48.

Wilde and Bompas, Serjts., and Bere in support of the rule. First, quare

impedit is not a real, but a mixed action: *Eaton v. Southby*, Willes, 131; Com. Dig. Qu. Imp.; Vin. Abr. Presentation. The plaintiff seeks to recover only the next turn, which is a chattel interest that passes to executors: *Mirehouse v. Rennell*, 8 Bingh. 490.

But if this be deemed a real action, the rule in *Worley v. Lee* is laid down without qualification, and must be held to embrace real as well as personal actions. Originally, the practice in both was the same, and continued so except where it was altered by statute: *Booth's Suit at Law*; Gilb. Hist. Com. Law, 11, 12, 26, 33, 34, 38, 39. And a real action could not be indefinitely prolonged by essoins, for the demandant procured from the Court a *dies datus* to count. By the statute of Marlebridge it is provided, that "in a plea of dower, that is called unde nihil habet, from henceforth four days shall be given in the year at least, and more if conveniently it may be, so that they shall have five or six days at the least in the year. In assizes of darrein presentment, and in a plea of quare impedit, of churches vacant, days shall be given from fifteen to fifteen, or from three weeks to three weeks, as the place shall happen to be near or far. And in a plea of quare impedit, if the disturber come not at the first day that he is summoned, nor cast no essoin, then he shall be attached at another day; at *which day, if he come not, nor cast no essoin, he shall be distrained by the great distress above given; and if he come not then by his default a writ shall go to the bishop of the same place that the claim of the disturber for that time shall not be prejudicial to the plaintiff; saving to the disturber of his right at another time, when he will sue therefore." And Lord COKE says, "in a quare impedit, or darrein presentment, an essoine de service le roy, ad terram sanctam, or ultra mare lyeth not for doubt of the laps." 2 Inst., c. 12, p. 125. [*547]

Then, as to the plaintiffs not having been able to serve the incumbent, in an action against several defendants, where some appear, and others are not served, the plaintiff must take out a rule for time to declare, if he would avoid a non pros. for not declaring in due time: *Sykes v. Bawens*, 2 N. R. 404; *Morton v. Grey*, 9 B. & C. 544. In *Christian v. Walker*, the chief question was, as to the regularity of a declaration delivered by-the-by, before the delivery of a declaration in chief.

Cur. adv. vult.

TINDAL, C. J. This rule calls upon the plaintiff to show cause why the declaration against the three defendants should not be set aside for irregularity, on the ground that the writ of quare impedit, upon which two of the defendants had been duly summoned and had appeared, had been returnable for more than a year before the declaration was delivered. The writ of quare impedit, upon which the two defendants were summoned, was returnable on the 8th of January, 1834; the defendants appeared thereon on the 11th of January, 1834; and the sheriff having returned nihil as to the third defendant, Jackson the incumbent, an alias quare impedit was issued, returnable on the 15th of April, *on which alias writ he was summoned and appeared. The declaration in quare impedit was not delivered until the 10th of January, 1835. [*548]

One ground upon which the motion was urged, was the new rule of Court of Hilary term, 2 W. 4, No. 35. But we think those rules do not extend to real actions, but to such proceedings only in which the three Courts of Westminster exercise a concurrent jurisdiction. However, the ground principally relied on, is the general rule of law, by which a plaintiff must declare within twelve months after the return of the writ. This is laid down by BULLER, J., in 2 T. R. 112, as an acknowledged rule of practice: not that the defendant can sign any judgment of non pros. for not declaring, for no such judgment can be signed until after a demand of declaration; but that after the lapse of a twelve-month from the return of the writ the delivery of the declaration comes too late. The same rule is admitted in 3 T. R. 123, and in 9 B. & C. 544. In *Cooper v. Nias*, 3 Barn. & Ald. 272, the question arises, whether the twelve-month is to be calculated from the return day of the writ, or the time of the appearance; the Court say,—“The rule is, if the plaintiff does not declare

within a year after the return day of the writ, he is out of Court. The safest course is to reckon the twelve months from the return day: the time given to put in and perfect bail is merely matter of indulgence." No case appears by which this rule has been shown to be applied to real actions; but, at the same time, no distinction is made in the books between them; and the rule, in principle, applies equally to actions of all kinds: the object being, that suits should not be kept alive an unreasonable time after the parties are in Court; and if the demandant is not bound to declare within one year, there seems no reason [*549] why he should not be at liberty *to do so for an indefinite period. The plaintiff or demandant is not injured by this rule: for if he has any reason for not declaring, as on account of all the parties not being brought into Court, it is the very constant course to apply for time to appear against those who have appeared.

We, therefore, think the plaintiff is out of Court as to the two defendants who appeared under the original writ, and that the declaration is irregular as to them, and must be set aside; but as to the defendant Jackson, who appeared upon a writ returnable in April, the plaintiff is in time to declare, and, as against him, the proceedings may go on.

BOWER v. HILL and Another. Jan. 31.

Defendants having erected, on their own premises, a permanent obstruction to a navigable drain leading from a river through defendants' premises to plaintiff's close, Held, that an action lay for the plaintiff, notwithstanding the portion of the drain which passed through the plaintiff's close had for sixteen years been completely choked up with mud.

THE plaintiff declared, that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, the plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain close of land, with the appurtenances, situated in the county of Warwick; and by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from the said close of the plaintiff, unto and along a certain stream or watercourse in the county aforesaid, unto and into a certain public navigable river, called the river Nene, in the county aforesaid, and so back again [*550] from *the same river unto and along the said stream or watercourse, and from thence unto the said last-mentioned close of the plaintiff, for himself and his servants to go, return, pass and repass in boats every year, and at all times of the year, at his and their free will and pleasure: yet the defendants, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the plaintiff in that respect, and to deprive him of the use and benefit of his said way, whilst the plaintiff was so possessed of his close, with the appurtenances aforesaid, and so entitled to the said way, to wit, on the 1st of January, 1830, and on divers other days and times between that day and the day of the commencement of this suit, in the county aforesaid, wrongfully and injuriously obstructed the said way. By means whereof, the plaintiff could not, during the time aforesaid, nor can he have or enjoy his said way as he of right ought to have done; and whereby also the plaintiff hath been, and still is, hindered from having, enjoying, and occupying his said close in so full and beneficial a manner as he otherwise would, and of right ought to have done; to wit, at, &c.

At the trial before TAUNTON, J., last Northampton assizes, it appeared that a drain or watercourse passed from the river Nene, through the defendants' closes up to a close of the plaintiff: that the drain was navigable from the river up to the defendants' closes, and had formerly been navigable up to the plaintiff's close; but for the last sixteen years, the accumulation of mud in the drain between the plaintiff's close and the defendants' had been so great, that no barge could pass along that part of it. Under these circumstances, the de-

defendants had recently erected, on their own land, a bridge over the drain, and a tunnel across it, under the bridge, just below the accumulation of mud, in such a manner as to render any passage up to the mud impracticable.

*In answer to a question proposed by the learned Judge, the jury found,—“That before the erection of the bridge and tunnel by the de-[*551]fendants, the passage was obstructed, so that the plaintiff could not have the use of it;” and upon this finding, a verdict was directed to be taken for the defendants.

Adams, Serjt., pursuant to leave reserved at the trial, obtained a rule nisi to set aside this verdict and enter, instead, a verdict for the plaintiff, or to have a new trial, on the ground that, upon the evidence in the cause, the plaintiff was entitled at least to nominal damages; his right to the watercourse and the value of his property being affected by the impossibility of retrieving the navigation to his premises if a permanent obstruction were allowed to exist. In order to sustain an action for the assertion of a right, it is not necessary that the party should have incurred pecuniary damage: *Marzetti v. Williams*, 1 B. & Adol. 415.

Hill and Miller, who showed cause, contended, that as the plaintiff, in consequence of the accumulation of mud upon his own premises and between them and the defendants', was never in a position to be obstructed by any act of the defendants' on the drain, he could not recover even nominal damages for that which was no injury, or if an injury, was occasioned in a great measure by his own neglect: Com. Dig. Action on the Case, B. 4; for a party who brings case must have justice on his side: *Bird v. Randall*, 3 Burr, 1845. In like manner, a commoner cannot maintain an action where the lord of the manor is defendant, unless a specific injury has been sustained: 1 Wms. Saund. b. note, 346. The plaintiff, here, unless he has incurred some damage, cannot sue the de-[*552]

defendants for an act done on their own soil; that act not being necessarily injurious to the plaintiff's reversion: *Baxter v. Taylor*, 4 B. & Adol. 72. In *Williams v. Morland*, 2 B. & C. 910, a plaintiff alleged in his declaration that he was possessed of a messuage and premises, and by reason thereof entitled to the use of a stream of water running through the premises, for supplying the same with water; that defendant erected a dam higher up the stream, and thereby prevented the water from running in its course, in its usual calm and smooth manner, whereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff: on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant, but added, that defendant had no right to stop the water in the summer-time: the Judge ordered the verdict to be entered for the defendant; and it was held, that the verdict was right; for flowing water was publici juris, and an individual could only acquire a right to it by appropriating so much of it as he required for a beneficial purpose: and therefore the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.

Adams and Humphrey, in support of the rule. In *Williams v. Morland* nothing was done by the defendant that could affect the plaintiff's title. In the present case, if the plaintiff were to acquiesce in the obstruction erected between his own premises and the river, his title to navigate the watercourse could in a few years be lost. His right to a common benefit from the channel *cannot be disputed: *Mason v. Hill*, 5 B. & Adol. 16, 24. But a permanent obstruction tends to impair his title, and therefore is an injury for [*553] which he is entitled to damages.

Cur. adv. vult.

TINDAL, C. J. This question comes before us on a motion for a rule to set aside a verdict entered for the defendants by the direction of the learned Judge; and the motion is made, on the ground that the finding of the jury, on certain points left to them, does not warrant such verdict; and, at all events, that, upon the evidence given in the cause, the verdict ought, properly, to have been found for the plaintiff.

The plaintiff declared in case; stating in his declaration, that he was possessed of a close, and entitled to a right of way from the said close along a certain drain or watercourse, unto and into a public navigable river called the Nene, and so back again, for himself and his servants to go, return, pass, and repass in boats, at his free will and pleasure; and the plaintiff then assigns as a grievance, that the defendants, knowing the premises, wrongfully and injuriously obstructed the said way, by means whereof the plaintiff could not enjoy it as he of right ought to do. At the trial, the jury, in answer to a question proposed to them by the learned Judge, found, "that the passage was obstructed before the erection of the bridge and tunnel by the defendants" (which was the act complained of), "so that the plaintiff could not have the use of it:" and upon this finding of the jury, the learned Judge directed the verdict to be found for the defendants.

It appeared, upon the evidence, that the plaintiff's close and premises were at the further end of the drain or watercourse; and that the defendants' premises, *upon which the obstruction was erected, were situated between [*554] the plaintiff's premises and the river Nene; and it further appeared, that the accumulation of mud in the drain between the plaintiff's close and the defendants' premises had been so great, and was so great at the time of the erection of the bridge and tunnel by the defendant, that for the last sixteen years, no barge could navigate or pass along that part of the drain or watercourse; and that the defendant had erected the bridge and tunnel across the drain at his own premises, just below the accumulation of mud, in such manner as to render any passage through the bridge and tunnel, even if the mud had been removed, altogether impracticable. And the question raised before us has been, whether, in this state of circumstances, there was such an obstruction of the right of passage along the watercourse, as can form the ground of an action against the defendants. But we think the right to the verdict, in this case, may be decided upon a narrower ground. The right of navigating through the drain or watercourse, from the plaintiff's close to the Nene and back again, is equally a right to navigate through the drain from the river Nene to the plaintiff's close and back. And upon the evidence in this case, if the plaintiff should endeavor to pass with a boat or barge from the river Nene to his premises, he would be prevented, by the defendants' erection, from even arriving so far up the drain as to reach the impediment created by the mud. The plaintiff, therefore, would, in the strictest construction of the words in the declaration, "be prevented, by the defendants' obstruction, from enjoying his way, as he of right ought to do;" for he could not get so near his premises, as, but for the erection of the tunnel, he might have done. And although this would, in fact, be but a very small prevention of the exercise of his right, yet it is the [*555] *principle on which we are to decide, and not the particular state of facts which apply to the present case; for if the obstruction had been at the very mouth of a drain, and the accumulation of mud had commenced several miles up, and close to the plaintiff's close, the same argument would have applied; in which case, it is obvious that the damage to the plaintiff, by such an intervening obstruction, might have been very great. Upon this ground, therefore, we think the case must go down to another jury, unless it is consented that he should take a verdict with nominal damages only.

But, independently of this narrower ground of decision, we think the erection of the tunnel is in the nature of, and, until removed, is to be considered as, a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he receive no immediate damage thereby. The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises:

Jesser v. Gifford, 4 Burr. 2141. The plaintiff's premises would sell for less whilst the tunnel is in existence, if now put up to sale. And, indeed, there seems no legal ground upon which the facts relied on by the defendants can constitute an answer to the charge upon the record. As a plea of denial of the charge, they would not support it; for the tunnel was erected by the defendants, and the erection is such as effectually to prevent barges from passing through it, whether they can come up to it or not. Again, if put upon the record as a plea in bar, *they would amount to a confession of the charge without [*556] being an avoidance; for it is no excuse to the defendants, that the plaintiff has voluntarily suffered an accretion of the mud, which he might remove at any time when he thought fit. The voluntary suspension by the plaintiff of his exercise and enjoyment of a right, can form no justification to the defendants for preventing him from the possibility of enjoying it.

Upon the more general ground, therefore, that the erection of the bridge and tunnel is an immediate injury to the plaintiff, by putting his right into hazard, and by preventing the actual enjoyment of it whenever he thinks fit to resume it, independently of the narrower ground on which we first relied, we think this action maintainable; and that the rule for a new trial must be made absolute.

Rule absolute.

WELLS v. PEARCY. Jan. 31.

By a local act all rights of common whatever in B. were extinguished; the wastes were divided; the owners of allotments were directed to inclose, and authorized to distrain the cattle of strangers trespassing. No fence having been made, held, that the owner of an allotment in B. could not distrain cattle which had strayed into his allotment from a common in W., in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of W.

REPLeVIN for horses. The defendant avowed, that before and at the time of making the act of parliament thereafter mentioned, and affixing the notice on the church door of the parish church of the parish of Bepton, under and by virtue of that act, as thereafter mentioned, and from thence until and at the time when, &c., in the declaration mentioned, he was the occupier of a certain cottage, and divers, to wit, *three acres of land with the appurtenances, [*557] situated and being in the parish aforesaid; that he, and all those who before him had successively occupied the said cottage and land with the appurtenances, for and during the full period of thirty years next before the time of affixing such notice in writing as thereafter mentioned, as such occupiers, without interruption, and claiming right thereto, had used and actually enjoyed, and had been accustomed to have, use, and enjoy, and of right ought to have had, used, and enjoyed, and the defendant, as such occupier of the said cottage and land with the appurtenances as aforesaid, at the time of affixing the said notice in writing as thereafter mentioned, ought to have had, used, and enjoyed, for himself and themselves respectively, so occupying as aforesaid, common of pasture in, upon, and throughout the said close in which, &c., for all his and their commonable cattle, levant and couchant, in and upon the said cottage and land with the appurtenances, every year, at all times of the year, as to the said cottage and land with the appurtenances belonging and appertaining. That the defendant, so being such occupier of the said cottage and land with the appurtenances, and so entitled to such right of common as aforesaid, by a certain act of parliament made before the said time when, &c., that is to say, at the parliament of our lord the now King, at a session thereof holden at Westminster in the third year of his reign, intituled "An act for inclosing lands in the Parish of Bepton in the County of Sussex," it was amongst other things enacted, that it should be lawful for a certain commissioner in the said act named, and he was thereby authorized, at any time or times before the execution of his award as in the said act mentioned, by notice

in writing under his hand to be affixed on the principal outer door of the parish church of Bepton, on some Sunday previous to divine service, to order and

[*558] *direct all or any part of the rights of common in, over, or upon the said common called Bepton Common, and the wastes and waste lands contiguous or belonging thereto, or any part thereof, to be extinguished, or the exercise thereof to be suspended, for and during such time as should be expressed in such writing; and that all such rights of common as the said commissioner should by such writing order and direct to be extinguished, or the exercise thereof to be suspended as aforesaid, should, from the time of affixing such writing on the said church door, cease, determine, and be extinguished, or the exercise thereof be suspended accordingly, any law, usage, or custom to the contrary notwithstanding: that if, during such suspension, or after such extinguishment of such rights of common, or other rights as aforesaid, any of the said proprietors, or occupiers, or claimants of pasturage and common rights there, or any other person or persons whosoever, should permit his, her, or their cattle or sheep to go, depasture, or feed on any of the said lands or grounds over which such right of common or other rights should be extinguished or suspended, then it should be lawful for any other of the said proprietors or occupiers to distrain such cattle or sheep being upon such lands or grounds contrary to such notice, and to impound the same until such person or persons so offending should pay to the person or persons so distraining any sum not less than 6s., nor exceeding 10s., for each head of cattle, and not less than 2s., nor exceeding 5s., for each sheep so distrained, as any one justice of the peace for the said county of Sussex should direct; and that in case the same, with all the costs, charges, and expenses, should not be paid within five days after such impounding, the said justice was thereby authorized and empowered, upon proof of such offence or offences having been committed, and nonpayment of the

[*559] penalty or penalties incurred, to cause the cattle or *sheep so distrained, or such of them as he should think fit, to be sold for raising and paying the penalty or penalties incurred as aforesaid, together with the costs and charges attending every such distress and sale; rendering the overplus, if any, upon demand, to the owner or owners of such cattle or sheep.

That the said act of parliament having been so made as aforesaid, the said commissioner did, after the making of the said act of parliament, and by virtue and in pursuance thereof, and before the said time when, &c., and before the execution of his award in the said act mentioned, by notice in writing, under his hand, bearing date a certain day and year therein mentioned, to wit, the 19th of July, 1833,—and which notice was duly affixed on the principal outer door of the said parish church of Bepton aforesaid, on Sunday the 21st of July, in the year last aforesaid, previous to divine service,—order and direct that all the rights of common in, over, or upon the said common called Bepton Common, and waste lands contiguous or belonging thereto, should be, from the time of affixing the said writing on the principal outer door of the said parish church of Bepton, for ever thereafter extinguished. That the said writing having been so made and affixed as aforesaid, all rights of common in, over, and upon the said common called Bepton Common, and the wastes and waste lands contiguous and belonging thereto, thereby became and were wholly extinguished by virtue of the said act of parliament. That the close in which, &c., called the common, otherwise Bepton Common, and the said common in the said act of parliament mentioned, were and are one and the same common, and not other and different. And because the plaintiff afterwards, and after the said rights of common had been and were so extinguished as aforesaid, to wit, at the said time when, &c., permitted his said cattle in the declaration mentioned

[*560] *to go, depasture, and feed, and because the same, at the said time when, &c., were on the said close in which, &c., depasturing and feeding there, and over which said close the rights of common had been so extinguished as aforesaid, the defendant, as such occupier as aforesaid, well avowed the taking of the said cattle in the said declaration mentioned in and upon the

said close in which, &c., as just, &c., as for and in the name of a distress, by virtue and in pursuance of the said act of parliament; and that, the defendant was ready to verify, wherefore he prayed judgment, and a return of the said cattle, &c.

The plaintiff pleaded, that the said close, in which, &c., before and at the said time when, &c., and from time whereof the memory of man is not to the contrary, was, and still is, contiguous and next adjoining to a certain common or waste consisting of divers, to wit, twenty acres of waste, situate, lying, and being in the parish of Woolbeding, in the county aforesaid, called Woolbeding Common, and had never been separated or divided from the said last-mentioned common called Woolbeding Common by any inclosure, hedge, or fence whatever, sufficient to prevent cattle from time to time feeding and depasturing in the said common or waste called Woolbeding Common from erring or escaping therefrom into the said close in which, &c.; that the said cattle, from time to time, during all that time, duly put on the common called Woolbeding Common, to use the common of pasture in, upon, and throughout the said common called Woolbeding Common, from time immemorial had gone, escaped, and rambed, and had been used and accustomed to go, escape, and ramble therefrom into the said close in which, &c., and to intermix there and feed with cattle from time to time feeding on the grass growing in and using the common of pasture in, over, and throughout the said last-mentioned *close; and [*561] in like manner, the cattle from time to time, during all that time, duly put in the said close in which, &c., to use the said common of pasture in, upon, and throughout the said close in which, &c., from time immemorial had gone, escaped, and rambed, and had been used and accustomed to go, escape, and ramble therefrom, into the said common called Woolbeding Common, and to intermix there and feed with cattle from time to time feeding on the grass growing on the said last-mentioned common. That by the said act of parliament in the said avowry of the defendant mentioned, it was, amongst other things, enacted, that the several and respective allotments to be made in the said common called Bepton Common and waste lands in the said act and avowry mentioned, after the division thereof, should, within twelve calendar months, to be computed from the signing and sealing the award of the said commissioner in the said act and avowry mentioned, or within a shorter space of time, to be computed by the said commissioner either before or after the execution of his award, be inclosed, fenced, and divided, either by hedges, ditches, or otherwise, as the said commissioner should direct: all which said inclosures and fences should be so made, planted, and guarded by and at the proper costs and charges of the respective persons to whom the said allotments should be respectively made, in such manner, share, and proportion as the said commissioner should in and by his award direct. That the said close in which, &c., had not yet been, nor was it at the said time when, &c., inclosed, fenced, separated, or divided from the said common called Woolbeding Common by any hedge, ditch, or otherwise, sufficient to prevent cattle feeding and depasturing in the said common called Woolbeding Common from erring or escaping therefrom into the said close in which, &c. That the plaintiff was not, nor were the persons having *right of common on the said common called Woolbeding Common, [*562] nor the owners or occupiers of the soil thereof, by the said act, or by the award of the said commissioner, or otherwise, directed, obliged, or bound to set up or erect any inclosure, hedge, or fence whatsoever between the said close in which, &c., and the said common called Woolbeding Common, or to separate or divide the said close in which, &c., from the said common called Woolbeding Common. That before and at the said time when, &c., he was the occupier and lawfully possessed of certain land and premises, situate in the parish of Woolbeding aforesaid, and that he and all the occupiers of the said land and premises, for forty years last past, had had and used, and of right ought to have had and used, and still of right ought to have, common of pasture for his or their commonable cattle, levant and couchant, upon the said land and premises,

in, over, and throughout the said common called *Woolbeding* year and at all times of the year, at their free will and possessed thereof, he, just before the said time when and year in the said declaration mentioned, put his said cattle in the said common, the same being then and there his said cattle, and couchant in and upon the said land and tenancies, of the said plaintiff, into the said common called *Woolbeding* Common, to depasture the grass there then growing common of pasture there, as it was lawful for him to do, and the said cattle remained there, using the said common to the escape thereof hereinafter mentioned. That the said common or waste called *Woolbeding* Common was said, and the said close in which, &c., so being and [§ 563] and not separated or divided *therefrom by any sufficient to prevent cattle feeding and depasture called *Woolbeding* Common from erring or escaping the close in which, &c., the said cattle of the plaintiff in the said close before the said time when, &c., to wit, on, &c., without the knowledge or consent of the plaintiff, went out of the said common or waste called *Woolbeding* Common in which, &c., and remained and continued therein, and without the knowledge of the plaintiff, until the defendant had or could have any notice that the said cattle were in which, &c., to wit, at the said time when, &c., of his own cattle in the said close in which, &c., and unjustly detained and pledges, in manner and form as the plaintiff claimed against the defendant; and further, that no justice of the peace for the county of *Sussex* had, at any time since the time when the plaintiff to pay any sum of money or penalty for the same and distrained by the defendant as aforesaid, being on, &c., at the said time when, &c., and that the plaintiff is entitled to a demurrer and joinder.

Platt, in support of the demurrer, contended that the *Bepton* being extinguished by the *Bepton* Inclosure Act, the plaintiff's common pur cause de voisinage share was no longer any mutuality between the inhabitants of the said parish, while the existence of that act, and the trespass committed by the plaintiff's cattle, not being denied by the plea, judgment must be given against the plaintiff. [§ 564] The rights of common were not extinguished by the *Bepton* parishioners making a fence, but absolutely by the omission to go before a magistrate, it might furnish a defence, but was no justification of the plaintiff's trespass.

W. H. Watson, for the plaintiff. The *Bepton* Inclosure Act extinguished all rights of common in *Bepton*, but can have no effect as to the common rights of other parishes.

Now, common pur cause de voisinage is an excuse for a trespass on a common, *E. ; Vin. Abr. Common, K. Bac. Abr. Cor. 2 Wms. Saund. 285, n. 4.* Here the parishioners of *Bepton* failed to do so, the excuse for trespasses by cattle of the plaintiff's remains the same as before. The enactment that the parishioners and occupiers may distrain if any person whatsoever feeds on *Bepton* Common, can be applied only to the plaintiff's cattle in *Bepton*; for other parishes have no notice of the act.

At all events, the avowant could only, pursuant to the act, till a magistrate had decided what damages the owner

therefore, not having averred that he went before a magistrate must be considered a trespasser ab initio: 2 Roll. Abr. 563, Com. Dig. Tresp. C. 2.

Platt, in reply, contended, that the act, though local, was binding on all persons; and that, therefore, the avowant was justified, under the general power, to distrain the cattle of any person whatsoever feeding on the common after the notice given at the church door.

Cur. adv. vult.

*TINDAL, C. J. The question in this case arises upon the pleadings [565] on the record, in which, after a declaration in replevin for taking the plaintiff's cattle upon Bepton Common, the defendant avows for damage feasant stating in his avowry, that he the defendant, before and at the time of passing the inclosure act, part of which is afterwards set forth, was entitled, as occupier of a certain cottage and land in Bepton, to a prescriptive right of common of pasture over the locus in quo. The avowry then proceeds to set forth some of the provisions of the statute 3 W. 4, for inclosing lands in the parish of Bepton, from which it appears that the commissioner appointed by the act had authority, before the execution of his award, by notice in writing under his hand, to direct "that all the rights of common in, over, or upon said common called Bepton Common, should become extinguished," and that if, after such notice, any of the claimants of pasturage or common rights, or any other person or persons whatsoever, should permit their cattle or sheep to feed or depasture on any of the lands on which such rights of common were so extinguished, it should be lawful for any other proprietor or occupier to distrain them in manner pointed out in the act. The avowry then proceeds to state, that the commissioner did, on a certain day, give notice under the act, that all the rights of common in, over, or upon the said common called Bepton Common, should be, for ever, thereafter extinguished, whereby the same were extinguished accordingly. And that because the plaintiff, after such rights of common were extinguished, permitted his cattle to feed and depasture on Bepton Common, he, defendant, as occupier of the said cottage and land, distrained them under the power so given by the statute. To this avowry the plaintiff pleads in bar, that the said place in which, &c., hath always been contiguous, and next adjoining to a certain other *common called Woolbeding Common, and hath never [566] been separated therefrom by any fence sufficient to prevent cattle feeding on Woolbeding Common from erring and escaping into the close in which, &c. And the plea then prescribes for a right of common pur cause de vicinage from one common to the other. The plea in bar then proceeds further to set out a clause in the inclosure act, by which the several allotments made under the act, are directed to be fenced and divided by sufficient hedges or otherwise, within the time mentioned in the act; that the close in which, &c., hath not yet been fenced and divided from Woolbeding Common; and that neither he the plaintiff nor the persons having right of common on Woolbeding Common, were, by the said commissioner or otherwise, directed to set up any inclosure or fence between the close in which, &c., and Woolbeding Common. And it lastly states that his cattle, being lawfully put upon Woolbeding Common, err'd and escaped, of their own accord and without his consent, from Woolbeding Common into the place and which, &c.

To this plea there is a general demurrer; and the question raised upon the demurrer and argued before us, is, whether the plaintiff is a trespasser by reason of his cattle, which were rightfully upon Woolbeding Common, erring and straying thence into the locus in quo, that is, into Bepton Common, after the extinguishment of the rights of common thereon under and by virtue of the inclosure act set forth in the avowry.

The nature of common pur cause de vicinage is clearly laid down and explained in 4 Rep. 38, b, and by that book it appears to be, not any right of feeding on the adjoining common, but only "an excuse of trespass by reason of the ancient usage, which the law allows to avoid suits which would arise if actions should be brought for every such trespass when no separation or

[*567] "inclosure is between the commons:" and, therefore, it is added, "one may inclose against the other; for *cessante causâ cessat effectus*." The same law is laid down by POWELL, J., in *Broomfield v. Kirber*, 11 Mod. 72:—"this sort of common must be in nature of an escape, and so an excuse. For a man cannot put in his cattle in common of vicinage originally, but they must escape. They may inclose, one against the other, if they will be at the charge." See, also, Co. Litt. 122, a. And it appears by a very modern case in 13 East, 348, that in order to put an end to the common pur cause de vicinage by inclosing, such inclosure must be complete, and that if it is not so, the cattle may still stray from the one common to the other without impediment, and the common pur cause de vicinage is not extinguished.

Now, it is manifest from the pleadings in this cause, that there was not any complete separation by inclosure between the common of Bepton and the common of Woolbeding, but that the locus in quo being part of Bepton Common was still left open to Woolbeding Common as much as it was before the inclosure act. With respect, therefore, to inclosure, the only mode of terminating a common pur cause de vicinage which is mentioned in the books, it is clear that no such termination exists in the present case.

But it is contended on the part of the avowant, that by the operation of the inclosure act, this right of common pur cause de vicinage was extinguished. And this is contended in argument upon two distinct grounds. First, it is argued, that all rights of common upon Bepton having been extinguished by the act, all reciprocity between the commoners on the adjoining commons is gone; and that, as there can be no longer any [*568] "straying from Bepton Common to Woolbeding, so the Woolbeding commoners can no longer excuse their cattle for straying upon the place which was, before the inclosure act, the Bepton Common. But, without deciding whether such would be the legal consequence or not, if due notice had been given to the plaintiff that all rights of common upon Bepton Common had been extinguished by the act of parliament, we think it clear, in order that such extinguishment of the rights in Bepton Common may put an end to the excuse for straying from the adjoining common, and make the commoners of such adjoining common trespassers if their cattle stray therefrom, that there must be notice of this extinguishment. The question therefore is, has there been any such notice? Now, it is admitted by the pleadings that there has been no inclosure, the most effectual mode of giving notice that the license to intercommon, or the excuse of mutual trespasses, has been put an end to. And as to any notice of what has been done in an adjoining township under a private act of parliament relating to that township, the act of parliament itself is no notice to them. And, lastly, there is no allegation upon the record of any notice, in fact, that the commoners of Woolbeding were not to permit their cattle any longer to stray from their own common; so that, upon the whole, we think there has been no sufficient notice in this case to make the Woolbeding commoners trespassers for continuing the use of a practice which has been carried on from the earliest time under an implied agreement; which agreement, in the absence of such notice, they might well suppose to continue in full force.

But, in the next place it is argued, that by the direct operation of the statute, the right of common pur cause de vicinage is taken away; for, that the commissioner directed by his notice, that *all the rights* of common in, [*569] "over, or upon, the place in question should be for ever thereafter extinguished. The answer, however, to this argument appears twofold; first, the common pur cause de vicinage is not strictly and properly a right of common at all; it is merely an excuse for a trespass: but, secondly, and principally, the act is only a private act of parliament, and is no more than an agreement between the Bepton commoners to extinguish their own rights of common, sanctioned and enforced by the legislature. The act, therefore, has no binding power on the rights of those who are strangers to it, and no parties to the agreement which

it professes to confirm. So far, therefore, as depends on the operation of the statute, the rights of the Woolbeding commoners remain as they were before.

Upon the whole, therefore, we think on the facts stated in the pleadings in this cause, the right of the plaintiff to his common *pur cause de vicinage* had not been taken from him at the time in question, and therefore that there must be
Judgment for the plaintiff.

*M E M O R A N D A.

[*570]

THE Right Honorable Sir WM. ELIAS TAUNTON, Knt., one of the Judges of the Court of King's Bench, died the day before the commencement of this term; he was succeeded by Mr. Serjeant *Coleridge*, who, on the 28th of January, was sworn into office, and took his seat on the Bench on the following day.

The Right Honorable Lord LYNTHURST, having received the appointment of Lord High Chancellor, in the room of the Right Honorable Lord BROUGHAM and VAUX, Sir JAMES SCARLETT, Knt., one of his Majesty's Counsel, was appointed to succeed his Lordship in the office of Chief Baron of the Court of Exchequer. Sir JAMES, having been created a peer by the style and title of Baron ABINGER, of Abinger, in the county of Surrey, and of the city of Norwich, on the first day of this term, took his seat on the Bench as Lord Chief Baron.

Sir *E. B. Sugden*, one of his Majesty's Counsel learned in the law, was in the course of the term appointed Lord Chancellor of Ireland, in the room of the Right Honorable Lord PLUNKET.

Frederick Pollock, Esquire, one of his Majesty's Counsel, and *William Webb Follett*, Esquire, received the honor of knighthood, and were appointed respectively to the office of Attorney and Solicitor General, in the room of Sir J. Campbell, and J. M. Rolfe, Esquire. Sir *W. W. Follett* was also appointed one of his Majesty's Counsel.

*On the first day of this term the following gentlemen, having respectively been appointed his Majesty's Counsel, were called within the bar, and took their seats accordingly; viz.:—[*571]

Fitzroy Kelly, Christopher Temple, Walker Skirrow, Richard Torin Kinderley, Edward Jacob, John Miller, Henry John Shepherd, Daniel Wakefield, and James Wigram, of Lincoln's Inn, Esquires; William Burge, Thomas Joshua Platt, and George Spence, of the Inner Temple, Esquires; and Charles Henry Barber, of Gray's Inn, Esquire.

END OF HILARY TERM.

NEW CASES
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were,

TINDAL, C. J.,
PARK, J.,

GASELEE, J.,
BOSANQUET, J.

WHITE v. PARKER. *April 24.*

Devise of land to trustees, in trust to permit testator's wife and daughters to receive the clear rents of three parts to their sole and separate use, and the testator's son the clear rent of the fourth part; the trustees to pay all outgoings, to repair, and to let the premises. Held, that the legal estate, as to all the four parts, vested in the trustees.

Upon the death of one of two trustees, the survivor was to appoint another in place of the deceased, and to convey the premises to him, to hold them jointly with the survivor. One of the trustees being dead, the survivor, by a deed to which the cestui que trusts were parties, appointed P. sole trustee, in place of himself and the deceased, and conveyed the premises to P., to hold to him and his heirs, and not jointly with the surviving trustee. Held, that the whole legal estate passed by that conveyance to P.

IN covenant by the assignee of a lessee for years against the assignee of the reversion, on a covenant to take trees and fixtures at a valuation at the end of the term, the defendant pleaded that the next and immediate *reversion [*574] in the demised premises did not vest in the defendant.

At the trial before TINDAL, C. J., the plaintiff, after proving a lease of the premises to the person who assigned to himself, by George Adams the elder, for twenty-five years from October, 1807, put in the will of the said George Adams, who died in 1809.

By that will, Adams devised all his land in the parish of Acton (including all the demised premises), and all other his real estate whatsoever, and all his estate and interest therein, with their appurtenances, to Joseph Ringham and Thomas Suter, their heirs and assigns, upon trust, as to one-fourth part of all his said devised real estate, to pay or to permit and suffer his wife Catherine Adams to have and receive the clear yearly rents and profits thereof, for and during the term of her natural life; with remainders over to his son George

Adams, and his daughters Elizabeth, the wife of William Wright, and Mary Adams, and to the survivors of them, in fee. And as to one other fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his son George to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of his natural life; and from and after his decease, in trust as to the same fourth part, for the eldest or only son (as the case might be) of his son George, who should be living at his decease, his heirs and assigns: and if his son George should not leave a son surviving him, then in trust for such person or persons as at the decease of his son George should be his heir or heirs, and his, her, or their heirs and assigns. And as to one other fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his daughter Elizabeth Wright, wife of the said William Wright, to have and receive the clear yearly rents and profits thereof, for and during the term *of her natural life, with remainders over to her [*575] issue, or heirs. And as to the remaining fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his said daughter Mary to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of her natural life, with remainder over to her issue or heirs: the several parts and shares of his said wife and daughters in the rents and profits of the said devised real estates to be for their respective sole and separate uses whilst under coverture, and to be paid into their own hands or to such person or persons as they respectively should from time to time, by writing under their hands, order, direct, or appoint, and not to be subject to the control of any husband. He directed his trustees and the survivor of them, and the heirs and assigns of such survivor, from time to time, in their own judgment and discretion, to let and set his said devised real estates for such term or terms of years not exceeding seven years, and on such conditions as they should think fit, always reserving the best and most approved yearly rent or rents which under all circumstances could be reasonably had or gotten for the same. And further, during the continuance of the trust thereinbefore declared of and concerning his said devised real estates, out of the rents, issues, and profits thereof, to pay and discharge all outgoings, for taxes or otherwise, in respect to the premises, and to keep the premises in repair, and to retain payment for their expenses. And he directed that, upon the decease of his said trustees, or either of them, or of any other trustee to be appointed by virtue of that authority, or upon his or their refusing or becoming incapable to act in the trust, a new trustee or trustees should be appointed in his or their place and stead, by the surviving or continuing trustee, or the executors or administrators of the surviving trustee; and thereupon the trust *estate and premises should be conveyed to and vested in the surviving [*576] or continuing and the new appointed trustee or trustees jointly; and in case there should be no surviving or continuing trustee or trustees, then in such newly appointed trustee or trustees and their heirs, upon the several trusts thereinbefore declared, of and concerning the same, or such of them as should be then subsisting or capable of taking effect; and that every such new trustee should and might act therein as if he had been appointed by the testator.

Ringham died in 1818; and, in November in the same year, Suter, the surviving trustee, by an indenture, to which all the cestui que trusts were parties, appointed the defendant to be sole trustee, in the place of himself, and of the deceased trustee; and further executed a conveyance by lease and release for the express purpose of vesting the legal estate in the defendant.

George Adams, the son, was of full age at the date of the will. At the time of commencing this action, all the cestui que trusts named in the will were living, and the property had not been divided.

A verdict having been found for the plaintiff upon the issue affirming the next reversion to be in the defendant,

Taddy, Serjt., moved to set it aside, on the ground, first, that as to the fourth

part appertaining to George Adams, the legal estate was in him, upon the true construction of his father's will; secondly, that at all events it was not in the defendant, the surviving trustee Suter not having conformed to the power in the will which authorised him to convey.

For the first point he relied on *Doe dem. Leicester v. Biggs*, 2 Taunt. 109, [*577] where it was held, that a devise to one in *trust to permit and suffer another to receive, gives the legal estate to the cestui que trust; and though he admitted that, with respect to the three shares allotted to the females of the testator's family, the legal estate might vest in the trustees in order to secure the property to the separate use of the females,—*Jones v. Lord Say and Sele*, 7 T. R. 653, *Harton v. Harton*, Cowp. 766,—there was nothing to prevent George Adams from having the legal estate in his fourth part, pursuant to the decision in *Doe v. Biggs*: he might hold it as tenant in common with the trustees. And if the legal estate in any part of the premises were not in the trustees, the issue, which went to the whole, ought to be found for the defendant. *Hare v. Oster*, 2 Vin. Abr. 262; *Eq. Cas. Abr.* 388.

At all events, according to the power in the will, the surviving trustee could only convey to a new trustee, to hold jointly with himself: for it was evident, that the deviser intended there should never be fewer than two trustees. The conveyance to the defendant, therefore, not being in conformity with that power, no estate passed to him.

A rule nisi having been granted,

Smirke showed cause. With respect to the conveyance, it is immaterial to inquire whether or not the defendant has been properly appointed a trustee, for the legal estate is in him at all events by the deed of lease and release. In *Doe dem. Read v. Godwin*, 2 Vin. Abr. 262, *Eq. Cas. Abr.* 388, the City Lottery Act, 46 G. 3, c. 97, vested the prizes therein enumerated in five trustees by name, in trust for the purposes of the act; and by the sixteenth section it was enacted, that “in case of the death of one or more of the trustees before the drawing of the lottery and the conveyance of the prizes to the fortunate [*578] holders of the *tickets, the survivors should, and they were thereby required, to fill up the vacancy or vacancies by the election of some other persons for the purposes of the act.” Nevertheless, it was held, in an action of ejectment, that the conveyance of a prize to the lessor of the plaintiff by four only of the five trustees (one having died), was valid; although it was there contended, that the act made it imperative to fill up the vacancy before any conveyance was made. *Doe v. Keir*, 4 Man. & Ry. 101, also shows that the legal estate passed, at all events, whether the power was or was not duly executed. Besides, the defendant and George Adams being both parties to the conveyance, are estopped to say that no interest passed.

Then upon the construction of the will, the legal estate vested in the trustees, as well in respect of George Adams's share as of the three others. For the trustees are required to discharge outgoings for taxes and otherwise; to let and to keep the whole in repair, and to retain for their expenses: these things they could not do unless they had the legal estate. In *Doe v. Biggs* no such duties were assigned to the trustees; the decision turned entirely on the words by which the estate, whether legal or equitable, was created, and there appear to have been no other provisions in the will that could assist the court in ascertaining the intention of the deviser. MANSFIELD, C. J., said, “This case might be argued and considered for ever without advancing it at all in law, reason, or precedent. But, as it happens, in this will the last words are, ‘permit and suffer,’ which give the cestui que trust a legal estate; and the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and, consequently, for want of a better reason, we are [*579] forced to say that we think this will gives the *legal estate to the party beneficially interested.” (*Smirke* was here stopped by the Court.)

Taddy and *Erle* in support of the rule.

The powers to let, to pay outgoings, and to repair, were necessary in respect of those portions of the property which were devised for the benefit of the females. But there is nothing inconsistent in confining the legal estate of the trustees to three-fourths, and allowing it to vest in the male devisee as to the other fourth. It has always been a principle in construing wills, to give the beneficial proprietor, if possible, the legal estate; and though the testator might use the precaution of naming trustees to secure the property of his daughters, he could scarcely have intended to preclude his son, who was of age at the time the will was made, from having full dominion over the property devised to him.

At all events, the conveyance by Suter operates under the statute of uses, and therefore must be governed by the intention of the testator. Now it was clearly his intention to avoid the incident of a survivorship, and to give his daughters the security of two joint trustees. In *Doe v. Godwin*, the conveyance did not operate under the statute of uses. If this had been a conveyance under a power in a deed to convey to another jointly with the existing trustee, it had been clearly void; and Suter had no power to convey except according to the testator's directions. It is true that here was a conveyance by lease and release, but as that appears by its recital to be in pursuance of the power contained in the will and for the purpose of giving effect to the appointment of the new trustee, if that appointment was defective, the conveyance also must be inoperative.

TINDAL, C. J. In this issue, in an action of covenant, the question arises, whether the immediate and *next reversion of the premises did or did not vest in the defendant. There are two grounds on which it is con- [*580] tended that the reversion in question did not vest in him: First, it is said, that under the will of George Adams the interest devised to the trustees was not a legal interest, but was executed, at least in part, in one of the *cestui que trusts*; secondly, that even if this be not so, the power to convey conferred on the surviving trustee has not been well pursued; and that, therefore, no legal estate has passed to the defendant.

With respect to the first point, it depends upon what shall appear to be the intention of the testator expressed upon the will; and we cannot give full effect to his intention, unless we say, the use is executed in the trustees. It is contended that if the legal estate, as to any part of the premises, be not in the trustees, that would be sufficient to warrant a verdict for the defendant; assuming that position to be correct, for the purpose of argument, and confining our attention to the portion devised to the testator's son George, the words are, after a devise of the whole to the trustees,—“upon trust, as to one-fourth part of the same, to pay to or permit and suffer my said son George to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of his natural life; and from and after his decease, in trust, as to the same fourth part, for the eldest or only son (as the case may be), of my said son George, who shall be living at his decease, his heirs and assigns; and if my said son George shall not leave a son surviving him, then in trust for such person or persons as at the decease of my said son George shall be his heir or heirs, and his, her, or their heirs and assigns.”

It is contended, that inasmuch as the testator uses the words, “shall pay to, or permit and suffer my said son to have and receive the rents,” the case must be governed *by the decision in *Doe dem. Leicester v. Biggs*, where upon a devise in trust to pay unto, or else to permit and suffer the testator's [*581] niece to receive the rents, it was held, that the legal estate was executed in the niece.

It is to be observed, that in that case the court says, that if there be a repugnancy, the first words in a deed, and the last in a will, shall prevail; and that “for want of a better reason” they were forced to say, that that will gave the estate to the party beneficially interested. Here the words are not precisely

the same; but "to permit and suffer my said son to receive the clear yearly rents;" the trustees were themselves to pay the outgoings: besides which, as to three parts, it was necessary the trustees should take the legal estate for the protection of *femes covert*; *Jones v. Lord Say and Sele*; and it would be a very anomalous construction of the will to say, that the use was executed in the *cestui que trust* as to one-fourth part, and in the trustees as to the other three-fourths. How could we reconcile such a construction with the power given to the trustees "to demise the said devised estates, reserving the best rent that can be had?" If George were in possession of a fourth, how could the trustees reserve the best rent for the whole of the devised premises? The testator goes on:—"And further, during the continuance of the trust hereinbefore declared of and concerning my said devised real estate, out of the rents, issues, and profits thereof to pay and discharge all outgoings, for taxes or otherwise, in respect of the premises, and to keep the premises in repair." How could they effect this, if the fourth part were in the possession of another person?

Looking at the will, it is impossible to carry into effect the intention of the testator, without saying, that the trustees took the legal estate in the whole of the premises.

The case, therefore, comes within the rule laid down in 2 Wms. Saund. 11 [*582] (note):—"So, where something *is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate."

Now, when the testator directs the trustees to pay all outgoings, and gives his son George the fourth part of the clear rents, what is that but giving him a fourth part of the residue of the rents, after discharging all outgoings? I think, therefore, that the trustees took the legal estate in the whole.

But it is said, that the reversion does not vest in the defendant, because he takes by a conveyance under a power, and the power has not been duly pursued. Perhaps, upon the death of Ringham, another trustee should have been appointed. But when in the conveyance to Parker it is recited, that Suter had refused to act further in the trusts of the will of G. Adams, deceased, and with the privity and approbation of Catharine Adams, George Adams, party thereto, &c., he had agreed to appoint the said C. R. Parker, party thereto, to be a new trustee, in the place and stead of Joseph Ringham, deceased; and when it is witnessed, that, for the purpose of vesting the freehold messuages, lands, tenements, and hereditaments devised by the will of the said George Adams, deceased, in the said C. R. Parker, his heirs and assigns, upon the trusts therein contained concerning the same, the said Thomas Suter, by and with the privity, consent, and approbation of the said C. Adams, G. Adams, &c., and according to the estate and interest of him the said T. Suter in the premises, under and by virtue of the said recited will of the said G. Adams, deceased, had bargained, sold, and released the premises to the said C. R. Parker, how are we to [*583] *say in a court of law, that because Suter neglected his duty and failed to appoint another trustee, no interest passed to Parker by the deed which has been executed? Suter cannot say *nihil operatur*, and the *cestui que trusts*, being all parties, are equally estopped. I am satisfied that the conveyance was valid at law, and vested the reversionary interest in Parker.

PARK, J. The distinction we now take was taken by Sir JAMES MANSFIELD, in *Doe v. Biggs*; and in *Shapland v. Smith*, 1 Bro. C. C. 75, it was laid down, that if trustees have duties to perform, which require the possession of the fee, the fee is vested in them. In *Doe v. Biggs* they had no such duties, so that that case does not control our present decision. *Kenrick v. Beauchlerk*, 3 B. & P. 175, proceeded on the same principle, and the rule was there referred to in argument by Serjt. Williams.

The very point arises on the will now before us, and I see no reason for making any distinction between the four separate parts of the property. We have only to see whether the final words are applicable to the whole, for they are almost the same as those used by Serjt. *Williams*—"to pay rates and taxes, and keep the premises in repair, or the like."

GASHLEE, J. This case differs from *Doe v. Biggs* in many particulars. First the trustees are to apply the clear yearly rents to the use of the several cestui que trusts. What can that mean but the clear residue after defraying all outgoings? Secondly, the words relied on in *Doe v. Biggs* were the last words in the will; here they are followed by the clause which requires the trustees to pay the outgoings out of the whole receipts, and to keep the estate in repair. The effect of leaving the legal estate as to a fourth in the son would be to raise a squabble every time repairs were to be done. Besides this, Parker, [*584] after accepting a conveyance from the trustee, is precluded from saying that he had no title to convey. Whether or not a court of equity would order another trustee to be appointed we need not say; but, sitting in a court of law, we are bound to say that the legal estate was in the defendant at the time of the action.

BOSANQUET, J. The question is, did the legal estate in the whole vest in the trustees, or was it, as to a fourth, executed in George Adams? The terms of the disposition in favor of George Adams resemble those in *Doe v. Biggs*. The terms in that case were, a trust to permit and suffer the testator's niece to receive and take the rents, issues, and profits of the estate devised to the trustees: and if the disposition to George Adams had stopped at that point, it would have been difficult to distinguish the cases. But the Chief Justice has pointed out the material difference occasioned by the use of the word clear in the present devise: that means, the clear residue after the deduction of all outgoings. According to Sir JAMES MANSFIELD, in *Doe v. Biggs*, if there be an ambiguity the last words must prevail; and in that case the directions to permit and suffer the cestui que trust to receive the rents were the last words of the devise; and those words, unrestrained, would give the legal estate to the cestui que trust. In the present will those words are followed by many other directions; and amongst others by directions to the trustees to defray charges and make repairs. How could they do that unless they had the legal estate? It seems to me, therefore, that they have in respect of George Adams's share the same estate which it is admitted they have in respect of the shares devised to the females.

Rule discharged.

See *Playford v. Hoare*, 3 Young & Jer. 175; *Tenny v. Moody*, 3 Bingh. 3; *Doe v. Scott*, 4 Bing. 506; *Doe v. Walbank*, 2 B. & Adol. 554. In the principal case, it may, perhaps, be considered questionable whether, if the legal estate in one undivided fourth part, had, in fact, vested in the son, G. Adams, the objection would not rather have been mere matter for a plea in abatement for non-joinder of the other tenants in common, than ground of variance; see *Merceron v. Dowson*, 5 B. & C. 479.

The covenant on which the above action of *White v. Parker*, was brought, was a covenant by the lessor and his assigns, to pay the lessee and his assigns for trees planted and buildings erected during the term, at a valuation to be made by two arbitrators to be appointed by the lessor and lessee, or their assigns respectively, at the expiration of the lease. It seems to have been taken for granted by the counsel for the defendant, that such a covenant runs with the land: as to which, see *Grey v. Cuthbertson*, 4 Dougl. 351; *S. P. 2 Chitty's Rep.* 482. and *Selywn's Nisi Prius*, tit. Covenant, sect. v.

*SMITH and Another, Assignees, of WHALLEY, a Bankrupt, [*585]
v. CRAMER. April 24.

A trader, in embarrassed circumstances, absented himself from his house from the 16th of February till the 9th of March. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of March, two letters written by him on the 16th of January preceding, asking for time on two bills of exchange payable by him in February, were received in evidence to show the motive of his absence.

UPON a motion for a new trial on this cause, one question was, whether certain letters written by the bankrupt, Whalley, were admissible in evidence in support of an issue which alleged him to have committed an act of bankruptcy on or before the 5th of March, 1834.

It was proved that in December and January, 1834, Whalley was in embarrassed circumstances, with an execution in his house: that on the 16th of February, he left Stafford, the place where he resided and carried on trade, and did not return till the 9th of March.

The letters in question were written by him on the 16th of January to the holders of two bills of exchange, which he was liable to be called on to pay in February, and prayed for further time.

*PARK, J., before whom the cause was tried, received the letters as [*586] declarations by the bankrupt, tending to throw light on the cause of his absenting himself from Stafford.

A verdict having been found for the plaintiff, *Indlow*, Serjt., moved for a new trial, on the ground that those letters were inadmissible, as not having been written at the time of the bankrupt's departure from Stafford, or during his absence. In *Lees v. Martin*, 1 Moo. & Rob. 210, the declarations of a trader made shortly after an absence, were held not admissible to prove such absence an act of bankruptcy.

Declarations of the bankrupt are only admissible in evidence when they accompany or relate to the act of bankruptcy to be proved.

TINDAL, C. J. I think these letters are clearly within that class of evidence under which the conduct and language of the bankrupt previous to bankruptcy have been received in proof to show the effect of an equivocal act. They were evidence to go to the jury that the bankrupt was a needy man; and also to give a color to his absence from Stafford.

The rest of the Court concurring, the rule was

Refused.

[*587]

*PASSENGER v. BROOKES. April 24.

A defence on the ground of want of consideration for an agreement cannot be proved under the plea of non assumpsit.

To this action of assumpsit on a special contract between a timber merchant and a builder, the defendant pleaded that he did not promise in manner and form as the declaration alleged.

At the trial before TINDAL, C. J., the defendant's counsel proposed to prove by evidence *dehors* the contract that there was no consideration for the agreement. But

The learned Chief Justice rejected such evidence, as not admissible under this plea: and

A verdict having been found for the plaintiff,

Talfourd, Serjt., moved for a new trial, on the ground that in contemplation of law the consideration for a promise is parcel of the promise, and therefore, if there be no consideration, there is in law no promise: so that the evidence in question was strictly relevant to establish the proposition, that the defendant did not promise. Thus, according to the example given in the rules, Hil. 4 W. 4, Assumpsit, 1.—“In an action on a warranty, the plea of non assumpsit will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach.”

TINDAL, C. J. The third example applies more closely to the present case:—“All matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.”

*Upon this ground we cannot grant the rule for a new trial.

Rule refused. [*588]

Talfourd then moved for and obtained a rule nisi upon another matter disclosed in an affidavit.

ESQUIRE DUKES *v.* GOSTLING. *April 25.*

Plaintiff declared, that he was possessed of a close and pond; that defendant, at the time of the grievance complained of, was possessed of a close used as a private road, adjoining plaintiff's close and pond; and that defendant wrongfully made in his said close, used as a private road, a sewer near to the plaintiff's pond, and continued the sewer for a long time, and thereby during all that time diverted the water of the pond: Held, that the allegation that the defendant's close was used as a private road at the time of making the sewer was surplusage, which it was not incumbent on the plaintiff to establish in proof.

THE declaration stated that defendant demised to the plaintiff, for a term not yet expired, among other things, a certain close of land, and a pond full of water in and upon the said close, situate in the parish Islington in the county of Middlesex. That, at the time of committing the grievance by the defendant thereafter mentioned, the plaintiff was and still is under and by virtue of the said demise lawfully possessed of the said close of land, with the appurtenances, situate as aforesaid, and of the said pond full of water in and upon the said close: that the defendant, before and at the time of the committing the grievance thereafter mentioned, was possessed of a certain close of land, used and employed by the defendant as a private road, and adjoining the said close of land of the plaintiff, and the said pond full of water in the said close; nevertheless, the defendant, contriving and intending to injure, prejudice, and aggrrieve the plaintiff, and to deprive him of the use and benefit of the said pond full of water, whilst the plaintiff was so possessed of the said pond of water, *to wit, on the 1st of May, 1833, and on divers other days and times [*589] between that time and the time of the commencement of the suit of the plaintiff against the defendant in that behalf, wrongfully and injuriously cut, dug, and made in his said close used as a private road as aforesaid, a certain large sewer, close to and adjoining the said close and the said pond of water of the plaintiff, and kept, and continued, and caused to be kept and continued the said sewer adjoining to the said close and pond of water of the plaintiff for a long space of time, to wit, from thence hitherto; and thereby during all the time aforesaid wrongfully drew off and diverted large quantities of the water of the said pond; and the plaintiff thereby, for want of sufficient water in the said pond, could not during that time use, occupy, and enjoy his said close and his said pond full of water, as he otherwise might, could, and would, and ought to have done: to the plaintiff's damage of 1,000*l.*

Plea, general issue.

It appeared at the trial that the plaintiff, a cattle-keeper, being, as lessee of the defendant, in possession of a field with a pond in it, the defendant, in April, 1833, obtained permission of the plaintiff to fill up a portion of the pond for the purpose of making a road to the defendant's house. The permission was given on condition of the defendant's abating 10*l.* of the plaintiff's rent, and leaving a sufficient supply of water for the plaintiff's cattle.

Before constructing the road, the defendant built a sewer to carry off the surplus water of the pond in rainy seasons. This sewer ran from the south side of the pond into a drain out through a field of the defendant's on the north side; and, after the sewer was completed, the road was carried over it through the northern extremity of the pond.

The depth of the pond when full did not exceed *two feet and a half; [*590] its ordinary depth was eighteen inches.

In order to build the sewer, the defendant was obliged to drain the pond dry;

and, according to the plaintiff's witnesses, it never again contained a sufficient supply of water for his cattle, notwithstanding the plaintiff had puddled the bottom to prevent leakage, and at the head of the sewer had erected a cylinder two feet and a half high, with a grating at the top, so that no water could enter the sewer till it was two feet and a half deep in the pond.

The defendant ascribed the desiccation of the pond to the accident of two dry summers; and his counsel objected that, as the sewer was made before the road, the injury proved did not correspond with the injury described in the declaration.

A verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit instead, if the objection should be found available.

Spankie, Serjt., having obtained a rule nisi accordingly,

Byles showed cause. The objection is without weight, because, although the defendant's road not having been constructed till after the sewer, he could not have cut the sewer in his close used as a road, as alleged in the declaration, yet, the time when the close was used as a road not being specified, it must be taken to be at the time of commencing the action, and then the allegation would be correct, viz., that the defendant wrongfully made a sewer through a close of the defendant, which at the time of commencing the action was used as a road.

In Sir N. Point's case, Cro. Jac. 214, in an indictment for a forcible entry, it was laid, that such a day and year the defendant entered into such land, *existens liberum tenementum* *of J. B., and with force expelled him; and [*591] judgment was reversed, for not saying *ad tunc existens*, for it might be the freehold of J. B. at the time of the indictment, and not at the time of the entry. That was confirmed in Bridge's case, Cro. Jac. 639. So in Rex v. Somerton, 7 B. & C. 463, an indictment charged that A. B., on a certain day, being the servant of J. H., one gold ring then and there being in the possession of J. H., and being his goods and chattels, feloniously did steal: It was held that the fair import of the charge was, that A. B. was the servant of J. H. at the time when the theft was committed. To the same effect is Rex v. Ward, 2 Ld. Raymd. 1461. At all events, the sewer is a continuing nuisance; and the plaintiff may recover for the continuance, notwithstanding he may have misdescribed the premises at its commencement.

Secondly, the defendant's close of land, being described by its abutments as adjoining the plaintiff's close and the pond to it, the use the defendant made of his close is immaterial, and may be rejected as surplusage, or might have been amended at the trial, or now: Hill v. Salt, 2 Cr. & Mee. 420.

Thirdly, by the new rules of pleading, the defendant, in an action on the case, by pleading not guilty to the principal charge, must be taken to have admitted all matters of inducement.

Spankie and *Knowles* in support of the rule. The charge is, depriving the plaintiff of his water by digging through the defendant's close used as a road; and, whatever occasioned the loss of the water, it was not digging through the defendant's road. Not guilty, therefore, was the only plea to a charge conceived in such terms; and though that plea should, under the new rules, be [*592] held to involve an admission of matters of *inducement, still it leaves the plaintiff to establish the grievance he alleges, that is the drawing off his water by a cut through the defendant's road. The showing that the water had been drawn off by any other cut would not have established that allegation. The cases in Cro. Jac. only decided that an indictment was insufficient for want of the word *ad tunc*, but in this declaration it is expressly alleged, that, at the time of the grievance, the defendant used his close as a road, and that he injured the plaintiff by cutting a sewer through the said close; that is, the close used as a road at the time of the grievance. Rex v. Somerton is in favor of the defendant.

There is a further variance in the allegation of the means by which the water

was withdrawn. According to the evidence, it was not withdrawn by the sewer, but previously, and in order to the construction of the sewer. As to the supposed continuance of the nuisance, the grating of the sewer was at such a height as to prevent the improper escape of water after the sewer had been once built.

TINDAL, C. J. In this case the defendant relies on two objections:—first, a misdescription of the grievance of which the plaintiff complains; secondly, a variance in another material point, namely, that the pond was not emptied by the sewer, but in order to the construction of a sewer for the protection of the road which the defendant was permitted to make.

It appears to us that the defendant has been answered. The declaration states, that while the plaintiff was possessed of his close and pond, the defendant wrongfully and injuriously cut and made in his close used as a private road, a certain large sewer adjoining the close and the pond of the plaintiff. But, by way of inducement, the plaintiff says, that before and at the time of committing the grievance, the defendant was *possessed of a close of land [*593] used by the defendant as a private road, and adjoining the plaintiff's close and pond; and this gives rise to the first head of objection, that the defendant's close was not, according to the language of the declaration, used as a road at the time the pond was emptied, nor till after the sewer was built. The language is indeed equivocal: but it might be open to the plaintiff to explain the ambiguity by evidence, and to show at what time the close was used as a road, whether at the time of the injury, or at the commencement of the action. However, without deciding that point, it is, at all events, clear that the allegation is immaterial, and does not relate to the gravamen of the action. What has it to do with the wrongful act of the defendant, or the measure of damages which the plaintiff is entitled to claim, whether the defendant used his close as a road, an orchard, or a garden?

If the whole of the inducement had been omitted, the declaration would have been as well without it; we cannot, therefore, allow it to be turned to the defeat of the plaintiff's claim. Nor, under the new rules of pleading, is it open to the defendant upon this record to take the objection; for the general issue, not guilty, denies only the commission of the injury, and not the matters of inducement.

Then comes the second objection, that the declaration alleges the pond to have been emptied by the defendant's making a sewer, whereas the evidence shows it to have been emptied by the steps taken preparatory to making the sewer.

But the plaintiff complains not only of the emptying of the pond, but of its continuing empty in consequence of what the defendant has done; and it is clear, according to the evidence, that, since the trench for the sewer was dug, the water has never risen to its usual level. We think, therefore, that the rule for entering a nonsuit must be discharged.

*GABLEE, J. If it were necessary to express an opinion as to the time when the defendant's close is alleged to have been used as a road, [*594] I should say the declaration expresses the time when the grievance was committed; but it is not necessary to decide this, for under the new rules the defendant, having pleaded only the general issue, is precluded from objecting to matters of inducement.

PARK, J., concurred.

Rule discharged.

BOSANQUET, J., was absent, in the capacity of Commissioner of the Great Seal.

POTTS v. SPARROW. April 28.

Illegality of consideration must be pleaded specially as a defence, not only where the express contract on which a plaintiff sues is illegal, but also where illegal services have been performed, no contract to pay for them can be implied.

THE plaintiff, an attorney, sought, in this action of assumpsit, against Sparrow, to recover his bill of costs for preparing an agreement,—by which Jane Stanley, the administratrix of Thomas Stanley, transferred to Sparrow her right to sue John Jones upon an engagement entered into by him with Thomas Stanley, and authorised Sparrow to sue Jones in her name,—and also the costs of the action of Stanley v. Jones (see *antè*, 7 Bingham 369), which the plaintiff Potts conducted for Sparrow in Jane Stanley's name, and which failed, on the ground that the agreement between Thomas Stanley and Jones was void for maintenance.

The defendant Sparrow pleaded non assumpsit only.

A verdict was obtained for the plaintiff Potts, with leave for the defendant Sparrow to move to enter a nonsuit instead, on the ground that Potts could not recover for services rendered in transferring an illegal contract, and in conducting an action on such a contract; and a rule nisi having been obtained accordingly, [*595] **Comyn*, who showed cause, contended first, that under the new rules this objection ought to have been pleaded specially, and could not be advanced under the general issue; the less so, as some kinds of maintenance are not illegal: Per Lord ELDON in *Wallis v. Duke of Portland*, 3 Ves. 494.

The Court here called upon

Talfourd, Serjt., and *Dowling*, for the defendant. By the new rule "all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded *e. gr.* illegality of consideration." The illegality which under this rule is to be pleaded in avoidance, is illegality in the contract which is the subject of an action; but no contract arises in respect of service performed in furtherance of an illegal agreement. The law does not recognise the existence of such services. In an action on the vitious agreement itself, the objection of maintenance could only have been raised by plea. But the plaintiff here seeks to recover of the defendant in respect of services rendered to enforce the illegal agreement. The illegality, therefore, of which the defendant would avail himself, is not the illegality of an agreement, but illegality in the conduct of the plaintiff which excludes the presumption of a contract between him and the defendant. He could only plead, therefore, the general issue, that no contract existed. If the court sees that the conduct of the plaintiff is illegal, they will refuse to assist him, whether the defendant points out the illegality or not; as in the case of the highwayman, who filed a bill against his companion, for an account of the proceeds of their joint exploits on Hounslow Heath.

[*596] **TINDAL*, C. J. That argument would apply to where a transaction is affected with usury or any other illegality; and yet I never heard that if the defendant omits to avail himself of the fact, the court is to go on and discover it for him. The question here is, whether under the new rule the defendant should have pleaded the alleged illegality in order to avail himself of it in defence to this action. It has been very acutely put by the learned Serjeant that the rule applies only to cases where the illegality is in an agreement which forms the subject of a suit, and not to cases where the claim is in respect of illegal services, which the employer cannot be called on to pay for; the existence of which is not recognised by the law; and on which, therefore, not even an implied contract can arise. But there are many cases in which the claim in respect of services performed, or goods delivered, would be plainly illegal, and as such would impose on the defendant the necessity of pleading the illegality, although no express contract would be proved at the trial.

Here the defendant relies on the illegality of the contract, and he ought to have put on the record that the several acts in respect of which the plaintiff seeks to recover were illegal.

PARK, J. It is not now competent to a defendant in an action of assumpsit to rely on the illegality of the transaction without putting it on record; and that

whether the illegality arise on a statute or at common law. I am not prepared to say that, where there is no such plea, a judge would not be bound to prevent any questions leading to such a defence.

GASELEE, J., and VAUGHAN, J., concurred.

Rule discharged.

***DAVIES and Wife Demandants; WILLIAM SELBY LOWNDES, [*597]**
Tenant. *April 27, 28.*

T. J. Selby, who had no relations of his own name, devised his property to his right and lawful heir-at-law, (for whom he directed advertisements to be published), charged with legacies to be paid in twelve months after testator's death; and if no heir was found, to W. L., on condition he changed his name to Selby. On the side of his mother and grandmother, the testator had several relations, to whom he left large legacies: Held that by his lawful heir he meant an heir of the blood of the Selbys, and that none such being found, the property belonged to W. L.

THOMAS DAVIES and Elizabeth his wife, by their attorney, demanded against William Selby Lowndes certain manors in the county of Buckingham, containing, divers, to wit, 5000 acres of arable land, &c., and divers, to wit, 500 messuages, 500 buildings, &c., with the rights, members and appurtenances to the said manors belonging; and also 50 other messuages, &c., with common of pasture thereunto belonging and appertaining, situate and being in the several parishes of Whaddon, Great Harwood, Little Harwood, Tottenhoe, Shenley, Great Lynford, Mursley, and Bletchley, and the rectory of Tottenhoe, with the appurtenances in the county of Buckingham, which the said Thomas Davies and Elizabeth claimed to be the right and inheritance of her the said Elizabeth, —by writ of our lord the King of right; and thereupon said, that Thomas James Selby deceased, whose heir the said Elizabeth is, was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in the time of peace, in the time of Lord George the Third late King of Great Britain, within sixty years next before the commencement of this suit, by, taking the esplees thereof, to the value of, &c.; and the said Thomas Davies and Elizabeth his wife further said, that the said Thomas James Selby died so seised of the tenements aforesaid with the appurtenances, without having any heir, save and except Erasmus Lloyd thereinafter mentioned; that the said Thomas James Selby was the son and heir of James Selby *who died [*598] without any other issue of his body, and without having any heir save [*598] and except the said Thomas James Selby; that the said James Selby was the son and heir of James Selby, the grandfather of the said Thomas James Selby which said last-mentioned James Selby also died without having any heir save and except the said first-mentioned James Selby, and which said James Selby secondly mentioned was the son and heir of Thomas Selby, by Mary his wife, theretofore Mary Lloyd; which said Thomas Selby died without other issue of his body, and without any other heir by the said Mary than the said James Selby, secondly above named: and the said Thomas Davies and Elizabeth his wife, further said, that the said Mary, the mother of the said James Selby secondly above named, in her lifetime and at the time of her death, was the daughter of Alban Lloyd and Mary his wife; that James Lloyd was the son and heir of the said Alban Lloyd by the said Mary his wife; and also the brother of the said Mary the wife of the said Thomas Selby; that Evan Lloyd was the son and heir of the said James Lloyd; that William Lloyd was the son and heir of the said Evan Lloyd; and that Erasmus Lloyd was the son of George Lloyd who was the son of the said James Lloyd; and which said Erasmus was the cousin and heir of the said William Lloyd; and that upon and at the time of the death of the said Thomas James Selby, who died so seised without issue as aforesaid, the right of the tenements aforesaid with the appurtenances descended from the said Thomas James Selby to the said Erasmus Lloyd as the cousin and heir as aforesaid of the said Thomas James Selby, who

died so seized as aforesaid. That from the said Erasmus Lloyd, the right of the tenements aforesaid with the appurtenances, upon his death, descended to and upon John Lloyd as the son and heir of the said Erasmus Lloyd, and from the said John Lloyd the right of the said tenements with the appurtenances, [*599] *upon his death descended to Catherine, Frances, and one other Mary as the daughters and co-heirs of the said John Lloyd; and from the said Catherine Lloyd who married Thomas Julian, upon her death all her part of and in the said right which came to her as co-heir as aforesaid descended to and upon the said Elizabeth, who was wife as aforesaid of the said Thomas Davies as the daughter and heir of the said Catherine: and afterwards, upon the death of the said Frances all her part of and in the said right which came to her as aforesaid, descended to and upon the said last-mentioned Mary and Elizabeth as the sister and niece respectively, and co-heirs of the said Frances. And afterwards upon the death of the said last-mentioned Mary, all her part of and in the said right which came to her as aforesaid, descended to and upon the said Elizabeth as the niece and co-heir of the said last-mentioned Mary; which said Elizabeth thereupon and before the commencement of this suit became and was entitled to the whole of the said tenements with the appurtenances as such heir and consin of the said Thomas James Selby as aforesaid; and which said Thomas Davies and Elizabeth his wife now demand the same, and that such is their right they offer, &c.

Plea, general issue.

The cause was tried at bar.

Talfourd, Serjt., Sir *W. Follet*, and *E. V. Williams*, for the demandants.

The Attorney-General, Sir *John Campbell*, *Kely*, and *R. V. Richards* for the tenant.

The four knights, girt with their swords, and the other twelve recognitors having entered the jury-box, Sir *John Campbell*, after six or seven of them had been sworn, tendered the demi mark.

[*600] **Talfourd*, objected that it ought to have been tendered before any of the recognitors had been sworn. The Court, however, ordered the trial to proceed, postponing the discussion of the objection to a future opportunity, and the rest of the recognitors were sworn.

E. V. Williams, on the part of the demandants, having then opened the pleadings.

Sir *John Campbell*, on the part of the tenant, claimed to hold the property under the will of Thomas James Selby, of Whaddon, in Buckinghamshire, who was an orphan at eleven years of age, and died on the 7th of December 1772, unmarried. The demandant's writ was sued out on the 6th of December 1832.

Thomas James Selby, by his will, bearing date August 10th, 1768, and duly attested, among other matters, gave and devised as follows:—"To my right and lawful heir-at-law (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers), all my manors, lands, &c., in Buckinghamshire—[in the will particularly described],—to hold the aforesaid manors, &c., to my heir-at-law, his heirs, executors, administrators, or assigns for ever, subject and chargeable nevertheless with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned: that is to say—[among other legacies], —to my cousin Temperance Bedford I give 1000*l.*; to Mr. Franklyn, who married Miss Elizabeth Wells, I give 1000*l.*; and to Miss Nelly Wells and Mrs. Franklyn (late Catherine Wells) I give 100*l.* each; to Mrs. Ann Kent, sister to Temperance Bedford before mentioned, 1000*l.* All which debts, together with all which legacies, funeral charges, and appointments, I do hereby [*601] order and direct *to be paid by the said heir-at-law, his heir, executor, or assigns, within twelve months after my decease; but should it so happen that no heir-at-law is found, I then do hereby constitute and appoint William Lowndes, Esq., of Winslow, in the county of Buckingham, and now Major

in the Militia, my lawful heir, on condition he changes his name to Selby : and I give the estates, and all the manors before mentioned, together with all rights, hereditaments, members and appurtenances before mentioned, to the aforesaid William Lowndes, subject to and chargeable nevertheless with all the legacies, annuities, debts, funeral charges, and other charges before mentioned. Next I give and bequeath all my tenements or messuages, with their appurtenances thereto belonging, situate and being in St. Clement's church-yard, in the parish of St. Clement's Danes, London ; and also all those my messuages, farms, lands and tenements, tithes and hereditaments, and premises, with every of their appurtenances, situate, lying, and being in the Isle of Ely, in the county of Cambridge ; and also all that my manor of Hertingfordbury, in the county of Hertford, with all rights, members, manors, and appurtenances thereto belonging, together with all farms, lands, tenements, and hereditaments whatsoever, to the Rev. Mr. John Lord, and to Mr. Richard Filkes, their heirs, administrators, and assigns, in trust that they or the survivors of them, their heirs, executors, administrators, or assigns, do and shall, as soon as conveniently may be after my decease, sell and dispose thereof by public auction.—[The money to be disposed of to the treasurers of three charities in the will named.]—Next I give to my dear cousin Temperance Bedford, of Husborne Crawley, daughter of the late Author Bedford, Minister of Sharnbrooke, before mentioned, 1000*l.* over and above what is before recited, this being part of my personal estate, together with all interest *that is or shall become due ; and which 1000*l.* is out [*602] at use, and lent by me to Sir Thomas Alston, Bart., of Odell, in the county of Bedford : and I do also give and bequeath to the said Temperance Bedford the two pictures of my mother that hang up in my study ; also the picture of my grandmother ; also an iron-chest, now in the hands of Mr. Hoare, my banker, in Fleet Street, containing my mother's jewels and some other trifles ; and also my mahogany chest of drawers in the dressing-room at Wandon, together with my mother's picture and other family pictures ; together with all notes, bonds, moneys, and whatsoever else is contained in the same. I also give to the aforesaid Temperance Bedford, her heirs, executors, administrators, and assigns for ever, after the decease of my dearly beloved Mrs. Elizabeth Hone, commonly called or known by the name of Vane—[to whom the Wavendon estate was devised for life],—all that my dwelling-house at Wavendon, together with all messuages, farms, lands, tenements, hereditaments, and premises, with their appurtenances, situate, lying, and being at Wavendon, otherwise Wandon aforesaid, Apsley Guise, Husborne Crawley, Heath, and Reach, in the several counties of Buckingham and Bedford. I do also give and bequeath to the said Temperance Bedford the perpetual advowson and disposal of the living or rectory of Wavendon aforesaid for ever, together with the tithes of all sorts thereof."

The testator appointed John Lord, Richard Filkes, and Mrs. Hone his executors and executrix.

The testator's father, James Selby, married Mary Alston, daughter of Sir Rowland Alston, of Odell in Bedfordshire.

The testator's grandfather, James Selby, married Margaret Wells, daughter of John Wells of Wavendon.

The testator's great grandfather was unknown.

*Temperance Bedford and Ann Kent, named in the will, were the daughters of the testator's first cousin Temperance Alston, who married [*603] Arthur Bedford.

Ellen Wells, Catharine Franklyn, and Elizabeth Franklyn, were the granddaughters and co-heiresses of Lionel Wells, the brother of Margaret Wells, the testator's father's mother.

Such being the will and the state of the testator's family,

The Attorney-General contended,

1st, That the demandant's claim was too late. The legacies were to be paid

within twelve months: as they were charged on the realty they could not be paid till the estate was vested in a permanent owner, who should have the power to mortgage for the purpose, and then, as the testator could not have proposed that the legatees should be kept out of their money for sixty years, he must have intended that Mr. Lowndes should become the permanent owner if the undiscovered heir of the Selbys did not appear within a twelvemonth.

2dly, Mrs. Davies was not even heir-at-law; for she only claimed from the testator's paternal great grandmother while there were still heirs existing on the part of the paternal grandmother: and BLACKSTONE (2 Bl. Comm. 238), disputes all the authorities which hold that the blood of the paternal great grandmother is entitled to the preference. *Clere v. Brook*, Plowd. 444 to 449. But see 3 & 4 W. 4, c. 106, s. 8; Co. Lit. 12; Lord Bacon's *Maxims of the Law*, 16; Hale's *History of the Com. Law*, 122. *Bac. Abr. Descent, B.*

3dly, Looking to the circumstance that the testator had left legacies to relations on the side of his own mother, and to the co-heiresses of his father's [*601] mother, he could not be ignorant that there were persons alive who would have answered the description of his heirs, and therefore by the devise to his *right heir* he must have meant an heir of the blood of the Selbys.

In support of this position, the Attorney-General read the opinion of Lord MANSFIELD and the Court of King's Bench delivered in Easter term, 1780, upon a trial at bar, see post, 619, of an ejectment brought by the descendants of Lionel Wells, brother of Margaret Wells, the testator's father's mother, to recover the testator's London property; and the judgment of Lord LOUGHBOROUGH and the Court of Common Pleas, delivered in Trinity term, 1782, upon a special verdict found at the Lent assizes, 1781, upon the trial of an ejectment brought by the same parties to recover the testator's Buckinghamshire property. See post, 622.

4thly, He relied on a fine with proclamation levied by the devisee William Lowndes in Trinity term 1784, of the whole estate.

The will of Thomas James Selby having been read,

Mr. R. L. Appleyard proved that the tenant was the son of the devisee, William Lowndes, named in the will, who died in 1818, and was succeeded in the possession of the estate by the tenant.

The court rolls of the manor of Whaddon were then put in, from which it appeared, that from the year 1774 to 1781, the devisee had held courts as lord of the manor, in the name of William Lowndes; that no court was holden from 1781 to 1783; that, in November 1783, a court was holden in the name of William Lowndes Selby; in 1784, in the name of William Selby, formerly William Lowndes; and from 1784 till the devisee's death, in the name of William Selby.

*The next evidence adduced, was a decree in Chancery of the 23d of [*605] April, 1779, upon a bill filed in Easter term, 1773, by Mrs. Hone, the executrix of T. J. Selby's will, against William Lowndes and the several persons who had then set up claims; and upon a bill filed in October, 1773, by William Lowndes against Samuel Thorne, Margaret Wells, and all others, who up to that time had made any claim to the estates. By this decree, the bills were ordered to be taken *pro confesso* against certain of the defendants, who did not appear; to be retained for twelve months; and that in the mean time, the claimants under Margaret Wells should be at liberty to bring an ejectment to recover possession of the premises.

By a final decree in these two causes, made on the 28th of March, 1783, which operated upon all the persons who had then set up claims, the Court, "declared the will of the testator, Thomas James Selby, well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, which was thereby ordered accordingly; and it was further ordered, that the Master should compute interest on such of the testator's debts as carried interest, and on the legacies, from the time to which interest was com-

puted thereon by the Master's report, and that the same should be raised by mortgage or sale of the testator's estate, called Whaddon Chase, Whaddon Park, and other lands subjected to the payment thereof by the testator's will, or of a sufficient part thereof, with the approbation of the Master, and as he should direct; and that all proper parties should join in such mortgage or sale as the Master should direct; and it was ordered, that 22,658l. 18s. Bank 8 per cent. Annuities, standing in the name of the Accountant-General, in trust in the said causes, under the title of 'Hone and Medcraft and Lowndes and Wells,' which had arisen from the rents *and profits of the manor, park, [†606] tithes, and other estates at Whaddon, and were paid into the bank by the said William Lowndes Selby, the receiver, should be transferred to the said William Lowndes Selby, the parties having agreed to settle the proportions thereof belonging to them respectively between themselves: the Court then declared, that the manor of Whaddon and Nash, and other the premises devised by the said will to William Lowndes Selby, were to be considered as belonging to the said William Lowndes Selby; and ordered, that he should be let into the possession thereof, and that all the title-deeds and writings relating to the said estates should be also delivered to him: the Court further declared, that the devises in the said testator's will of the several freehold and leasehold estates thereby given to charities, were void devises, as being within the meaning of the act of parliament of the 9 G. 2; that such leasehold estates should fall into and constitute part of the general residue of the said testator's personal estate; that the title-deeds and writings of the said testator's estates, lying in St. Clement's Church Yard in the county of Middlesex, and at Hertingfordbury in the county of Hertford, should be delivered to the defendant, Sir Rowland Alston, who had recovered possession thereof; and that the title-deeds and writings of the estates, purchased by the testator after the making his will, should be delivered to the defendants Ellen Wells and Henrietta Franklyn, and Elizabeth Franklyn, who had recovered the possession thereof."

The demandants' counsel objected to the reception of these decrees, on the ground that the demandants were neither parties nor privies to them, but claimed by title paramount; that the decrees were *res inter alios gestæ*; and, for aught that appeared to the contrary, *might have passed by collusion for the [†607] purpose of obstructing future claims.

The Attorney-General. The decrees are not offered as binding on the demandants, but merely to show how the tenant came into possession.

Telford. William Lowndes did not come into possession under the decrees, but appears to have been in possession as receiver some years before.

TINDAL, C. J. I see no objection to the decrees being admitted as evidence of the character in which he held the premises: they are not conclusive as to the right. With respect to the objection that they are *res inter alios gestæ*, that is not conclusive against their admissibility; for in actions against the sheriff for an escape, and on other occasions, it is usual to give in evidence judgments against third persons, to show the character in which the plaintiff claims, and the amount of damage he has sustained.

The decrees having been read, several deeds of purchase were put in, bearing date from 1658 to 1763, by which various portions of the property in question had been conveyed to the testator, his father, and grandfather respectively; also, the will of his father, who died in 1728. Proof was then given that Temperance Bedford was a cousin of Sir Rowland Alston, whose sister was married to the testator's father; and the tenant's case was closed by putting in the fine with proclamations, levied by his father as William Selby, in Trinity term, 1784, of all the property devised to him by the testator.

On the part of the demandants,

Telford, in answer to the first objection, contended that William Lowndes took the estate on condition only, *and held it as a trustee for the right heir until he could be found; and as the estate was devised subject to [†608]

the charge for legacies, the right heir, when found, could not have set aside any incumbrance created for that purpose by the provisional owner, so that no delay was necessary for the payment of legacies.

In answer to the second objection, he relied on the old authorities, and the recent statute 3 & 4 W. 4, c. 106, s. 8, which declares, as well as enacts, "that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants."

In answer to the third objection, after observing that the decisions of Lord MANSFIELD and Lord LOUGHBOROUGH on the will had never been reported, he contended that the devise to the testator's right heir being express and unqualified, the effect of those words could not be got rid of by interpolating the words "of the blood of the Selbys," upon grounds of mere conjecture.

As to the fine, if the consor took the property only on the condition of holding it till the right heir should be found, it did not operate adversely against that heir for whom the consor was in fact trustee. At all events, a fine with proclamations derives its operation and effect from the supposed notice to all the world. But here the consor, after holding the estate for some years in [*609] the name of *Lowndes*, levied the fine in the name of **Selby*; there was, therefore, an entire deficiency of notice as to any fine levied by the claimant William Lowndes; and the fine, as legally fraudulent, must be esteemed void. [TINDAL, C. J. The lands are properly described.] This was admitted.

The Attorney-General now suggesting that, if the Court decided in favor of the tenant upon the construction of the will, or the effect of the fine, it would be superfluous to go into the demandant's pedigree,

TINDAL, C. J., said, I think it unnecessary this case should go any farther: assuming the pedigree proved, we should, in point of law, decide against the demandant.

However, upon *Talfourd's* tendering a bill of exceptions, the Court directed him to proceed with the proof of his clients' pedigree.

The demandants' pedigree was then clearly traced up to James Lloyd, of Monington, in the county of Pembroke, who died about 1670. It was proved that,

James Lloyd's sister, Mary Lloyd, married a Thomas Selby, of Nevern, in Pembrokeshire.

It was alleged that the name of the testator's great grandfather was Thomas Selby; and,

In order to show that the testator's grandfather, James Selby, was son of the Thomas Selby, who had married Mary Lloyd, the demandants called several old witnesses, and produced an old pedigree of the Lloyd family, but relied mainly on the will of James Lloyd, bearing date the 3d of September, 1669, in which the first bequest was "to James Selby, of Wavenden, in the countie of Buckingham, the son and only issue of Thomas Selby, of Nevern, in this countie, by my sister Mary, his deceased wife, the sum of fortie pounds." He

[*610] then bequeathed fourpence to the cathedral of St. *David's, twopence to the church of Monington, twopence to the poor of the parish; his messuage and lands in Dogmells to his son and heir Evan, charged with a payment to his two brothers of eight score pounds, being four score pounds a year to each; to his wife, during her widowhood, the moiety of his messuages and lands in Monington; and all his personal estate to his son Evan, who was appointed executor to pay debts and legacies.

The inventory of James Lloyd's chattels was also put in, the whole of which amounted to no more than 38*l*.

James Lloyd was an attorney; James Selby, the legatee, an attorney; and his son James, a serjeant-at-law, who acquired a great fortune in his profession, which he had invested in the purchase of part of the property now in dispute.

The will was brought from the registry of the Consistory Court of Carmarthen: but the documents there had been loosely kept; several persons besides the registrar had had access to the muniment room; and it did not appear where or by whom the will was first discovered. It appeared to have come first into notice only about four years ago, notwithstanding some search had been made, without effect, in the same office, for wills to assist claimants to the Selby estate as long as fifteen years ago. The ancient official index referred to the will of a James Lloyd, of Monington, who died in 1670.

In the complexion of the paper and ink, and the general character of the handwriting, the will had the appearance of a document of the seventeenth century; but several of the letters, and even some entire words, were in the characters of the present day.

The Attorney-General contended, chiefly from its internal evidence, that the instrument was a forgery, and, if so, that the demandants' pedigree fell to the ground.

He suggested, that the original will of James Lloyd *might have been abstracted from the registry, copied in *fac simile*, with the interpolation of the remarkable clause describing James Selby, and that copy might then have been put in the place of the original: that the description of James Selby was too particular to have occurred to any one except for the purpose of this cause; and the legacy to him bore no proportion to the other dispositions in the will. [*611]

TINDAL, C. J. Gentlemen of the Grand Assize,—You are summoned this day, upon this writ of right, to determine, by your recognition, whether William Selby Lowndes, who is the tenant of the land in dispute, the estate in the county of Buckingham, hath more right to the property which is the subject-matter of dispute, than the demandants, John Davies, and Elizabeth his wife, in right of his wife, have to the same tenements.

The demandant claims under a pedigree, by which she makes herself out, or rather requires you to find her to be, the heir-at-law of Thomas James Selby, the person who was last seized of this estate before any dispute arose. On the other side, the tenant, William Lowndes, claims that, as son and heir of his father, who was the devisee in the will of Thomas James Selby, he has a right to the possession. And, therefore, two questions of different kinds will come before you, one of which will be a question of fact for your consideration; another will be a question of law for the consideration of the Court; on which, I doubt not, you will take such directions as they shall give you before you come to a decision as to which of the parties has the better right to the tenements in question.

There is no doubt that Thomas James Selby was seized of the property in question, and that he died seized on the 7th of December, 1772. The period of time which the *law allows during which writs of right are capable of being submitted to a court of justice is sixty years; and it appears in [*612] evidence that the writ of right in question was sued out of the proper office on the 6th of December, 1832, that is, one day short of the limited period of time which the law has prescribed. First of all, then, has Mrs. Davies made herself out to your satisfaction as the heir-at-law of Thomas James Selby, the person last seized? for it is needless to observe, if she has not made herself out by satisfactory evidence as the representative of Thomas James Selby, she and her husband can have no right whatever to dispute the possession with Mr. Lowndes; he and his father having had possession for a very long period of time, unless the party who claims to disturb and oust him from the possession can show a

legal title as representative of the person last seised, they are to be considered as perfect strangers to this possession ; and upon that ground your recognition should be found for the tenant.

But, on the other hand, supposing Mrs. Davies does not make herself out as the heir-at-law, through the regular channel, to Thomas James Selby, the person last seised, if he, during the course of his life, executed a will, by which he devised his property and put it in a different channel, and the present tenant rightly claims under the devise in this will, then, although the pedigree is amply and completely proved to your satisfaction, the will comes in and interrupts the course of succession.

There is, also, a collateral point which is urged on the part of the tenant of the land, set up as an answer to this action,—that whether his father was or was not described so as to take under the devise, he was in possession in the year 1784, claiming right and title to this land for his own enjoyment and use ; that he then levied a fine with proclamations ; and that five years having elapsed [*618] without any claim on the part of any *stranger, though he may not have had the right originally, he has made that defective title a good one by the legal operation of that fine. Upon this head, the only question for you will be a matter of fact,—how and in what character he claimed the land at the time ; whether he claimed it acting for other persons in a subordinate capacity ; or whether he claimed an absolute right for himself, insisting that the land was his own : that will be the question of fact for you : then the law will follow, which, I shall, with the assistance of my brethren, endeavor to deal with.

Gentlemen, let us come now to the first point of the case, which is a pure question of fact for your consideration,—whether Elizabeth, the wife of Thomas Davies, has or has not proved that she is the right heir-at-law of Thomas James Selby, who died in 1772. (The learned Chief Justice, after stating and commenting on the whole of the evidence in support of the demandants' pedigree, proceeded,—) If she has failed in her pedigree, then, upon that ground, you are bound to find your recognition in favor of the tenant ; but if she has not failed in her pedigree, it becomes my duty to state to you what, in point of law, I consider to be the effect of the devise and the effect of the fine which has been levied on the part of the tenant.

The will in question is that of Thomas James Selby, which is dated in 1768. He died in 1772. The question will be, what estate under this will, in the judgment of this Court, did William Lowndes, Esq., of Winslow, take on the death of the testator ? And it is the opinion, not only of myself, but of the other learned Judges by whom I am assisted, that, under the will, the devise was one which, under the circumstances that have happened, and the failure of any heir of the blood of the Selbys, vested the fee simple in William Lowndes, [*614] who was the devisee. It appears that, at the time of making *this will, the testator had outlived for a very long period both his father and his mother. His father died a serjeant, and, when he died, the testator was little above four years old ; his mother died when he was about eleven. Therefore he had not any great opportunities, or perhaps no opportunity, of inquiring into the state of his family. There were some relations of the family living in the neighborhood ; for we have evidence, on the part of the defendant, of the serjeant having had both a brother and a sister : the sister had married. But it is impossible to read this will, and not to see that he had not, within his own knowledge at the time, any heir of the name of his father's family. That being the state of the case, he begins, after some directions about this will, with this devise :—"Next I give and devise to my right and lawful heir-at-law (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers), all my manor of Whaddon and Nash." The first question, therefore, is, what is the meaning of the testator in saying "my right and lawful heir ?" If these words are taken in their general and unlimited sense, they would denote any heir whatever,

either an heir ex parte paternâ or an heir ex parte maternâ : however remote they might be, it would include any one at whatever distance, so long as they could make out any consanguinity. But these words, though so general in the first devise, we think manifestly cut down and restrained from their general and large sense to a more particular sense, and to denote an heir of the blood of the Selbys. This, we think, is the manifest intention of the testator. In the first place, it would have been a very unnecessary thing, if he had intended to include within the words of this devise heirs of any kind, however remote they might be, to make a devise at all, because the law would have carried the [*615] *property to his heir, however distant the heir might be. And when [he] he has said that, he puts in a clause which shows that he must have some desire that this heir should have the name of Selby : " should it so happen that no heir-at-law is found, I then do hereby constitute and appoint William Lowndes, Esq., of Winslow, in the county of Buckingham, and now major in the militia, my lawful heir, on condition he changes his name to Selby."

These words bring one's mind very far to the conclusion that the anxiety of the testator was to discover by those advertisements a person of the name and blood of Selby who should be his heir ; because, in the failure of efforts to discover such a person, he makes and constitutes a stranger to his family his lawful heir, he taking the name of Selby, the name of the testator.

But the matter does not rest there ; for you also find, to support the inference which may be fairly supposed to arise from this form of bequest, he actually knows that he has persons who would be his heir in the large and unlimited sense, and yet he passes them by, merely giving them a legacy ; for in one part of his will he gives a legacy to his cousin Temperance Bedford ; afterwards he leaves to the same person an advowson in the county of Bucks. In endeavoring, therefore, to discover what the mind of the testator was, we find that he gives, in the largest and most general way, his estate of Whaddon to his lawful and right heir : and we find afterwards, that there is a person named in the will who must have been his heir-at-law if no nearer could be found ; and it seems, from leaving her a legacy, that he did not mean to include heirs ex parte paternâ as well as heirs ex parte maternâ ; that she is not one of that class or character of heirs which he meant, but of a larger description ; therefore, I should say, upon that ground, it is clear that he meant heirs ex parte paternâ.

*There are other reasons, one of which has struck the mind of all of us : there is something very singular in the terms of this devise to Mr. [*616] Lowndes. It is not simply if any heir cannot be found, he devises to him, but it appears that he designates and appoints him in a very unusual way his heir-at-law. He says, if you cannot find one of the description I am searching for, then I do hereby constitute and appoint William Lowndes, Esq., to be my lawful heir : making him, as it were, as the old Roman law did, an adopted heir ; a person standing in *loco hæredis*, who was not to be ousted till a person having a greater title than himself appeared. And then, when we add to that, there are certain duties to be performed by this heir whom he so constituted, namely, the payment of legacies, the payment of annuities, and the payment of other charges, which charges he makes upon the estate, and which estate it becomes, therefore, essentially necessary that the devisee shall take, in order that he may raise those charges either by mortgage or by sale of that estate, how can we suppose that he meant this to be ambulatory for sixty years ; so that, if, during that time, no such heirs appeared, the object of his bounty would be dead three or four times over ? Looking, therefore, at his indications of intention to cut down these words to a more limited and restrained sense, we hold that, upon this will, the heir-at-law to whom he first meant to refer, was an heir of the blood of the Selbys ; and no such heir having been found, and this demandant not being such an heir, the devise to William Lowndes was a good and valid devise.

I shall not enter into many of the other points ; it becomes unnecessary to

decide them; as whether it was unnecessary within a year, to make the claim. Nor shall I enter into that very learned question which has created doubts in [*617] the minds of some of the ablest *lawyers which this country has known from that time down to the present; I mean as to the priority of right of succession between No. 10 and No. 11, discussed in the second volume of Blackstone.

There is only one point remaining. Upon the evidence, it appears that, for the first two or three years after the death of the testator, there were some proceedings in Chancery; that in the course of these proceedings, Mr. Lowndes was appointed a receiver of the property; and whilst he remained receiver, he held the courts by his own name of William Lowndes. I do not think he could have done otherwise: he was acting the part of a public officer of the Court of Chancery. After that, a final decree was made; and from that time the court rolls show, first, an alteration by the addition of Selby to his name, and afterwards by his dropping the name of Lowndes, and taking that of Selby alone. From the decree he was in the receipt of the rents and profits of the estate; and, therefore, the only question of fact is, whether he was receiving those rents and profits at that time, as actually in the dominion of the estate, holding in his own right, and asserting the freehold to be his own; or whether he went on receiving as a person afterwards to be accountable, in the nature of a trustee, to serve other persons. I see no evidence of the latter proposition. It appears to me, that he received that which he conceived and claimed to be his own, and received it in his own name, and appropriated it to his own right. And if that be the case, then this fine, which was levied by him, is a good fine in a court of law; for if he had the freehold in him (whether by right or wrong) when he levied that fine, it was a good fine. If he was a trustee, and had a trust for other persons, I am not prepared to say that that would not be a good fine in a court of law, though a court of equity might hold him still responsible [*618] for the persons *to whom he was trustee. But if you are satisfied he was in the pernanacy of the profits, claiming them as his own, that was, in a court of law clearly a valid fine; after the proclamations, and five years non-claim, that was a bar to all the world: and, therefore, that alone, without reference to any other point, would give a verdict for the tenant.

It has been more than once asked by a learned gentleman of the grand assize, whether the name has been changed in the way which the law prescribes. In this will the condition is, that Mr. Lowndes changes his name to Selby. It appears, that at first he retained the name of Lowndes, while the receivership was going on; and that afterwards he took the name of Selby in addition to the other; and I am not prepared to say that that was not changing his name: but at all events he afterwards changed it entirely, and left out the name of Lowndes. There is nothing in the will that purports that the condition is to be executed in a very limited or precise time; therefore, though he took it a little later, and though in some particular acts he might use the other name, it would not at all interfere with the general act of changing his name. And there is no necessity for any application for a royal sign manual to change the name. It is a mode which persons often have recourse to, because it gives a greater sanction to it, and makes it more notorious; but a man may, if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his new name as well as he can. Therefore it does not appear to me that is an objection which can, upon the present occasion, succeed. It is an objection which is quite out of court if the fine has been levied, or if the demandant has failed in her pedigree; and, in my judgment, and that of my learned brothers, it is equally out of court if this will is one, as we think it is, [*619] which *intended only to benefit, first, the heir of the blood of the Selbys, and, failing in that, the testator's constituted and adopted heir.

Such, then, is the case, and therefore, whatever may be the opinion which you may form upon the pedigree, I have no doubt that, when you come to a

conclusion upon it, you will still hold that the law we are endeavoring to lay down is the correct law, and that your recognition must be for the tenant.

Talfourd, tendered a bill of exceptions to the construction put on the will, and to the ruling as to the effect of the fine; which being accepted, the recognitors were requested to say, first, whether they found that the demandant had established her pedigree; but, after retiring for half an hour, they returned, finding a verdict generally for the tenant; and declined any separate finding as to the demandant's pedigree.

It seemed to be agreed both by the counsel and the Court that in a writ of right the jury could not find a special verdict. Verdict for the tenant.

The following are the decisions pronounced in 1780 and 1781, by the Courts of King's Bench and Common Pleas, upon the construction of *Thomas James Selby's will*:—

*(IN THE COURT OF KING'S BENCH.)

[*620]

DOE dem. ELLEN WELLS and Others v. W. LOWNDES. *April 22, 1780.*

UPON a trial at bar of this cause, the pedigree of the claimants being admitted, and that there was no fact controverted between the parties,

Lord MANSFIELD, addressing the jury, said,

The question is a question of construction, analogous to a question of identity; for the whole turns on this,—Whom did the testator mean by “my rightful heir, whom I don't know,—my rightful, lawful heir?” And it is very different from what the case would have been if he had said, I give to Mr. Lowndes my estate in case no heir is found; or I give him the estate until an heir shall be found: then Mr. Lowndes could retain nothing, if there were any one who could claim by descent: but that is not the case; for here is a gentleman who has estates purchased by his grandfather; estates purchased by his father; and estates purchased by himself: and all of them come within the local description that is the subject-matter of this devise. An heir *ex parte paterna*, an heir of the blood of the Selbys, would certainly take them all. But suppose there is no heir upon the part of the father, and the estate is to go in descent on the part of the mother, grandmother, and great-grandmother, who shall be his heirs depends upon the title to the estate. If it be an estate purchased by himself, it goes one way; if purchased by his father, another way; if by the grandfather, it goes another way; because you must go a line back; for the wife can never inherit to her husband, or any body claiming under her: you must go back to *get to the blood. And if that is the case, who is the person [*621] here described? for here are three right and lawful heirs when the rule of who is heir is taken from the subject-matter. If I speak of an heir applied to borough English lands, I speak of the youngest son; if I speak of an heir in Kent, gavelkind; if I speak of the heir general, or an heir in tail, they all take by description from the subject-matter. But this testator describes a person to whom, as his rightful heir, he gives the whole: that places the Court under the necessity of finding out a meaning for this expression, rightful heir; and that is to be collected from circumstances, just as if a father had two sons of the name of John, and left property to his son John: you must find out from collateral circumstances which he meant. Now, it strikes me, this man meant an heir upon the part of his father; and that he should be of the name of Selby; and that appears from various circumstances. In the first place, it appears this gentleman's grandfather and a brother came into Buckinghamshire from the north country: they either did not know much of their families; or their families, perhaps, were so obscure and low, they did not publish it in Buckinghamshire; but they rose to good circumstances, and a certain degree of consequence in

¹ From Mr. Gurney's notes taken at the time, corrected by Serjt. *Hull* and Serjt. *Rooke*, and preserved by the Lowndes family.

life. Then they rose much higher by means of the great fortune they acquired by the serjeant. But the serjeant had not traced back his pedigree in the north, and nobody was able strictly to find out what his family was, nor to whom they belonged. As to the testator, Mr. Selby, he knows very well his relations upon the part of his mother; and he knows his relations upon the part of his grandmother, his grandfather's wife. But the heir in view, the object of his bounty, is a person he does not know,—a person not found,—but a person to find whom he desires advertisements to be put in the paper. The relations he *did know he did not mean to enjoy the estate if there was [*622] no heir preferable to Mr. Lowndes; for he knows the Bedfords, he knows the Wells, he knows the Alstons; he gives to some, very bountiful legacies, and he gives to Mr. Lowndes the estate unless an heir shall be found. He describes Temperance Bedford by the terms of his dear cousin; he describes the plaintiffs who are now claiming, and he gives them all legacies; and it is admitted in the case he perfectly knew they were his relations. If any of these are his heir, he knew nothing of it, and supposes him a person yet to be found; and unless that heir is found, whom he knows nothing of, Lowndes is to have the estate. The inference is very strong, in my opinion, that he meant an heir upon the part of his father; and unless an heir upon the part of his father was to be found, a person he did not know, he meant the estate should go to Mr. Lowndes. All the circumstances are admitted; therefore I do not know what to leave for you, but to find a verdict for the defendant.

The jury found for the defendant accordingly.

DOE dem. ELLEN WELLS and Others v. W. LOWNDES. June 1, 1781.

UPON a special verdict found at the Bucks Lent assizes, 1781, in another ejectment between the same parties, which special verdict set out the will of Thomas James Selby,

Lord LOUGHBOROUGH, C. J., delivered the judgment of the Court of Common Pleas as follows:—

On the part of the lessors of the plaintiff, it is contended, in the first place, that they are entitled to all the premises under the will, they being the persons described in that *will under the denomination of the right and lawful [*623] heir of the testator.

In the second place, it is contended that if they are not so entitled, yet they are entitled by descent to all the premises, excepting the estate at little Harwood and the leasehold; that they take by descent, as heirs-at-law, the limitation over to the defendant, Mr. Lowndes, being an executory devise, too remote, and therefore void.

This last point was started, and very ingeniously argued upon the second argument; and at first view, perhaps, there is somewhat specious in it. I will take notice of it first, in order to lay it aside, because it appears to be merely specious. The argument upon that point proceeds thus: There is in this will a devise to the right and lawful heir and his heirs. There is then a devise to William Lowndes and his heirs. This latter devise, it is contended, cannot take effect as a vested estate, because it would be a fee upon a fee; it must therefore be executory, and if it is executory, it is too remote, for the commencement of it is indefinite. The whole of this argument seems to me to be an obvious fallacy. It is said that there is a devise here to the right and lawful heir and his heirs: it is true that there is a clause in the will, respecting the disposition of the estate, prior to the devise to William Lowndes; but whether in that clause of a bill there is contained a devise of the estate or not, is the very question in the cause. If the person is ascertained to whom the estate is given under that clause, then it is very clear that no estate is given to William Lowndes; not because the devise to him is too remote, but because upon that supposition there is nothing given to him. The prior devise, as it is a little

improperly called in the argument, is to a person not named, but described, —whose existence is doubtful, but is not eventual. Whether at the death of the testator there doth or not exist a person to whom the description applies *is a certain though it is an unknown fact. If there does exist such a [*624] person, nothing is given to Mr. Lowndes; if there does not, the estate vests immediately in Mr. Lowndes: therefore there is no objection to the legality of the devise to Mr. Lowndes in the creation of that devise. Whether it obtains in his favor or not, may not be exactly known at the death of the testator; but it is absolutely certain, if there is a person answering to the description of that clause prior to the nomination to Mr. Lowndes, that person takes, and Mr. Lowndes never can take. On the other hand, if there is no such person as answers to that description, Mr. Lowndes takes, and the estate vests in him. Neither would it make void the devise to Lowndes, though it were admitted in the argument, and though it were expressed in the will, that the purpose of inserting his name in the will was to prevent an escheat. The authorities upon that point cited by Mr. Serjt. *Hill* are all true. It is true that no estate can be created by a will that is against the rules of law; but there are no rules of law that either by will or deed a grantee or feoffee should not take against the lord.

The case, then, comes entirely to depend upon the first question, and that is, whether the lessors of the plaintiff are entitled to take under the description of right and lawful heir of the testator, Thomas James Selby.

But before I come to consider the parts of the will from whence the exposition of these words is argued upon either side, it may be proper to observe that the common topic of argument from the favor due to the heir-at-law is totally inapplicable to the present case: the lessors of the plaintiff are relations to the testator, but they do not claim by descent: in this case they certainly have no legal right to the leasehold estate, and they have as little right to one part of the freehold, a small part,* indeed, but still a part of that *which is comprised in the general devise: they, as well as the defendant [*625] Mr. Lowndes, claim, and can only claim under the will. When they therefore introduce themselves as claimants under the will, it is not just reasoning to talk of the favor that is due to heirs-at-law. But, perhaps, it would not be quite fair to dismiss this topic without a little more observation upon it. It is an established rule laid down in many and very ancient authorities, that an heir-at-law is not to be disinherited without express words, necessary implication, or declaration plain. The foundation of the rule is obvious and plain. The right of the heir by descent is certain, and therefore he is not to be disinherited: and the rule always speaks of an heir-at-law in the character of heir, and, taking by descent. The law gives an estate to the heir if there is no other person to take it; and he who claims in opposition to that clear, undoubted, and certain right must show a better title: therefore no doubtful, no ambiguous, and no uncertain intent shall take away that clear right of the heir-at-law. Let us consider, then, in the present case, whether there are any of the contending parties that stand in the situation of the heir-at-law claiming by descent.

Here is a will produced, to which both parties resort: in that will the name of William Lowndes is found; and there can be no hesitation as to his identity:

The only question is, whether the three lessors of the plaintiff, Elizabeth Wells and the two Franklyns, are described in the devise antecedent to the devise to Lowndes. Unless their title can be made out clear, Lowndes's title is clear and certain upon the will. Upon examining the argument upon the interpretation of the clause, we must allow that they are relations, and that they are relations capable of succeeding, and that, therefore, they are entitled that no words shall be strained or forced to exclude them.

*On the part of the lessors of the plaintiff, the great argument (for [*626] all that was urged in the case results to this argument, and supports

one or other of the propositions contained in it),—the great argument was this: the testator, it is said, was ignorant who personally was his heir; he was even ignorant to what relation, by the rules of succession, the character of heir would belong; but, whoever the persons, and whatever their right, the testator meant to describe their legal title; and his intention was, that the law should name his heir. Upon this proposition the whole of the plaintiff's case depends, and it will be necessary to examine the several parts of it. That the testator was ignorant of who personally was his heir,—that he did not know the individual or individuals who were to succeed in that character,—is certainly true, and I take it to be the only certain part of this argument. I rather believe that the testator did not know that there might be some possible relation whose claim would extend to all the lands that either he, his father, or grandfather had acquired, whose right he meant to preserve, to whom it might be necessary to give the leasehold estate, and whom he likewise sought to charge with the legacies. The words he has used are certainly but ill adapted to convey that idea; for that person I have described would be a person of the blood of the Selbys, who would succeed to the entire estate, whether descended from the grandfather, the father, or of his own purchase, and would be the general representative of that family which he wished to establish. But this I state only as a matter of conjecture. I hold it to be certain that the testator did not know who the person was, for he directed means to be used to find out the person. I do not hold it to be certain that the testator was ignorant what right the law threw upon particular classes of relations. But I take it to be by no

[*627] *means true that the testator meant that the law should name his heir; for I think it is as plain as it can be made by any instrument that the testator has with great anxiety endeavored to guard against this. One observation on the whole will is, that the idea of family is very strongly marked, continuing the name, and being represented in his possessions, and in his seat in the country; and throughout the whole of the will it certainly would be straining exceedingly, and not only straining, but obliterating a great deal of it to suppose that in this instrument the least idea prevailed of an intestacy: the law, if the testator meant to refer himself to the law, undoubtedly would name in direct opposition to that which is his manifest intent: the law would sever that property which he wished to unite: the law would, for instance, take an acre from the park, and give it to different persons,—the law would sever the fishponds, for they are upon the leasehold premises,—the law would disunite the farm, which it is manifest was his object and intent to keep united in one hand, namely, the person who was to be his representative.

Another thing is extremely strong upon that part of the case. The lessors of the plaintiff come here as heirs-at-law upon the part of the grandmother; they come to claim under the description in the will all that is comprised in the devise. The foundation of their title is, they are so related as to be his heirs-at-law on the part of the grandmother; but it is obvious that there is another person to whom a part of the premises comprised in this devise must, exactly upon the same proposition and the same argument, belong, because they are not heirs-at-law of the grandfather, and to that part of the estate which descends from the grandfather they can set up no title. What becomes of that part of the estate? Does it escheat? will Mr. Lowndes take it, if *Mr. Lowndes

[*628] stands in the place of that heir-at-law of the grandfather who would take the whole of the estate? The value of those premises is small; but the value of them does not at all alter the argument if he stands in the place of the heir-at-law with regard to that part of the premises. Then there are two parties; the heirs-at-law, on the part of the grandmother, who say, his estate belongs to us, because, if there had been no will, it would descend to us. On the other hand, there stands Mr. Lowndes, claiming the other part of the estate. The lessors of the plaintiff say they are entitled to it. Why so? only because the greater part of the estate is of that nature that, if there had been no will, it would have de-

scended to them. Is it to be in average between them when there are two persons whose claims are thus equally balanced, and who neither could qualify any right with respect to leasehold estate? Upon what ground is the Court to say it shall go in average between them?

Upon all these observations, it seems, therefore, that in this will right and lawful heir-at-law cannot possibly mean every heir-at-law. It is contended it would be the heir on the part of the father, though the heir on the part of the mother would be nearer related to the testator. Why? not because the heir of the mother could not be entitled to take by any course of legal descent. Is it more applicable to the heir on the part of the grandmother? The heir on the part of the grandmother is just as much excluded from claiming any part of the estate which comes from the paternal grandfather as the heir on the part of the mother is precluded from claiming any part of the estate which came from the father. The only person to whom this description seems in all its parts applicable, is the heir on the part of the paternal line, the heir of the blood of Selby, who would be, in the common and ordinary acceptation of the word, in the *general sense of the country, the representative of the family of the Selbys, in whose favor it is probable he meant this devise should operate, [*629] and for whom he meant to keep the leasehold estates connected with the freehold, and charged the payment of the debts and legacies out of the estate. I say no more than that it is probable, because it is not necessary to carry that argument further; for it must not be forgot that the lessors of the plaintiff are now called to maintain their right; that they must show against a clear and specific devise to a person named, of whose identity there can be no doubt, that they come under the words of the will: and, in my apprehension, the argument that is attempted to support their case does not make it out with clearness, with certainty, and with that conviction that is necessary to establish a title against another which undoubtedly is clear.

However, the defendant's counsel don't leave the matter upon the imperfection of the argument urged on behalf of the lessors of the plaintiff, for they undertake to show, on the behalf of the defendant, that negatively the lessors of the plaintiff cannot be the persons meant in this will; and there are two circumstances by which they contend that that proposition is made out with a very strong degree of evidence. In the first place, they say, and nothing can be more certain, that the person to whom the testator meant to apply the description of right and lawful heir-at-law was one whose person was unknown to him; for he directs that advertisements should be published, immediately after his decease, for the better finding out of that person. Then he is there describing one of whose possible existence he had some idea, but of whose actual existence he knew nothing. Now, that, they say, never can apply to the lessors of the plaintiff, because the lessors of the plaintiff he undoubtedly knew, and one of them, *Elizabeth Wells, is mentioned by name in the will; and, though [*630] the names of the other two are not mentioned, yet their mother's name is mentioned. Their father is described, and described by the circumstance that explains his connexion with the testator; he is described as the husband of Elizabeth: the female who is in the same degree with them, and married a person of the name of Franklyn, is also named in the will. The object of the inquiry the testator directed to be made was, not to ascertain a point of law, but to discover an unknown person; and it would be ridiculous to suppose he had directed advertisements to find out that which he extremely well knew. The object, therefore, of this description must be some other person than those who were before his eyes, and whom he names. When the testator comes to make a devise in favor of Lowndes, he takes care and is anxious that Lowndes should assume the name of Selby; there is a positive direction in the will that Lowndes, whenever he becomes entitled, shall take the name of Selby. Now, if the testator could have conceived that there was any event in which Elizabeth Wells and the Franklyns might be entitled to claim under the will, it is inconceivable

that he who was anxious to make a gentleman abandon his own name, should not be equally anxious to make those assume that name under which he intended the representation of his family should continue. But, besides this, there is another circumstance in the will which the defendant's counsel contend, and it seems to me unanswerably, makes it still more clear that the testator negatively did not intend that the lessors of the plaintiff should be the representatives of his family in possession of his estate, managing that estate, and, of course, as the heirs of that estate by the will, executing his will with regard to that estate. To Elizabeth Wells, and to the Franklyns, there are two legacies given; those [*631] legacies are charged upon *this* estate. The mere circumstance of giving legacies charged upon an estate will not, perhaps, of itself be sufficient to show that the legatees could not in any event take the estate out of which the legacies are to issue. But this is not all; the testator has proceeded to give several legacies, and directs that they shall be paid within twelve months, which is the usual time at which legacies are made payable; he directs that they shall be paid by his heir-at-law within a twelvemonth after his decease; but if it should so happen that no heir-at-law should be found, he then appoints Mr. Lowndes his lawful heir, upon condition that he changes his name; and he gives him the estate charged with those legacies. It is clear, therefore, that the testator supposed a case in which Mr. Lowndes might be the person to pay the legacies to Wells and to the Franklyns. Now, that case could not by possibility exist, if Wells and the Franklyns were the persons to answer the description of his right and lawful heir, because they would take the estate: the estate would not come to Mr. Lowndes, and Mr. Lowndes, therefore, could never be in the situation which the testator has supposed to be a situation likely to happen within a short compass of time. From these circumstances the counsel for the defendant contended, and their argument seems to me well-founded, that there is sufficient evidence to show negatively that the heir could not be the lessors of the plaintiff. The other part of the argument seems to me to show that the lessors of the plaintiff have not been successful to make out the point that they are the persons intended: the utmost of the argument would be probable conjecture, not very certain, and which, in such a case, ought not to prevail against a clear title. Mr. Lowndes's title is a clear one, unless another be found to bar it; therefore, the Court, upon the whole, are of opinion judgment ought to be for the defendant.

Judgment for defendant accordingly.

[*632] *Ex parte BOWLES'S Trustees. April 30.

A charge for searching for judgments, will not render an attorney's bill taxable under 2 G. 2, c. 23.

White applied to refer to the prothonotary to be taxed, an attorney's bill for the expense of certain settlements and conveyances, on the ground that the bill contained charges for searching for judgments: these charges, he contended, were disbursements at law under 2 G. 2, c. 23, s. 23; and he relied on *Wilson v. Gutteridge*, 3 B. & C. 157, where preparing a warrant of attorney was held to be a taxable item, the Court of King's Bench saying they had a general jurisdiction, independently of the statute, to tax an attorney's bill.

Sed per Curiam. The case has been overruled by *Fenton v. Correa*, Ry. & Moo. 282; and it has been held in *Clutterbuck v. Combes*, 5 B. & Adol. 400, and a long list of cases, that the Court has not a common law right to tax an attorney's bill. It cannot be said, that searching for judgments is a charge or disbursement at law or in equity under the statute 2 G. 2, c. 23.

Rule refused.

*BARNETT v. GLOSSOP. May 1.

[*633]

In assumpsit for the price of a copyright bargained and sold, a defence on the ground that the copyright was not assigned in writing, must be specially pleaded.

THE plaintiff sued in assumpsit upon an alleged bargain and sale of his copyright in a dramatic composition, entitled "Victorine, or, I'll sleep on it," to the defendant, the manager of a suburban theatre. The declaration also contained a count on an account stated.

The defendant pleaded that he never promised *modo et formâ*.

At the trial before the under-sheriff, it was proved that the defendant agreed to give 15*l.* for the piece, but afterwards repudiated it.

There was no written assignment of the copyright; and it was objected, on behalf of the defendant, that, without such an assignment, the piece could not be said to have been sold to the defendant, the statute 3 & 4 W. 4, c. 15, prescribing that the author of any dramatic piece shall have, as his property, the sole liberty of representing it, or causing it to be represented at any place of dramatic entertainment, and the statute 8 Ann. c. 19, s. 1, having enacted, that no bookseller, printer, or other person whatsoever, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing.

The under-sheriff thought that, under the new rules, the objection could not be taken unless it were specially pleaded. Whereupon the plaintiff had a verdict for 15*l.*, with leave for the defendant to set it aside and enter a nonsuit instead, if the Court should be of opinion that the objection could be taken under the general issue.

*A rule nisi having been granted to that effect,

Dowling, who showed cause, relied on the rule Hil. 4 W. 4, Assumpsit, 3. [*634]
"In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

Thomas, in support of the rule. The evidence in the question ought to have been received in support of the plea that the defendant did not promise in the manner alleged in the declaration. For the law presumes *omnia ritè acta*; and, therefore, it must be intended that the bargain and sale on which the plaintiff declares is a valid and binding contract. But, without an assignment in writing, there can be no valid transfer of a copyright in a dramatic composition: 8 Ann. c. 19, s. 1; *Power v. Walker*, 3 M. & S. 7; the defendant, therefore, did not promise in the manner alleged in the declaration, which implies a promise upon a binding contract. In the eye of the law he made no promise at all, for he made none which the plaintiff could enforce: and yet the transaction between the plaintiff and defendant was neither void nor illegal; so that it would have been inaccurate to have pleaded in the language of the new rule, nullity, want of consideration, or illegality of consideration: the transaction was legal as far as it went; the proposed consideration was good; and the plaintiff only failed from having omitted to clothe his contract with the formalities required by law.

The defendant, by pleading he did not promise, casts it on the plaintiff to prove that he did; the plaintiff *has failed to establish that by the proof which the law requires, and, therefore, must be nonsuited. Upon the [*635] same plea to an action on an attorney's or apothecary's bill the plaintiffs would fail, the one, if he omitted to prove that his bill had been duly delivered, the other, that he was duly authorized to practise. If, under the new rules the plaintiff had been compelled, where the law requires a contract in writing, to state in his declaration whether such writing exists or not, and to set it forth if it exists, it might be proper to call on the defendant to state spe-

cifically in his plea the objections to be alleged to the contract; but it will be a great hardship on the defendant to call on him to state such objections in answer to a general declaration; for he may have forgotten whether the contract was reduced to writing or not, or whether the writing, if it exists, contains the legal requisites for its validity. It could never have been intended to place defendants under such a disadvantage; and, therefore, the Court will not put on the new rule the construction for which the plaintiff here contends.

TINDAL, C. J. It appears to me that, upon the right interpretation of the new rules of pleading, the defence now relied on should have been put on the record. The words of the rule are, "All matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." The general issue, therefore, is to operate only as a denial in fact, and not in a matter of law.

In this case the plaintiff declares, that he bargained and sold his copyright in a certain dramatic composition to the defendant; and the answer, upon the plea of non assumpsit, is, that, looking to the statutes of *8 Ann. c. 19, [*636] and 3 & 4 W. 4, c. 15, the inference from both is, that there cannot be a valid transfer of property to a dramatic work without a writing. That is not a denial, in fact, of the existence of the contract, but a claim to be discharged from the contract, because the formalities which the law has prescribed have not been observed. Such a kind of discharge is exemplified by the instances given under the third rule; *ex. gr.*: "Infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law; drawing, endorsing, accepting, &c., bills or notes by way of accommodation; set-off, mutual credit, unseaworthiness, concealment, deviation." What is this defence, but that the formalities required by statute to make the contract legal have not been complied with? I think, therefore, that no answer has been given to the evidence by which the plaintiff has established his case, and that this rule must be discharged.

PARK, J. The new rule has expressly limited the effect of the plea of non assumpsit, so as to render it no longer a general issue, involving matter of law as well as matter of fact, but a mere denial of matter of fact; and all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, must be specially pleaded. The object of the rule was, that neither party should be taken by surprise, and that object would be defeated if we were to yield to the argument that has been urged for this defendant. If the objection now insisted on had been put on the record, no judge would have sent this case to the undersheriff.

GASELEE, J. I am of the same opinion. This is a defence that ought to have been pleaded. The cases *cited on the part of the defendant have [*637] no direct application to the present question; they have established, that the purchaser of literary works is not an assignee entitled to sue as proprietor, unless he be clothed with a statutory title; but they tend also to show, that an oral contract for the transfer of such works is illegal; and if so, under the new rule illegality in a contract must be pleaded.

BOSANQUET, J. I agree with the rest of the Court, and should have been very sorry if we had felt it necessary to decide otherwise. The object of the new rule was, to provide that all legal defences should be put on record. The general issue, except where it is prescribed by statute, may be considered as put an end to, and the denial expressed by non-assumpsit is confined to denial of matter-of-fact. The declaration in the present case suggests a good cause of action at common law; but it is objected, that by the provisions of a statute, the plaintiff is, under the circumstances of the case, deprived of the benefit he possessed at common law; that brings the defendant within the rule which has confined the operation of non-assumpsit to the denial of the fact of the contract; and "all matters in confession and avoidance, including not only those by way

of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." This is a case, therefore, in which a cause of action, available at common law, is rendered unavailable by the provisions of a statute, and that is a defence which ought to be put on record.

Rule discharged.

*DENNETT v. PASS and Another. May 1.

[*638]

Where costs were ordered to be paid to the defendants or their attorney, a demand by their attorney in the country was held sufficient to authorize an application for an attachment to enforce payment, notwithstanding the agent of the attorney in the country was the attorney on record.

By a rule made in this cause costs were ordered to be paid to the defendants, or their attorney. The defendant's attorney on the record was Taylor, the London agent of Wagstaffe, who was the defendants' attorney in the country. Wagstaffe having demanded the costs in question, an attachment was issued to enforce payment, when *Atcherley*, Serjt., obtained a rule nisi to set aside the attachment, on the ground that the demand should have been made by Taylor, the attorney upon record, being the only person who could answer the description of defendants' attorney within the meaning of the rule for the payment of costs.

Taddy, Serjt., who showed cause, contended that the attorney in the country answered that description better than the London agent, notwithstanding the latter happened to be the attorney on record.

Atcherley referred to *Hartley v. Barlow*, 1 Chitty, 229 (see also note, *ibid.*), where it was held, that an attachment for contempt in not paying money to a party or his attorney, pursuant to the master's allocatur, could not be supported on an affidavit stating a demand of the money by the attorney's clerk.

TINDAL, C. J. It appears to me, that the attorney in the country comes within the meaning of the rule which directs that the costs shall be paid to the defendants or their attorney. In the common phrase, he is the *attorney who conducts the action. Usually the rule is for payment to the party or his attorney or agent; if that had been the language here, no one can doubt that Taylor, through the attorney on the record, would fall within the description of agent, and Wagstaffe within the description of attorney. As to *Hartley v. Barlow*, the case is materially distinguishable: for the demand there was made by the managing clerk upon a rule which only authorized payment to the attorney. The managing clerk might be a person unknown to the party; the attorney in the cause cannot be changed without the sanction of an order of the Court.

PARK, J. I agree with the decision in *Hartley v. Barlow*, for the attorney's managing clerk could not be said to satisfy the description of attorney or agent. Here the defendants' attorney lived in the country, and it would be too much to call on his London agent to take a journey for the purpose of making the demand.

GASELEE, J. The applicant has not ventured to say that Wagstaffe was not the defendants' attorney.

BOSANQUET, J., concurred.

Rule discharged.

*BOULTON v. COGHLAN. May 1.

[*640]

The defendant pleaded, that a promissory note on which the plaintiff declared, was made by defendant in December, 1833, in pursuance of an agreement thereby to secure to J. A. money lost to him at play in July, 1833:

Held, that this plea was not supported by evidence, that in July, 1833, defendant gave J. A. a bill of exchange, payable, six months after date, for 874. lost at play, which

bill J. A. endorsed to V. K. and that in December, 1833, defendant substituted for this bill of exchange a promissory note for 100*l.*, bearing date September, 1833, and payable to the order of V. K. six months after date, being the note on which the plaintiff sued.

To an action on a promissory note for 100*l.*, made by defendant on the 12th of September, 1833, payable to the order of V. Knight, six months after date, and by Knight endorsed to the plaintiff,

The defendant pleaded, that before the making of the promissory note by him, to wit, on the 23d of July, 1833, and on divers other days afterwards, the defendant did on each of those days at one time lose to one John Aldridge, and the said J. Aldridge did on each of those days at one time win of the defendant, a certain sum of money amounting in the whole to a large sum, to wit, the sum of 100*l.*, by gaming and playing at a certain game, to wit, a game called French Hazard, contrary to the statute in that case made and provided: and the said sum having been won and lost, and remaining due and unpaid, to wit, on the 12th of December, 1833, it was agreed between the defendant and the said J. Aldridge that the payment thereof should be secured by the promissory note of the defendant, to be by him made, and whereby he should promise to pay 100*l.* to the order of the said V. Knight as for value received six months after the date thereof; and the defendant averred that, in pursuance of the said agreement, the defendant, to wit, on, &c., made the said promissory note, and thereby promised to pay 100*l.* to the order of the said V. Knight as for value received six months after the date thereof, for securing the payment, by the defendant, of the said sum so won and lost as aforesaid; and the defendant *averred that the said promissory note so made as aforesaid, was [*641] and is the same identical promissory note in the declaration mentioned, whereby and by force of the statute in such case made and provided, the said promissory note was and is void; and that, the defendant was ready to verify, &c.

The defendant pleaded, secondly, that there was not, at any time, any consideration or value for his, the defendant's, making the said promissory note, or paying the amount of the said note, or any part thereof. That the said V. Knight endorsed the said note to the plaintiff without any value or consideration for so doing; and that the plaintiff held the said note without any value or consideration for his having been or being the holder thereof.

Replication. That the said promissory note was not made by the defendant in pursuance of the agreement in the said first plea mentioned for securing the payment by the defendant of the said sum in that plea mentioned. That the said endorsement by the said V. Knight to the plaintiff, was made before the said promissory note became due and payable, to wit, on the 6th of February, 1834, and that the said V. Knight, then being the holder of the said promissory note, delivered the same to the plaintiff with the said endorsement thereon, for a good and valuable consideration before and then given by the plaintiff to the said V. Knight for the same; that is to say, for and in respect of the said V. Knight being then indebted to the plaintiff in a large sum, to wit, 200*l.*, for the work and labor of the plaintiff by him done and performed as an attorney and solicitor and otherwise for the said V. Knight upon his retainer and at his request; and for money paid, laid out, and expended by the plaintiff for the said V. Knight at his request.

At the trial, it appeared that, in July, 1833, the defendant, *pursuant [*642] to an agreement with Aldridge, upon balancing an account of losses at play, had accepted a bill of exchange for 87*l.*, payable six months after date, and drawn on him by Aldridge as a security for money lost by the defendant to Aldridge, at play. Aldridge endorsed the bill to Knight.

In December following, by agreement between the defendant and Knight, the promissory note on which the plaintiff sued was substituted for this bill of exchange, and subsequently endorsed by Knight to the plaintiff.

It was objected, on the part of the plaintiff, that this evidence did not substantiate the allegation in the plea, and ought not to have been received; for it

was not the promissory note, but the prior bill of exchange that the defendant agreed to give as a security for the money lost to Aldridge.

The jury found that the plaintiff gave a good consideration for the note, but that the note arose out of a gambling transaction, of which the plaintiff was ignorant; whereupon

A verdict was taken for the defendant, with leave for the plaintiff to move to set it aside, and enter a verdict for the plaintiff upon the above objection, and another on which no decision was pronounced.

A rule nisi having been obtained accordingly,
Talfourd, Serjt., and *Chandless* showed cause.

The allegation in the plea was substantially proved. No doubt, the original agreement was to give a bill of exchange for the money lost at play; but the bill was not payment: it was given up before it became due, and the promissory note substituted for it. Upon that substitution, the previous illegal agreement on the bill of exchange became engrafted into the note, for which there was no consideration but a gaming debt.

*TINDAL, C. J. We are all of opinion, that evidence of the agreement between the defendant and Aldridge was not admissible under [*643] this plea. The plea states, that the defendant, having lost money at play to Aldridge in July, 1833, it was agreed between them, in December following, that the payment should be secured by the defendant's promissory note, payable to Knight six months after date, and that the note made in pursuance of that agreement is the note set out in the declaration.

To which the replication is, that the said promissory note was not made by the defendant in pursuance of the agreement in the plea mentioned for securing the payment by the defendant of the sum in the plea mentioned. That involves a denial, both of the making of the note, and of its being made in pursuance of the agreement between the defendant and Aldridge. Now it appears on the evidence, that the instrument given by the defendant to Aldridge, upon balancing an account of losses at play, was a bill of exchange, drawn before the making of the promissory note which is the subject of the action, and having a different six months to run; and that, before the bill of exchange became due, a promissory note was substituted by the defendant, for a different sum, and having a different six months to run. The agreement, therefore, as to the promissory note, was not the agreement originally made, but a new and substituted agreement; and, if evidence of it be let in, it gives the defendant the opportunity of resorting to two separate agreements, under a plea which specifies but one. That might operate as a hardship on the plaintiff, by making it difficult for him to decide on the evidence with which he should be prepared in answer. Suppose the first agreement had been for a bond, and the substituted agreement for a promissory note; or the first for a bond, and the substituted agreement for a chattel to be delivered in satisfaction. Such agreements would, being of an entirely different nature, occasion a surprise to [*644] the opposite party, if they were allowed to be shown in evidence under a plea referring only to one of them; indeed, a defendant might be let in to prove a whole series of substitutions, if admitted to prove this. We think, therefore, the defendant should have pleaded the substituted as well as the original agreement, and that, therefore, this rule must be made Absolute.

The Court refused to permit the defendant, upon payment of costs, to amend his plea and go down to another trial.

BRADLEY v. MILNES. May 2.

To a plea, that work in respect of which plaintiff sued, was not, according to agreement, done to the satisfaction of defendant or his surveyor, plaintiff replied, that it was done to the satisfaction of defendant and his surveyor; without this, that it was not done to the satisfaction of defendant or his surveyor:

Held, that upon this issue it was sufficient to show that the work was done to the satisfaction of the defendant.

ASSUMPSIT for work and labor, and materials found.

The defendant pleaded that by an agreement between plaintiff and defendant, the sum now demanded was to be paid by the defendant upon the plaintiff's completing a building for the defendant, to the satisfaction of the defendant or to the satisfaction of the defendant's surveyor; and that the building had never been completed to the satisfaction of the defendant or to the satisfaction of his surveyor.

Replication,—That the building was completed to the satisfaction of the defendant, and to the satisfaction of his surveyor; without this, that it was not finished to the satisfaction of the defendant, or to the satisfaction of his surveyor.

Upon which the defendant joined issue.

At the trial the plaintiff proved that the building had been completed to the satisfaction of the defendant.

A verdict having been found for the plaintiff,

Atcherley, Serjt., obtained a rule nisi to set it aside on the ground that evidence of the satisfaction of the defendant alone did not sustain the issue raised by the replication.

Talfourd, Serjt., showed cause. The plea being in the alternative, the substance of the issue has been proved. In *Jones v. Clayton*, 4 M. & S. 349, where the plaintiff declared against the sheriff for a false return of nulla bona to a fi. fa. against the goods of R. and J. S., and alleged that "although R. and J. S. had goods, &c., within his bailiwick, &c., yet defendant did not levy the debt and damages aforesaid, but did falsely return that the said R. and J. S. had not, nor had either of them, any goods or chattels whereof he could levy the said debt and damages, or any part thereof," that allegation was held to be sustained, although plaintiff did not prove that J. S. had any goods; for it was severable that both or either of them had goods, &c. So in *May v. Brown*, 3 B. & C. 113, where, in a declaration on a libel, the plaintiff, after adverting to several matters in the way of inducement, alleged that the defendant published the libel concerning the plaintiff and the matters aforesaid, and it turned out that the libel related to some only of those matters, *ABBOTT*, C. J., said, "It was contended that the plaintiff had, by the form of his declaration, rendered it necessary for him to prove (though otherwise it would have been [*646] unnecessary), that the libel does relate to all the matter previously alleged; that, by the averment that the defendant published a libel 'of and concerning the matters aforesaid,' he had rendered it necessary for him to prove all the matters aforesaid to be matters to which the supposed libel related. I am, however, of opinion, that the allegation does not compel the plaintiff to prove formally and precisely that the libel relates to every part and particular of the matter so previously stated, but that it satisfies all he has taken on himself to prove, if he shows that the libel relates substantially to the matters previously alleged by way of introduction, in such a manner as that the defamation contained in the libel is of the character and effect which the plaintiff has described." The same principle was established in respect of a plea, in *Spilbury v. Micklethwaite*, 1 Taunt. 146, where it was held that if a plea of justification consisted of two parts, each of which would, when separately pleaded, amount to a good defence, it would sufficiently support the justification if one of those facts were found by the jury. In *Co. Lit.* 282, a, it is laid down, "If the matter of the issue be found, it is sufficient."

Here the Court called on

Atcherley, to support his rule. According to the declaration and the plea, the plaintiff might in his replication have taken issue on the satisfaction of the defendant or of his surveyor; but having taken upon himself to aver the satisfaction of the defendant, it was sufficient to show that the work was done to the satisfaction of the defendant.

faction of both, he does not sustain his issue unless he proves the satisfaction of both.

The first part of the replication tenders the substantial issue, and not the formal traverse with which it *concludes: when the *absque hoc* is only the negation of a negation, the substantial issue is in the preceding [*647] affirmation. In *Moore v. Boulcott*, 1 New Cases, 323, to an action on an attorney's bill, defendant pleaded that the bill was for work at law and in equity, and was not delivered to her a month before action. Replication, that the bill was not for work at law and in equity, was held ill. [TINDAL, C. J. There the next step was a demurrer.] In *Goram v. Sweeting*, 2 Saund. 206, where the plaintiff declared that the ship, tackle, &c., were sunk and destroyed, it was held, that if the defendant traversed it, the traverse must be in the disjunctive, and not in the conjunctive.

To the same effect is *Wood v. Budden*, Hob. 119. And this is not a case in which the Judge has power to amend under 3 & 4 W. 4, c. 42: *Hanbury v. Ellar*, 3 Nev. & M. 438.

TINDAL, C. J. It appears to me that there are no grounds of objection to the evidence which has been received in support of the issue in this cause. It is to be observed that the question arises after verdict, so that it is to be considered whether any defect in the pleadings is not cured by that verdict. To an action on a demand for the plaintiff's work and labor, the defendant has pleaded, that the work was done under an agreement between him and the plaintiff, according to which the defendant was not to be called on to pay till the work was done to the satisfaction of the defendant, or to the satisfaction of his surveyor, and then avers that the work was not done to the satisfaction of the defendant or to the satisfaction of his surveyor; clearly meaning that if the plaintiff did the work to the satisfaction of the defendant or his surveyor, that would be a sufficient answer.

The plaintiff replies, first, that the work was done to *the satisfaction of both the defendant and of his surveyor, and then takes a traverse in [*648] the very terms of the defendant's plea, "without this, that the work was not done to the satisfaction of the defendant, or to the satisfaction of his surveyor;" that is, in effect, saying that it *was* done to the satisfaction of one or the other, which was the meaning of the parties. I agree that the defendant might have demurred specially on the ground that the issue tendered was not, as the replication stood, sufficiently certain: instead of that, he joins issue, and it is clear that upon that issue the plaintiff was bound to show that the work was done to the satisfaction of the defendant or of his surveyor. As he succeeded in showing that, justice has been done between the parties, and after verdict it is too late to object to the supposed ambiguity of the replication. By the 4 Ann., c. 16, 1, it is enacted that "no advantage or exception shall be taken of or for an immaterial traverse."

The cases on this point are numerous, and many of them are collected in *Comyns's Digest Pleader*, D. 22. A defendant is not to be allowed to join issue, and after taking the chance of a verdict, to take advantage of an ambiguity in the language of a traverse.

PARK, J., concurred.

GASELEE, J. I have no doubt that the issue tendered by the plaintiff was in substance the issue authorized by the contract between the parties; the work was to be done to the satisfaction of the defendant or of his surveyor, and the plaintiff having proved that it was done to the satisfaction of the defendant, the defendant cannot now take advantage of a slip in the pleading, to which, if it left him in any doubt, he ought to have demurred.

VAUGHAN, J., concurred.

Rule discharged.

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*FINNERTY v. SMITH. May 2.

The Court set aside a Judge's order for better particulars of set-off, on the ground that plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained.

In this case the Court made absolute a rule for setting aside a Judge's order for better particulars of set-off, on the ground that the plaintiff's attorney's clerk had, without authority, although without any fraudulent intention, altered the date of the jurat of the affidavit on which the Judge's order had been obtained.

Also, upon setting aside an irregular judgment of non-pros, they imposed the condition of payment of costs by the plaintiff's attorney, on the ground that his clerk had, without authority, although without any sinister motive, inserted the word *peremptory* in the Judge's order for an attendance at his chambers on the subject.

The practice of such unauthorized interpolations of the records of the Court was severely censured.

POOLE v. DICAS. May 4.

An entry of the dishonor of a bill of exchange, made in the usual course of business, at the time of the dishonor, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry.

In an action on a bill of exchange drawn by the defendant, accepted by Wheeler, and endorsed by the defendant to the plaintiff, a notary's clerk stated at the trial, that when the bill became due on Saturday, the 8th of June, 1833, it was left by the plaintiff with the notary, to demand payment. A copy of the bill was made in a book kept by the notary for that purpose, and Manning, one of his clerks, now dead, went out about seven in the evening to demand payment of the *acceptor; in a short time Manning returned, and in the margin of the book containing the copy of the bill, wrote by the side of the copy of the bill, "no effects." This entry was produced at the trial, and proved to be in Manning's handwriting.

Another clerk made a similar entry, from Manning's dictation, in a separate book which contained the protest of non-payment. All this was done in the regular course of the notary's business. On the Monday following a letter was written to the plaintiff, in London, apprising him of the dishonor of the bill, of which the defendant, also resident in London, received notice on Tuesday by a letter put into the post on Monday.

It was objected that the entry made by Manning ought not to have been received in evidence, and that the notice ought to have been given to the defendant on the Monday. A verdict was taken for the plaintiff with leave for the defendant to move to set it aside and enter a nonsuit on these grounds.

Humfrey having obtained a rule nisi accordingly,

Bompas, Serjt., and *Hoggins*, who showed cause, relied on *Doe d. Patteshall v. Turford*, 3 Barn. & Adol. 890, where all the cases on the subject are cited, and where it was proved to be the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to endorse on duplicates of such notices the fact and time of service; on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having endorsed on the duplicate of each notice a memorandum of service on the tenant; two of these notices were *proved to have been delivered by him on that occasion;—and it was held, on the trial of an

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ejection, after the attorney's death, that the endorsement so made by him was admissible evidence to prove the service of the third notice.

Kelley and Humfrey, contra, contended that an entry such as the present "is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it; and secondly, where it is one of a chain or combination of facts, and the proof of one raises the presumption that another has taken place:" which was the rule acceded to by PARK, J., in *Doe v. Turford*. Here the entry of the dishonor of the bill was a single unconnected fact, the proof of which did not raise a presumption of any other fact, so that the entry rather resembled that which was made by a sheriff's officer in *Chambers v. Bernasconi*, 1 Tyr. 335, where the Court of Exchequer intimated an opinion that a written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, was not, after the death of the officer, evidence of the place of arrest in an action between a bankrupt and his assignees. [TINDAL, C. J. What was decided in that case in the Court of Error was, that it was no part of the officer's duty to endorse on the writ the place of arrest. The endorsement, therefore, was not entitled to credit as an entry made in the course of business.] Here, the entry was not the best evidence; for the person who gave the answer at the place of presentment might have been called: nor was it clearly proved to have been made at the time of the transaction.

*Then, the letter announcing the dishonor of the bill ought to have been put in the post in time to reach the drawer on the day the bill [*652] was dishonored. In *Smith v. Mullett*, 2 Campb. 209, where, in an action by the fourth against the first endorsee of a bill of exchange, all the parties to which resided in London, it appeared that the plaintiff received notice of the dishonor of the bill from his endorsee on the 20th of the month, and gave notice to his immediate endorser, by a letter put into the twopenny post-office on the evening of the 21st, but so late that it was not delivered out till the morning of the 22d, —it was held, that by that laches the plaintiff discharged all the prior endorsers, although in the course of the 22d notice of the dishonor was given both to the second endorsee and to the defendant.

TINDAL, C. J. Upon inspection of the bill, we are satisfied that no question can arise on the last point; for if the bill, after its dishonor on Saturday evening, were returned to the holder, in regular course, on Monday, notice could scarcely be given to the defendant till Tuesday.

As to the first point, which is of considerable importance, we think the evidence in question was admissible; and we think it admissible on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business by a person who had no interest to misstate what had occurred. If there were any doubt whether it were made at the time of the transaction, the case ought to go down to trial again; but according to my impression of the testimony in the cause, the entry was made at the time: had any ambiguity existed on that head, a single question to the witness, on cross-examination, would have cleared it up. *I give my opinion, therefore, on [*653] the assumption that the entry was made at the time. And this does not carry the law farther than the principle established in *Doe d. Patteshall v. Turford*. There, it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to endorse on duplicates of such notices the fact and time of service; on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having endorsed on the duplicate of each notice a memorandum of service on the tenant: two of them were proved to have been delivered by him on that occasion; and it was held, on the trial of an ejection, after the attorney's death,

that the endorsement so made by him was admissible evidence to prove the service of the third notice.

In the present case it was the duty of the notary's clerk to present bills for payment on the evening of the day when payment was demandable. After going out with the bill for the purpose of presentment, he returns and makes an entry in the margin of the book in which a copy of the bill had been made upon its being left at the notary's for the purpose of presentment. This was all in the ordinary course of business. The clerk had no interest to make a false entry: if he had any interest, it was rather to make a true entry: it is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred; and a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made, was open to all the clerks in the office, so that an entry if false would be exposed to speedy discovery. The entry being thus *prima facie* consistent with truth, there are many accompanying circumstances which tend to [*654] confirm its correctness; and *the letter addressed to the holder on Monday day to apprise him of the presentment and dishonor of the bill is a link in the chain which gives consistency to the whole. It has been argued that the decision in *Doe v. Turford*, can only be supported on the supposition that no other evidence could have been given but that which was received. But that is carrying the case farther than the facts warrant; for there might have been persons present when the notice was served. In the present case, it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application; and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous.

The rejection of the evidence which has been received would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange.

PARK, J. I am of the same opinion. We should occasion great alarm if we were to reverse all the decisions which have been referred to on this point. I go along with the observations of Mr. Justice JAMES PARKE, in *Doe v. Turford*, where he puts the reception of entries made in the usual course of business, on the ground that the party made the entry at the time. The book here has all the appearance of exactitude; and the whole proceeding was but one act. The clerk goes out; returns; and makes the entry at once; and PARKE, J., says—"It is to be observed, that in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party and his death are enough to authorize its reception; at whatever time [*655] it was made it is admissible: but in the other case *it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." It would occasion an enormous expense to call all the persons who might have been at the place when the presentment was made. The decision in *Chambers v. Bernasconi* turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the place of arrest, and that such an entry therefore had no claim to be received as evidence of that fact. If we were to accede to the argument for the defendant, we should overrule all the cases on the subject for the last fifty years.

GASELEE, J. I am of the same opinion. If only the entry made by Manning had been produced, it would have been more trustworthy evidence than the mere recollection of persons who might have been present; but the entry is one of a chain of circumstances each confirmatory of the other, and therefore the reception of the evidence was correct according to the principle laid down in *Doe v. Turford*.

Rule discharged.

BOSANQUET, J., was absent, in his capacity of commissioner of the great seal.

*WAITE v. JONES. *May 5.*

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Plaintiff declared that he executed a separation deed between himself and his wife, and agreed to pay certain debts due to G. and R., and certain household expenses at H. in full, confiding in an agreement by the defendant to pay him a certain sum towards the discharge of the said debts and expenses, and to enlarge the time mentioned in the deed of separation, for plaintiff's quitting the house at H., but that the defendant did not pay the sum agreed on. Plea, that plaintiff was solely liable to pay the debts due to G. and R., and the household expenses in full, the agreement to pay part of which was stated to be the consideration for the defendant's promise. Held, that the plea was ill, and the declaration sufficient.

THE plaintiff declared that, on the 19th of October, 1833, the defendant signed a certain memorandum in writing, whereby he agreed to and with the plaintiff, that the time mentioned in a certain deed of separation for the said plaintiff's quitting a certain house at Holloway, should be extended to the 9th of December next inclusive; and also to pay the plaintiff the sum of 160*l.*, by eight half-yearly payments, towards Messrs. Horne and Gates's demand of 366*l.* 4*s.* 9*d.*, the said plaintiff taking the whole of such demand on himself; the payments to be made at the times of the payment of the annuity mentioned in the said deed of separation. And the defendant also agreed to pay 20*l.* towards liquidating certain outstanding debts at Rickmansworth, and also 220*l.* towards certain household expenses at Holloway, such last-mentioned sum of 220*l.* being divided into two payments, one-half thereof being payable at Michaelmas-day then next, and the other half at Lady-day, 1835. And by the said memorandum in writing, it was stated, that the defendant agreed to the above in consideration of the plaintiff's executing the deed of separation, and agreeing to pay Messrs. Horne and Gates, and the household expenses and Rickmansworth debts, in full. And the plaintiff averred, that he, confiding in the said agreement of the defendant, and in consequence thereof, was induced to, and did then execute, the said deed of separation in the said memorandum mentioned, that is to *say, a certain deed of separation between the plaintiff and one Mary his wife, and agreed to pay the said Messrs. Horne and Gates, in the said [*657] memorandum mentioned, their said demand of 366*l.* 4*s.* 9*d.*, and the said household expenses and Rickmansworth debts in full; and then took upon himself the payment of the said demands, debts, and expenses; whereof the defendant had notice; yet the defendant did not nor would perform the said agreement, but wholly neglected and refused (although often requested so to do), to make the first payment of the said sum of 220*l.* so agreed to be paid by the defendant towards the household expenses at Holloway as aforesaid; which said first payment thereof, amounting to a certain sum of money, to wit, 110*l.* under and by virtue of the said agreement or memorandum in writing, became due and payable, and ought to have been paid by the said defendant at Michaelmas-day last, and the same still remains wholly due and unpaid; and the plaintiff, by reason thereof, was forced and obliged to pay, and was liable to pay the same out of his own moneys, to the damage of the plaintiff of 120*l.*

Plea. That at the time of the supposed signing by the defendant, of the supposed memorandum in writing in the declaration mentioned, and before and at the time of the commencing of this suit, the plaintiff was solely liable to make to the said Messrs. Horne and Gates the payments, the supposed agreement by the plaintiff to make which, was by the said supposed memorandum in writing, stated to be in part the consideration for the defendant agreeing, as was alleged to be in the said supposed memorandum in writing agreed by the defendant, and that the plaintiff was, at the said time of the supposed signing by the defendant, of the said supposed memorandum in writing, and before and at the time of commencing of this suit, solely liable to pay the said household expenses, and Rickmansworth debts, *in full, the supposed agreement by the plaintiff to pay which household expenses, and Rickmansworth debts, in full, [*658] was, by the said supposed memorandum in writing, stated to be in part the con-

sideration for the defendant agreeing, as was alleged to be in the said supposed memorandum in writing agreed by the defendant: and that, the defendant was ready to verify.

Demurrer and joinder.

R. V. Richards, in support of the demurrer. The plea is ill, and the consideration for the defendant's promise is sufficient, even though the statement in the plea be true: the agreement by the plaintiff to execute the separation deed is of itself sufficient. Separation deeds may be either legal or illegal; in the greater number of instances they are legal. See the cases collected in *Roper, Husband and Wife*, from 269 to 293; *Worrall v. Jacob*, 3 Mer. 268. There is nothing to show the present deed to be illegal, and the Court will not presume illegality. If it be legal, the execution of it is a good consideration for the defendant's promise; or even if its legality be only doubtful: *Longridge v. Dorville*, 5 B. & Ald. 117. And the mere trouble of the plaintiff's attending to execute might be a valid consideration for the defendant's promise; for the quantum of consideration is immaterial: *Starlyn v. Albany*, Cro. Eliz. 67; *Pullen v. Stokes*, 2 H. Bl. 312; *Trades v. —*, 1 Sid. 57; *Whitehead v. Greetham*, 2 Bingh. 461. So, if two or three matters constitute an entire consideration, and all fail but one, a sufficient consideration will remain to support a promise. *Best v. Jolly*, 1 Sid. 38; *Bradburne v. Bradburne*, Cro. Eliz. 149; Vin. Abr. action of assumpsit, Y.; Com. Dig. action on the case upon assumpsit, B. 1.

**Ellis*, contrá. An agreement made by a husband with a third person [*659] to sign a deed of separation from his wife, can form no legal consideration for a promise by the third person to pay money to the husband. It is contrary to the policy of marriage that the husband's assent to such a deed should be purchased by money. In *Hartley v. Rice*, 10 East, 22, it was held that a wagering contract for fifty guineas that the plaintiff would not marry within six years, was *prima facie* in restraint of marriage, and, therefore, void: that principle applies to the present case. The courts have always discountenanced bargains on the subject of marriage: *Woodhouse v. Shipley*, 2 Atk. 535; *Lowe v. Peers*, 4 Burr. 2225; *Baker v. White*, 2 Vern. 215; *Hall v. Potter*, 3 Lev. 411. And inducements promoting separation after marriage, have been looked on with as much jealousy as bargains before: *Brown v. Peck*, 1 Ed. Ca. Ch. 140; *Tennant v. Braie*, Toth. 78. In those two cases, bequests made to a wife on condition that she would separate from her husband, were held single.

It is not now disputed that deeds of separation may be legal in themselves, though the courts have conceded this with reluctance, and of late have proceeded entirely on the ground of established precedent: *Durant v. Titler*, 7 Price, 577; explained in *Jee v. Thurlow*, 2 B. & C. 547; *Fletcher v. Fletcher*, 2 Cox. 99; *Westmeath v. Westmeath*, 1 Dow. N. S. C. 519, S. C. in 5 Bligh, N. R. 339, as *Westmeath v. Salisbury*; *Lord St. John v. Lady St. John*, 11 Ves. 532; *Lord Rodney v. Chambers*, 2 East, 283, is shaken by the remarks of Lord ELDON in *Lord St. John v. Lady St. John*; and *Guth v. Guth*, 3 Br. Ch. Ca. 614, is disapproved of by Lord ELDON (in the same place), and by Lord LOUGHBOROUGH *in *Legard v. Johnson*, 3 Ves. 352, 361. Admitting, [*660] however, that, for the present argument, the deed of separation mentioned in the declaration, is not to be taken as illegal, this is no answer to the objection that the husband's consent to it is not to be bought. It is legal to abstain from marrying; but this abstinence is no consideration for the payment of money: *Hartley v. Rice*, 10 East, 22. So it is legal to vote for a parliamentary candidate, and it is legal for a majority of part-owners to appoint a commander of a ship; but these acts will not constitute a legal consideration for a promise to pay money: *Allen v. Hearn*, 1 T. R. 56; *Card v. Hope*, 2 B. & Cr. 661, and see p. 673; and, though the policy of the law be to encourage marriage, yet a bond conditioned that the obligor should marry was held void

in *Key v. Bradshaw*, 2 Vern. 102. It is true, that a covenant by trustees to indemnify a husband against debts to be incurred by his wife, has been held a good consideration for the husband's agreeing to adhere to the terms of a separation-deed. But, in the present case the money is to go into the husband's pocket; the defendant is not a trustee; nor has the payment any reference to the wife's expenses. Besides, the covenant of trustees takes effect only where the separation has actually been effected, and the trustees are parties to the deed: *Stephen v. Olive*, 2 Br. Ch. Ca. 90. The trustees, in such a case, are mere instruments to carry into effect a transaction previously determined on, and not illegal in itself. The general rule, as laid down in *Worrall v. Jacob*, 3 Mer. 268, is, that a court of equity will not carry into execution articles of separation between husband and wife, although it will enforce agreements originating in a separation: *Wilkes v. Wilkes*, 2 Dick. 791, is to the same effect: and it is upon *a principle analogous to this, that a provision for future separation is void: *Hindley v. Marquis of Westmeath*, 6 B. & Cr. 200. [*661] In *Elworthy v. Bird*, 2 Sim. & St. 372, the doctrine of enforcing such agreements was carried farther; but there the wife had been ill-used; the parties were separated in fact, on an understanding that the deed should be executed; and the Vice-Chancellor enforced the execution. But no agreement to separate would be enforced, on the face of which it appeared that the consideration, inducing the husband to consent, was money paid to him by a third person. It is true, that in *Nunn v. Wilmore*, 8 T. R. 522, a payment was to be made by a trustee to a husband, for his separate use, after separation; but it was a payment out of the husband's own property, the residue of which was to be applied to defraying the expense of the wife's maintenance; it was a mere exception from the property conveyed by him to the trustee.

If, then, it be illegal that the husband should have his consent purchased, the declaration is ill; for the plaintiff admits that the consideration of the promise to pay the money was, in part, his execution of the deed; and that he did execute the deed in consequence of the promise. And circumstances which are not expressly averred cannot be implied for the purpose of supporting the legality of the transaction: *Hartley v. Rice*, 10 East, 22; *Lowe v. Peers*, 4 Burr. 2225; and *Holland v. Hall*, 1 B. & Ald. 53.

But if it be said that the Court will not intend that the promise to pay the money induced the husband to execute the deed, then the consideration for the promise is so far without effect; and the rest of the consideration, as explained by the plea, is merely an agreement by the plaintiff to pay his own debts. Such a consideration for a promise is void: *Harris v. Watson*, Peake, N. P. C. 72, **Stilk v. Meyrick*, 2 Campb. 317, 6 Esp. N. P. C. 139; *Barber v. Fox*, 2 Saund. 136, and the notes to this last case, 2 Wms. Saund. 137, [*662] e, note b. The principles admitted in *Wilkinson v. Byers*, 1 A. & E. 106, are to the same effect, though the consideration was there supported.

Therefore, if the promise to pay operated at all as an inducing motive for the plaintiff to sign the deed, the declaration is ill; if it did not, the plea answers the declaration.

Richards in reply. The whole argument for the defendant proceeds on the assumption that the plaintiff had not arranged a separation before the defendant entered into the agreement in question; whereas it is manifest both from the declaration and the plea, that a separation had been agreed on and the deed actually prepared, before the defendant entered into his engagement with the plaintiff.

TINDAL, C. J. The objection to the plaintiff's claim to recover in this cause, arises on the consideration which is alleged to be the ground for the defendant's entering into the contract which is the subject of the action. That consideration appears to be of two distinct parts; first, the plaintiff's executing a deed of separation between himself and his wife; secondly, his agreeing to pay certain demands of Horne and Gates, and certain household expenses at Rickmansworth, in full.

It may be conceded that, if either part of the consideration be illegal, the whole falls to the ground ; for a party cannot enforce a contract where the consideration is illegal, either in the whole or part : *Featherston v. Hutchinson*, Cro. Eliz. 199, is a direct authority on that point. There, a promise by defendant to pay a sheriff [*663] the *debt of his prisoner, in consideration of the prisoner's being set at large and paying the defendant 2s., was held void as to the whole. If, therefore, the defendant entered into the agreement upon a consideration in any respect illegal, the plaintiff cannot support this declaration. It has been urged, that a part of the consideration was, an engagement to pay the plaintiff a certain sum as an inducement to him to separate from his wife ; in other words, an agreement for a future separation. If that were so the transaction would be illegal, and the consequence would follow. But we have no more right to impute an intended illegality than to impute fraud, and I think enough appears to show that this was an innocent act. First, it appears, that the separation-deed was prepared though not actually executed ; for the plaintiff alleges, that the defendant signed a memorandum, whereby he agreed that the time mentioned in a certain deed of separation for the plaintiff quitting a house at Holloway should be extended, and the plaintiff agreed to pay a sum by instalments, at the time of the payment of the annuity in the deed of separation mentioned ; and that he was induced by the defendant's agreement to execute the deed of separation in the memorandum mentioned. The deed, therefore, though not executed, was prepared, and did provide for the payment of an annuity. As this is stated to be a deed of separation, and the husband was to pay an annuity, one cannot understand how this should be any other than an annuity for the support of the wife. If so, why may not some third person step forward to secure her that advantage, by agreeing, in consideration of the husband's executing the deed, to take on himself certain payments, which the husband, without such security, might himself be called on to defray. If the agreement had been illegal, the defendant might have averred the facts which made it so ; but [*664] as we are not to impute misconduct unless *it appears, and as all that is stated here is reconcilable with a lawful undertaking, our judgment must be for the plaintiff.

GASELEE, J. I am of the same opinion. When the deed was about to be executed, the husband might think there were debts he ought not to be called on to pay, and if so, there was nothing illegal in a third person undertaking to discharge them for the benefit of the wife. The very object of exonerating the husband from those debts might be to enable him the better to pay the annuity.

VAUGHAN, J. Courts of law view separation-deeds with more favor than formerly. It is admitted that such deeds may be legal, and there is nothing to show illegality in that which is under discussion. If it had appeared to have been entered on by virtue of an agreement for a future separation, or that the husband was to receive money to induce him to separate, the deed would have been illegal. But it appears rather, that the separation had been already agreed on ; and that the defendant in this action was standing in the capacity of trustee for the wife. If the facts were otherwise, they might have been put on the record.

BOSANQUET, J. I agree that if part of the consideration be illegal, that circumstance would taint the whole ; and also that agreement for the husband to separate from his wife for a sum of money would be illegal : but the question is, whether we can collect anything of that sort from this record. The deed which the plaintiff was to execute, is called a deed of separation between a husband and his wife. Now there are some deeds of separation which are legal and some which are illegal ; illegality is not to be presumed ; and unless we [*665] *necessarily see that a transaction is illegal, we are not to put an unfavorable construction upon it. If we were driven to conjecture, we might infer that there had been an agreement between the plaintiff and his wife to

separate; that a separation deed had been prepared; and that the defendant was the person to carry it into execution. However, excluding all conjecture, we cannot see on the face of this declaration that the transaction in question was illegal, and therefore there must be

Judgment for the plaintiff.

BURTON *v.* WIGLEY. *May 5.*

An arbitrator, who had authority to decide on what terms a partnership agreement should be cancelled, directed, among other things, that the agreement should be cancelled; that one of the partners should have all the debts due to the firm; and should if necessary sue for them in the name of his late partner: Held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority.

THE declaration stated, that an action having been brought by Burton against Wigley, and another by Wigley against Burton, it was, by a Judge's order made in the two actions by consent of the parties, ordered that the said two causes should be referred to the award of an arbitrator, who was to determine whether a certain agreement in writing, dated the 23d of August, 1831, and a certain assignment of lease, dated the 5th of October, 1831, one or both, was or were not entered into and executed by the said parties upon some, and what representations, and whether the same were unfounded; and to award compensation to the party injured thereby, if the arbitrator should think fit; to decide whether the said parties, or either, and which of them, had violated or committed breaches of the said agreement, and in what particular; and to award compensation, if he should think *fit, for such breach or breaches; to [*666] decide the terms upon which the said agreement was to be cancelled; and also which of the said parties had a right to receive bills of costs for business done for the connexion of Wigley since the 5th of October, 1831, and whether they, and which of them, had improperly or otherwise received any and what sums, and what sums had been respectively received by the said parties from the said business during that period; and whether there was anything, and what, due to the said parties respectively in respect thereof, or any other account after deducting the disbursements and the allowances referred to in the said agreement, if the arbitrator should think fit; in fine, he was to decide upon those and all matters in dispute between the said parties, and to award such damages, or otherwise, as in his discretion he might think fit, taking into consideration the sum paid by Burton, as a consideration for the said lease, fixtures, and moneys laid out in repairs, and without prejudice to Burton's interest in the said lease. That the arbitrator, after hearing the parties, awarded, first, that the said actions in the order mentioned should be discontinued by the plaintiffs therein; and found, first, that the said agreement in the order of reference mentioned was entered into upon certain representations,—in substance, that the business of an attorney then carried on by Wigley, netted an average profit of between 1000*l.* and 1500*l.* a year; that it was a very respectable business; that the house in which it was carried on, was in a thorough state of repair; that Wigley would entirely withdraw himself from practice in London, or within seven miles of it; and that he would use his best endeavors effectually to transfer the said business to Burton;—next, that the extent and character of the said business, and the state of repair of the said house, had not been truly represented; and that the two last of *the said representations [*667] were introduced as stipulations in the agreement, and were not performed by Wigley; but the arbitrator awarded to Burton no specific compensation for such misrepresentation or breaches, having taken the same into account on the final settlement thereafter directed between the parties. That the arbitrator further found, that Burton was entitled to receive the bills of costs for all busi-

ness done for the connexion of Wigley, from the 5th of October, 1831, to the 6th of November, 1832; and that, during that period Wigley had improperly received in respect thereof, the sum of 40*l.* 15*s.*, and properly in part payment of certain furniture sold by him to Burton the sum of 82*l.* 16*s.* 3*d.*, that Burton had received properly during the same period, the sum of 288*l.* 13*s.* 3*d.*, and that there would be due to Wigley in respect of the total receipts, after deducting the disbursements and allowances referred to in the said agreement, the sum of 110*l.*; but the arbitrator, by his award, directed that no payment was to be made specifically in respect thereof, as he had taken the same into account in the final settlement thereafter directed between the parties. And, lastly, that the arbitrator having considered, on the one hand, the several claims made by Wigley, and, on the other, the claims of Burton, by his award directed that the said agreement should be cancelled, and the several claims of the parties should be settled on the following terms, viz.: that Burton should retain the dwelling-house in the agreement mentioned, and certain goods and chattels in the award specified; that all payments and receipts of money on either side, made up to the 6th of November aforesaid, should stand good; that Burton should be at liberty to collect and retain on his own account all sums of money due for business transacted at the office in Essex, from the [668] 5th of *October, 1831, to the 6th of November aforesaid, and to use the name of Wigley either alone or jointly with his own, if necessary, in suing for the same; that Wigley should, upon the 1st of October, then next ensuing, pay the sum of 100*l.* to Burton as damages; and should also execute a release of all actions, claims, and demands whatsoever, except as there excepted: that Burton, upon payment of said sum of 100*l.*, and execution of the said release, should cancel and deliver up the said agreement of the 23d of August, 1831; and that thenceforward Wigley should be at liberty to practise as an attorney and solicitor in London, or in any other place. Also, that Burton should then execute a release, of all actions, claims, and demands whatsoever, except as there excepted: and that each party should pay his own costs. Of which said award the defendant afterwards, to wit, on, &c., had notice. That on the 7th of November, 1834, it was duly ordered that the said judge's order should be made a rule of court. But that Wigley did not nor would on the said 1st of October next after the making and publishing of the award, and after he had notice thereof as aforesaid, or at any time before or since, although duly requested, pay or cause to be paid to the plaintiff the said sum of 100*l.* or any part thereof.

Demurrer and joinder.

Miller, in support of the demurrer, contended that the arbitrator had exceeded his authority in awarding that the plaintiff should use the name of the defendant, either alone or jointly with his own, in suing for the bill of costs mentioned in the award. If the award were supported in that respect, the defendant might eventually be liable for the costs of actions in which he had no interest: the rule of court conferred no authority on the *arbitrator to sub- [669] ject the defendant to the costs of such actions, and in that respect the award was not final. At all events, the arbitrator should have provided for the defendant an indemnity against the risk of those costs.

TINDAL, C. J. The question before us is, whether or not the arbitrator in ordering actions to be brought in the name of the defendant has exceeded his authority; for if he has, the award may be considered void. But looking at the order of nisi prius and the award, we are of opinion that he has not exceeded his authority in the matter now contested. By the order it appears he was to decide "whether a certain agreement in writing, dated the 23d of August, 1831, and a certain assignment of lease, dated the 5th of October, 1831, one or both, were or were not entered into and executed by the parties, upon some and what representations, and whether the same were unfounded; to award compensation to the party injured thereby, if he should think fit; to

decide whether the parties, or either and which of them, had violated or committed breaches of the said agreement, and in what particular; to award compensation, if he should think fit, for such breach or breaches; to decide the terms upon which the said agreement should be cancelled; and also to decide which of the said parties had a right to receive bills of costs for business done for the connexion of Wigley since the 5th of October, 1831." If he was to decide which of the parties had a right to receive the bills of costs, I should have thought it impliedly within the scope of his authority to order suits for the purpose of recovering those costs. But it does not rest there, for the power by which he is authorized to settle the terms on which the agreement between the parties should be cancelled includes this power of directing actions to be brought. It is said that *the effect of this may be to expose the defendant to costs, and that the award, to that extent, is not final between [*670] the parties. But such contingent liability to costs forms no part of the disputes which the arbitrator was called on to settle, in respect of which the award is clearly final; it is only something which may arise out of the award; a possibility of new disputes, from which no award can ever exempt the parties concerned. It is urged that the arbitrator might have provided the defendant some kind of security against the liability to these costs; but that again might have given rise to future disputes, and seems not to be required by the circumstances of the case. *Phillips v. Knightley*, 2 Str. 903, nearly resembles the present case.

VAUGHAN, J., and GASELEE, J., concurred.

BOSANQUET, J. The arbitrator finds that the agreement was entered into by Burton upon a misrepresentation, but he awards Burton "no specific compensation for such misrepresentation or breaches, having taken the same into account on the final settlement thereafter directed between the parties." In the final settlement he orders actions to be brought; that may subject Wigley to liabilities, but the arbitrator has considered that in the final account.

Judgment for plaintiff.

*ALEXANDER and Another v. GARDNER and Another. May 6. [*671]

Plaintiffs in London, sold to defendants a quantity of butter, which they expected from Sligo: the quality and price were specified in the contract. The butter was to be shipped for London in October, and to be paid for by bill at two months from the date of landing. The butter was not shipped till November, but the defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck, Held, that plaintiffs might recover the price from defendants in an action for goods bargained and sold.

ASSUMPSIT for goods bargained and sold, under the following circumstances:—

The plaintiffs, merchants in London, and agents for Irish houses in the sale of butter, being in expectation of a cargo from Murphy of Sligo, entered, by means of their broker, into the following contract with the defendants:—

"London, October 11, 1833.

"Sold to Messrs. William Gardner & Son for account of Messrs. Alexander & Co., 200 firkins Murphy & Co.'s Sligo butter, at 71s. 6d. per cwt. free on board for first quality; 4s., and 6s. difference for inferiors. Payment, bill at two months from the date of landing. To be shipped this month. An average for weights and tares within six days of landing, if required."

On the 11th of November, the plaintiffs received from Murphy the invoice and bill of lading of these butters, and also the intelligence that, owing to there having been no ship in the port of Sligo bound for London, the butter had not been shipped till the 6th of November.

This circumstance was immediately communicated to the defendants, who at

first refused to abide by the contract, on the ground that the butters were to have been shipped in October. In a little time, however, they abandoned their objection, and consented to retain the invoice and bill of lading which had been delivered to them on the 12th of November.

[*672] The invoice, which described the butters in detail as *to weight, number of casks, &c., was addressed to the plaintiffs; but upon handing it over, their name had been struck out, and the name of the defendants substituted, as is usual in the trade.

The bill of lading described the casks by their marks and several quantities, and directed them to be delivered to the plaintiffs.

In December, 1833, the greatest part of the butters was lost by shipwreck on the coast of Galway, and a small part of them arrived in a damaged state: whereupon the defendants, not having effected any insurance, refused to pay.

At the trial before TINDAL, C. J., it was contended on their part that, under the circumstances above stated, the action for goods bargained and sold did not lie; and that the plaintiffs, in order to recover, should have declared specially on the contract of the 11th of October, alleging and proving that the goods had been shipped in October, and duly landed; since, according to the contract, payment was not to be made till two months after landing.

The jury found that the condition for shipping in October had been waived by the defendants, and returned a verdict for 414*l.*, the contract price of the butters.

Talfourd, Serjt., pursuant to leave reserved at the trial, obtained a rule nisi for setting aside this verdict and entering a nonsuit on the ground above stated. He relied mainly on *Simmons v. Swift*, 5 B. & C. 857, where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him: it was held, that the property in the [*673] residue did not vest in the purchaser *until it had been weighed, that being necessary in order to ascertain the amount to be paid: and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. From that case it followed that an action for goods bargained and sold will not lie, unless the property in the goods passes to the purchaser at the time of the bargain. But so far was the property here from passing to the defendants at the time of the bargain, that at that time the goods were not in the plaintiff's hands, or, for aught that appeared, in existence. And the principle established by *Goss v. Lord Nugent*, 5 B. & Adol. 58, that when the time for delivery is fixed by a written contract, it cannot be extended by oral agreement, afforded a strong argument to show that the plaintiffs should have set out in their declaration the special circumstances of their demand.

Bompas, Serjt., and *Martin* showed cause. The action for goods bargained and sold will lie; for the property in the butters passed to the defendants by the contract. It was not necessary to that end, that they should have been in the actual possession of the plaintiffs. The invoice and bill of lading were symbols of possession, and by the transfer of those symbols the property passed to the defendants: *Lickbarrow v. Mason*, 2 T. R. 63; *Haille v. Smith*, 1 B. & P. 563; *Cuming v. Brown*, 9 East, 506; *Barrow v. Coles*, 3 Campb. 92. The plaintiffs had no longer an insurable interest: *Hibbert v. Carter*, 1 T. R. 745. In *Simmons v. Swift* the bargain was held incomplete, because something remained to be done on the part of the vendor, namely, the weighing a part of the bark; but here, at the time of the contract, the quantity, quality, weight, [*674] and price of the butters, were all ascertained by *the contract itself. *Rhode v. Thwaites*, 6 B. & C. 388, *Atkinson v. Bell*, 8 B. & C. 277, and *Elliott v. Pybus*, 10 Bingh. 512, are strong authorities for the plaintiffs. The condition for shipping in October was expressly waived by the defendants; there was no agreement for extending the time; and therefore, *Goss v. Lord*

Nugent has no application. Even if the contract here were conditional, the condition having been waived, it was not necessary to declare specially: 2 Wms. Saund. 269, b, note. As to the objection that the goods were to be paid for in two months after landing, that was a stipulation ascertaining only the time of payment, and not rendering the landing a condition precedent. In *Fragano v. Long*, 4 B. & C. 219, where the vendee, resident at Naples, sent an order to the vendors at Birmingham, "to despatch to him certain goods, on insurance being effected; terms three months' credit from the time of arrival;" the vendors (having marked the package with the vendee's initials), despatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in the vendee. At Liverpool the goods were delivered by the agent of the vendors to the owner of a vessel bound to Naples, through whose negligence they were damaged: it was held, that the property of the goods vested in the vendee as soon as they were despatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to his liability to pay for them; and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship-owner.

Talfourd and Kelly in support of the rule.

Looking to this transaction, it was not a contract for the bargain and sale of goods at the time of the *contract, and did not become so by any subsequent circumstances. For, [675]

First, the plaintiffs did not make out their case by showing simply, the endorsement of the bill of lading: they were obliged to connect it with, and to produce the special contract:

Secondly, the goods were not in their possession even when the bill of lading was transferred: and,

Lastly, the landing of the goods was a condition precedent to their being paid for; and as the contract was in writing, the condition for shipping in October could not be waived orally.

In none of the cases cited were there any special provisions in the contract, with reference to which the rights of the parties were to be decided; and in all of them the goods sold were in the possession of the vendors: but here the plaintiffs, not being in possession of the goods, were not in a situation to carry the contract absolutely into effect.

If *Fragano v. Long* had been an action for goods bargained and sold, it would have afforded an answer to the objection made in this case, that the landing of the goods was a condition precedent to the property vesting in the defendants: but it was an action by the purchaser of goods against a ship-owner for negligence in conveying them; and the purchaser having actually insured the goods, was the party at whose risk they were carried. Here the defendants had not insured, and for the reasons before urged, were not the responsible proprietors.

TINDAL, C. J. The question in this cause is, whether an action for goods bargained and sold is maintainable against the defendants. They contend, that such an action does not lie against them; but, that under the circumstances of the case, the plaintiffs should have declared specially.

The original contract was made on the 11th of *October, 1833, in which contract it is stated, that the plaintiffs sold to the defendants 200 [676] firkins of Sligo butter, free on board, at 71s. 6d. per cwt.: that the goods were to be shipped in the course of that month, and that payment was to be by a bill of exchange, payable two months after the landing of the goods.

Upon this contract three objections have been raised to the action for goods bargained and sold.

First, that the butters were not in the possession of the plaintiffs at the time of the contract.

Secondly, that they were not shipped in October as the contract required; and,

Thirdly, that as the payment was to be at two months after the landing of

the goods, and as the goods were never landed, such payment could not be required.

Notwithstanding these objections, I think the contract was to pay for goods bargained and sold, and that the declaration to that effect is in the proper form. And I agree that the plaintiffs must show that the property in the goods passed to the defendants by the contract; for, unless it did, the goods were not bargained and sold to them.

But as to the first objection, if the goods were ascertained and accepted before the action was brought, it is no objection that they were not in the possession of the plaintiffs at the time of the contract. In *Rhode v. Thwaites*, 6 B. & C. 888, the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads; four hogsheads were delivered; the vendor filled up, and appropriated to the vendee sixteen other hogsheads; informed him that they were ready, and desired him to take them away; the vendee said he would take them as soon as he could: and it was held, that the appropriation having been made by the vendor and assented to by the vendee, the sixteen hogsheads [*677] thereby *passed to the latter; and that their value might be recovered by the vendor under a count for goods bargained and sold.

Here, it is impossible to say the goods were not ascertained and accepted before the action was brought; for the quantity, quality, and price, were all specified in the invoice; and the bill of lading was regularly endorsed to and accepted by the defendants.

But then it is said, that the shipping of the goods in October was a condition precedent to any claim on the defendants. If the defendants had in the first instance repudiated the bargain on that ground, it is true no action would have lain against them. But it is found by the jury that they waived the objection; and this being only a parol contract, if the party waives the condition he is in the same situation as if it had never existed.

The third objection to the plaintiffs' recovery is, that the butters were to be paid for by a bill at two months after landing. But the object of that stipulation was, merely to fix the time of payment, and not to make the landing a condition precedent. For that point it is enough to refer to the decision in *Fragano v. Long*.

The present case, therefore, is brought within the result of all the decisions, as stated by Serjt. *Williams*, in the note 2 Wms. Saund. 269 b.

Here, the action was not brought till long after the two months which would have succeeded the landing of the goods, if they had arrived in the ordinary course. The plaintiffs, therefore, being in the situation of one who has parted with his goods, and the defendants of one who has received them upon an engagement to pay, the action will lie, and this rule must be discharged.

PARK, J. I entirely concur. The condition for shipping the goods in October having been waived, the question is, whether an action lies for goods bargained and sold; and that turns on the question, whether or not there [*678] has been an acceptance of the goods by the defendants. I think there has, and that an action might have been maintained even for goods sold and delivered; but it is sufficient to say, that the right to sue for goods bargained and sold is complete. The defendants' argument turns on the principle, that goods sold remain at the risk of the vendor, till everything is done to complete the contract: *Hinde v. Whitehouse*, 7 East, 558; or till a specific appropriation has taken place. But that having been effected here by the transfer of the bill of lading, the case falls within the principle of *Rhode v. Thwaites*, and *Fragano v. Long*. We have been pressed with the authority of *Simmons v. Swift*. There, the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified; and a part was afterwards weighed and delivered to him: it was held that the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that even if

it had been vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. In that I entirely concur. But see what the case was in *Rhode v. Thwaites*. There the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads: four hogsheads were delivered to the vendee; the vendor filled up and appropriated to the vendee sixteen other hogsheads, informed him that they were ready, and desired him to take them away. The vendee said he would take them as soon as he could. It was held, that the appropriation having been made and assented to, the property in the sixteen hogsheads passed to the vendee, and that *their value might be recovered by the vendor under a count for goods bargained and sold. And the argument that the arrival and landing of [*679] the goods was to be a condition precedent to payment, is answered by *Fragano v. Long*. There the vendee, resident at Naples, sent an order to the vendors, hardwaremen at Birmingham, "to despatch to him certain goods, on insurance being effected; terms, three months' credit from the time of arrival." The vendors despatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in the vendee: at Liverpool the goods were delivered by the agent of the vendors to the owner of a vessel bound to Naples, through whose negligence they were much damaged: it was held, that the property in the goods vested in the vendee as soon as they were despatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to a liability to pay for them; and that the vendee might therefore maintain an action for the injury done to the goods through the negligence of the ship-owner.

That case, therefore, and the case of *Rhode v. Thwaites*, entirely warrant our present decision.

GASELEE, J. The Chief Justice and my brother PARK having gone so fully into the case, I shall only observe that here the invoice specifies the weight and price of all the goods.

BOSANQUET, J. I think that this was a contract executed, and that therefore the plaintiff has properly declared for goods bargained and sold. It is not necessary for the support of such an action that the goods should be actually in the possession of the vendor. Here he was entitled to the possession, and has done all that was required on his part to render the transfer *effectual. It is said he should have declared specially, showing the performance of [*680] the condition precedent as to the time of shipping, or a waiver of it in writing. If the contract containing the condition had been by deed, that doctrine might have applied, but this was a parol contract, and the condition might be waived without a writing. A contract must be declared on according to its legal effect; and the effect of all the circumstances here is, to render it a contract without a condition. The objection that the arrival of the goods was a condition precedent to payment is answered by the case of *Fragano v. Long*, where it was decided that the property in the goods vested in the vendee as soon as they were despatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to the vendee's liability to pay for them; and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship-owner. Here, the time for arrival of the goods having long since elapsed, the time for payment must also be arrived if there was to be any payment at all, and that there was to be a payment is decided by *Fragano v. Long*. Rule discharged.

*FANCOURT v. BULL. May 6.

[*681]

1. A party who, being employed by plaintiff to procure a bill of exchange to be discounted, lodged it instead with defendant as a security for a debt due to defendant, was held a competent witness for plaintiff in an action of trover brought by plaintiff for the recovery of the bill.

2. To trover for a bill of exchange, defendant pleaded that the drawer being lawfully possessed of the bill, endorsed it to P., and that P. for good consideration endorsed it to defendant: plaintiff replied, that there was no good consideration for P.'s endorsing the bill.

The jury having found for the plaintiff on this replication, the Court refused to arrest judgment or award a repleader.

THE declaration stated that the plaintiff was lawfully possessed as of his own property of a certain bill of exchange in writing,—made and drawn by one Hugh Fraser upon and accepted by the plaintiff, bearing date the 20th of November, 1833, whereby the said Hugh Fraser requested plaintiff to pay to the order of said Hugh Fraser 350*l.* three months after the date thereof,—of the value of 350*l.* of lawful money, &c., and being so possessed thereof, the plaintiff, afterwards, to wit, on, &c., casually lost the said bill of exchange out of his possession; and the same afterwards, to wit, on, &c., came to the possession of the defendant by finding; yet the defendant, well knowing the said bill of exchange to be the property of the plaintiff, and of right to appertain and belong to him, would not deliver the said bill of exchange to the plaintiff, although requested so to do; but converted and disposed of the said bill of exchange to his, the defendant's use, to the damage of the plaintiff of 500*l.*, &c.

Pleas. First, general issue. Secondly, that the said bill of exchange in the declaration mentioned, before and at the time of the delivery thereof to the defendant as next thereafter mentioned, was in the possession of Hugh Fraser, who was the drawer thereof and the person to whose order the same was made payable; and that the same had been and then was *endorsed by the said [*682] Hugh Fraser, and also by one Frederick Palmer. That before and at the time of such delivery of the said bill of exchange to the defendant as aforesaid, one Samuel Salmonson and the said Hugh Fraser were justly and truly indebted to the defendant in a certain large sum of money, to wit, the sum of 300*l.* for money before then received by the said Samuel Salmonson and Hugh Fraser, to and for the use of the defendant; and thereupon and long before the said bill of exchange had become due and payable according to the tenor and effect thereof, to wit, on the 10th of December, 1833, and whilst the said Samuel Salmonson and Hugh Fraser continued and were so indebted to the defendant as aforesaid, the said Hugh Fraser in consideration thereof, and also in consideration of a certain further sum of money, to wit, the sum of 60*l.*, then lent and advanced by the defendant to the said Hugh Fraser at his request, then delivered the said bill of exchange so endorsed as aforesaid, to the defendant, for the purpose of securing to the defendant the repayment of the said several sums of money; by means of which said premises the defendant then became and was the lawful holder of the said bill of exchange, and continued such holder thereof until and at the time of the said supposed conversion thereof in the declaration mentioned; and that the defendant was ready to verify, &c.

Thirdly, that before the time of the said supposed conversion of the said bill of exchange in the declaration mentioned, the said Hugh Fraser, who was the drawer thereof, and the person to whose order the same was made payable, was lawfully possessed of the same; and being so possessed thereof, the said Hugh Fraser endorsed the said bill of exchange to the said Frederick Palmer; and the said Frederick Palmer, before the said bill of exchange had become or was due [*683] and *payable according to the tenor and effect thereof, to wit, on, &c., for a good and valuable consideration in that behalf, endorsed the same to the defendant, by means whereof the defendant then became and was the lawful holder of the said bill of exchange, and continued such holder thereof until and at the time of the said supposed conversion thereof in the declaration mentioned; and that, the defendant was ready to verify, &c.

The plaintiff joined issue on the first plea, and to the second replied, that the said Hugh Fraser received the said bill of exchange in the declaration mentioned, and until the defendant came possessed thereof held the same for a special pur-

pose, for the sole use and benefit of the plaintiff and not otherwise, to wit, for the purpose and in order that the said Hugh Fraser might get the said bill of exchange discounted for the plaintiff, and deliver and pay the proceeds thereof upon such discounting to the plaintiff: of all which premises the defendant at the time he received the said bill of exchange had notice: That the said Hugh Fraser, in violation of good faith and contrary to the purpose for which he received the said bill of exchange, deposited the same with the defendant as in the second plea was alleged; and the defendant took and received the said bill of exchange well knowing and with notice of all the said premises, and that the plaintiff had not received any value for the said bill of exchange: and that the plaintiff was ready to verify, &c. And as to the plea of the defendant lastly above pleaded, the plaintiff said, that there never was a good or valuable consideration for the said Frederick Palmer's endorsing the said bill of exchange to the defendant in manner and form as the defendant had in his said last plea alleged, &c.

Rejoinder, that the defendant had not at the time he received the said bill of exchange in the declaration mentioned, any knowledge or notice that the said Hugh *Fraser had received or held the said bill of exchange for the [*684] special purpose in the replication mentioned for the use and benefit of the plaintiff; or that the said Hugh Fraser had deposited the same with him the defendant contrary to the purpose for which the said Hugh Fraser received the same; or that the plaintiff had not received any value for the said bill of exchange: and of that, the defendant put himself upon the country, &c.

The defendant joined issue on the replication to the third plea; and the plaintiff, on the rejoinder.

At the trial, Fraser, being called as a witness for the plaintiff, was objected to as having an immediate interest in the result of the action:

But the objection being overruled,—(without reference to the statute 3 & 4 W. 4, c. 42), on the ground that whichever way the verdict went, he would be liable to one or other of the parties, and so, stood indifferent between them,—he stated,

That the bill had been intrusted to him to raise money for the plaintiff; that he applied to the defendant to discount it for the plaintiff, which the defendant agreed to do, if Fraser would allow a debt due from Salmonson and Fraser to the defendant to be secured by Fraser's receiving the amount of the bill minus that debt; this, after some show of reluctance, was assented to by Fraser, who thereupon obtained 60% on the bill; but when at a subsequent period he came and paid 60% to redeem the bill, the defendant insisted upon retaining it as a security for the debt due to him from Salmonson and Fraser.

The witness also proved that Palmer received no consideration for his endorsement.

Upon this evidence a verdict was found for the plaintiff; but a rule nisi was afterwards obtained to set it aside on the ground that Fraser was an incompetent witness,—or to arrest the judgment or award a repleader, on the ground *that admitting the allegations in the replication to the third plea to have [*685] been established in proof, there was nothing in them to shake the title to the bill set up by the defendant in that plea, the issue raised by the replication being immaterial; so that upon the third plea the defendant was entitled to judgment.

Stephen, Serjt., and Martin showed cause. The witness, being equally liable whichever way the verdict went, stood indifferent between the parties, and so was properly admitted: *Carter v. Pearce*, 1 T. R. 163. Then, with respect to arrest of judgment, the defendant's colorable title, as disclosed on the third plea, having been answered by the verdict on the replication, the plaintiff's title stands unimpeached as alleged in the declaration; and, upon the whole record, he is entitled to judgment: *Vin. Abr. Color. G.*

Nor was the issue on the third plea immaterial: for, after the averment in

the declaration, that the plaintiff had lost the bill, the third plea had been ill without an averment that the bill came to defendant on good consideration. The plaintiff having lost the bill, and not having transferred it in the ordinary course of business, the substantial question was, whether the defendant had lawfully acquired a property in it, which, under such circumstances, he could not do without giving consideration for it. He was in the same situation as a trespasser who holds a chattel; but who cannot retain it even against one who has a mere special property in it: *Wilbraham v. Snow*, 3 Saund. 47. And a traverse ought to be of the most material thing, and the effect of the bar: thus in trespass, if the defendant pleads that A. being seised made a lease to him, the plaintiff shows that after disseisin of A. his father was seised, and died seised, [*686] and *the land descended to himself, he must traverse the lease: Com. Dig. Pleader, G. 10. But if the issue be immaterial, the defendant, as having raised it, cannot take the objection: *Symmers v. Regen*, Cowp. 501. At all events, it would only go to a repleader, which the Court will not award in favor of a party, who upon the whole proceeding, appears to be substantially in the wrong: *Goodburne v. Bowman*, 9. Bingh. 632.

Kelly and Swann in support of the rule. The witness did not stand indifferent between the parties; for if the plaintiff succeeded, the witness would only be liable to the defendant in the amount of the bill, minus the 60*l.* he had repaid to the defendant; whereas, if the defendant had endorsed the bill over for value, and then succeeded in this action, the plaintiff would be liable to the endorsee in the full amount of the bill; and Fraser, consequently, would be liable over to the plaintiff to the same amount, as well as to the costs of this action.

Again, supposing Fraser were called on to pay the defendant the amount of his lien on the bill, he would be assisted in that payment by Salmonson, since the bill was deposited with the defendant for a debt due to him from Fraser and Salmonson. But if Fraser were called on to pay the amount of the bill to the plaintiff, he must bear the whole burden himself.

Then, the allegation in the third plea, that Palmer endorsed the bill for a good consideration, was immaterial; for it is alleged that Fraser being lawfully in possession, endorsed it. No consideration is necessary to the validity of an endorsement by one lawfully in possession; and the holder might have declared on that endorsement, omitting any mention of the intermediate endorsement by [*687] Palmer. Notwithstanding the finding *of the jury on the replication to that plea, sufficient remains on the plea to establish the defendant's title to the bill, and to the judgment of the Court.

The judgment for the plaintiff, therefore, on that replication, ought to be arrested. For whichever party appears upon the whole of the record to have the better title, will obtain the decision of the Court: *Wilkinson v. Marlin*, 2 Cr. & Jer. 636.

Our. adv. vult.

TINDAL, C. J. The defendant in this case obtained a rule to show cause why the verdict should not be set aside, on the ground of the improper admission of evidence, or why the judgment for the plaintiff should not be arrested, or a repleader awarded.

Upon the first ground of objection, we see no interest which Fraser has in the event of this suit, so as to render him an incompetent witness for the plaintiff. The defendant claims to retain this bill as a security for the debt of Fraser, for which he alleges it was pledged to him. If the plaintiff succeeds in this action, Fraser's debt will immediately revive, and the defendant may recover it in an action against him. If, on the other hand, the plaintiff fails in the action, he will be able to recover against the witness the amount of the damage he has sustained by the wrongful delivery of the bill: that is the amount of the lien which the defendant has obtained upon the bill: and as to the argument that the witness might be liable to the plaintiff in a larger amount than to the defendant, if the bill had been endorsed over by the defendant to a third party for value, the answer is, that such is not the case between these parties; for in

order to give such endorsees a better title than the defendant it must be shown that *it was endorsed over for value, and without notice of the defect of the defendant's title; but there is no such evidence in the case. The witness appears, therefore, to stand indifferent between the parties as to any claim on the bill itself; and as to the costs of this action, in case the plaintiff fails, there seems no principle upon which the witness can be held liable to such costs. If the plaintiff has brought an action of trover for his bill, which he is unable to support, either on account of any legal objection, or for want of sufficient evidence, he must himself bear the costs of such unfounded action; he can never state them in a declaration against the witness, as a necessary consequence of the act of the witness, in wrongfully delivering the bill to the defendant.

The application by the defendant to arrest the judgment, involves a question attended with greater nicety and difficulty. This application proceeds on the ground that, notwithstanding the jury have found for the plaintiff, upon the traverse of the single fact taken by him in his replication to the third plea, still sufficient remains upon that plea unanswered, and admitted by the replication, to form a legal bar to the plaintiff's demand. If such be the real state of the pleadings, the inference is undoubtedly correct that the plaintiff cannot be entitled to the judgment of the Court. But looking to the nature of the plaintiff's claim, as stated in his declaration, and to the answer set up by the defendant in his third plea, we think the allegations in his third plea, which remain admitted by the replication, do not constitute a legal answer to the action.

This is an action of trover, in which the declaration states the plaintiff to be possessed of the bill of exchange as of his own property, and that the defendant wrongfully converted it to his own use. The third plea purports to be a plea of property in the bill in the defendant; a defence which, according to the new rules *of pleading, must be pleaded specially to the action. This plea, therefore, in order to be a valid plea, must confess and avoid the plaintiff's right of action. It does, consequently, admit the property of the bill to have been in the plaintiff, and that the defendant converted the bill to his own use; but it proceeds to introduce and allege new facts, which, as the defendant contends, show the property to have been in the defendant, or, at all events, out of the plaintiff, at the time of the conversion of the bill. Those facts (omitting the allegation which has been negatived by the jury, and which, therefore, may be considered as if never inserted in the plea), are the three following; viz., first, that before the conversion by the defendant, Fraser, who was the drawer and the person to whose order the bill was made payable, was lawfully possessed of the bill. Secondly, that being so possessed thereof, he endorsed the bill to Palmer; and thirdly, that Palmer, before the bill became payable, endorsed the same to the defendant. The question, therefore, on the pleading, is reduced to this, whether these facts amount to an avoidance of the plaintiff's right of action, by showing the property in the bill to be out of the plaintiff.

That the special plea admits, not merely the right of possession, but the property of the bill to have been in the plaintiff, is clear from the decision of the Court in the case of *Comyns v. Boyer, Cro. Elis. 485*, in which the defendant pleaded in bar to an action of trover for nine oxen, that one William White was possessed of these nine oxen and sold them to the defendant in market overt, whereby he became possessed of them and converted them. Upon demurrer, one objection taken by the plaintiff was, that the plea did not confess nor deny the property, nor answer thereto. But the Court held "that the plea *was good enough as to that; for when he justifies by buying in a market overt, it is thereby allowed that the property was in the plaintiff, but he is bound by that sale; and he needed not otherwise confess it." The plaintiff, therefore, being admitted by the plea to be the lawful owner of this bill and to have the property in it, is it enough to deprive him of that property to allege in the plea that Fraser became lawfully possessed of

it, and endorsed it over to Palmer, and Palmer to the defendant, without alleging either that Palmer or the defendant took the bill for a valuable consideration? and we are of opinion that it is not. All the facts alleged in the plea may be perfectly true, and yet the property in the bill remain unaltered in the plaintiff; for these allegations are consistent with the loss of the bill by the plaintiff, and the finding thereof by Fraser; or with the delivery of the bill to Fraser for some special purpose; in either of which cases Fraser would have been lawfully possessed of the bill; but in neither of those cases could he have given any title to the bill to a third person as against the plaintiff, simply by endorsing it over: in order to give such title the endorsee must have given value for the bill, and have taken it *bonâ fide*, and without notice of the defect of Fraser's title. It is argued, that in the declaration upon a bill of exchange, it is sufficient to state an endorsement, without any allegation that it was made upon a good consideration; the bare allegation of the endorsement importing that it was made for value. This is undoubtedly the case, where the holder is enforcing his remedy on the bill which has been in a due course of circulation; but here the action is brought to recover the property in the bill, not to enforce its payment. The plaintiff alleges his title, and challenges the defendant to disprove it, or to produce a better; and it is manifest on the [*691] face of the declaration that this bill *was not in a course of circulation; for the plaintiff alleges that he was the owner of a bill drawn by Fraser upon himself, and accepted by himself the plaintiff; whereas a bill accepted by the plaintiff in the ordinary course of business, would not have been the property of the acceptor, but of the drawer or some endorsee. To devise such a title, therefore, out of the plaintiff, we think something more was necessary than a mere endorsement of the bill. In the case before cited of *Comyns v. Boyer*, a possession by a stranger, and sale in market overt, was held a sufficient allegation in the plea to divest the property of the plaintiff; because a sale in market overt is a title against all the world. But here, a lawful possession and endorsement, unless it was an endorsement for value, and without notice of the defect of Fraser's title, would not give a good title against all the world; it would give the endorsee no better title than Fraser had himself; that is, a title of possession only, leaving the property in the plaintiff.

For these reasons, we think there is no ground for arresting judgment for the plaintiff; and as to the award of a repleader, it is manifest that the plaintiff has taken his issue upon the material fact alleged in the third plea, which traversee has been found for him. The defendant, therefore, can have no right to demand a repleader, when it appears that his own plea is so defective, that even when unanswered, it forms no bar to the plaintiff's declaration.

Judgment for the plaintiff.

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*DEFRIES v. DAVIS. May 7.

The Court has no jurisdiction to discharge from custody an infant in execution for damages in an action of slander.

Talfourd, Serjt., obtained a rule calling on the plaintiff to show cause why the defendant, an infant 17 years old, should not be discharged out of the custody of the warden of the Fleet at the plaintiff's suit in this action.

The defendant had been taken in execution in February last at the suit of the plaintiff for 40*l.* damages, and 70*l.* 5*s.* costs, recovered in an action of slander, in which the plaintiff alleged and proved special damage.

The defendant petitioned for his discharge in the Insolvent Debtors' Court, but was opposed by the plaintiff, and remanded on the ground that being an infant he could not execute the warrant of attorney which is the condition of an insolvent's discharge.

Hoggins, who showed cause against the rule, contended that the Court had

no authority to interfere, the Insolvent Debtors' Court having an especial jurisdiction to relieve defendants in slander causes, and at the same time to award punishment for the slander. 7 G. 4, c. 57, s. 4.

Talfourd. The Insolvent Debtors' Court having been precluded from giving relief by the plaintiff's opposition, and so young a person being exposed to an imprisonment of four years for a juvenile indiscretion, the Court will interpose to mitigate such a punishment. In *Ex parte Deacon*, 5 B. & Ald. 759, it was held, that though a married woman, who, with her husband, was in execution for a debt contracted by her before coverture, could not be *discharged [*693] by the Insolvent Debtors' Court, she not being capable of executing a warrant of attorney and complying with the other terms required by the 1 G. 4, c. 119, s. 25, yet, she might be discharged by the court in which the action was brought.

TINDAL, C. J. We should be happy to interfere if it could be shown that we have any jurisdiction; but this case must be decided as if there were no Insolvent Debtors' Court; and we must be satisfied that when an infant is in execution for a malicious slander we can relieve him from the consequences. In the case of a wife, the husband being responsible, there may be ground for interfering, and that has sometimes been done, as was suggested in *Ex parte Deacon*. But in the case of an infant who has no property, we should exempt him from the only retribution he can make to the plaintiff if we acceded to this application.

The rest of the Court concurred.

Rule discharged.

ADLARD v. BOOTH. May 7.

Upon a declaration of two counts, the defendant paid into Court enough to cover the demand in the first, and obtained a verdict in the second; but having omitted to plead the payment, as required by the new rules, Held, that he was not entitled to costs.

THIS was an action on a bill of exchange and for work and labor.

The defendant paid money into Court upon the count on the bill of exchange sufficient to cover the amount of the bill, and obtained a verdict on the other count. He had omitted, however, to plead the payment into Court, in consequence of which the plaintiff had a verdict on the first count.

*The prothonotary having taxed costs for the defendant, and having [*694] declined to tax them for the plaintiff, on the ground that the defendant had succeeded in the action,

Petersdorff obtained a rule nisi for a review of the taxation, contending that the defendant could derive no benefit, as to costs, from the payment into Court, having omitted to plead it, as required by the rule which directs that "when money is paid into Court, such payment shall be pleaded in all cases."

Bompas, Serjt., who showed cause, ascribed this omission to sharp practice on the part of the plaintiff's attorney, and contended that the plaintiff ought not to profit by it.

TINDAL, C. J. The defendant has not availed himself of the right mode of taking advantage of his payment into Court: the rule says, "when money is paid into Court, such payment shall be pleaded in all cases."

I agree that if there had been any practice on the part of the plaintiff's attorney by which the defendant was misled, we should not permit him to be a sufferer; but it appears to me that the charge has not been made out, and therefore the rule must be discharged.

The rest of the Court concurred.

Rule absolute.

[*695] *GILLOW and Others, Executrix and Executors of GILLOW, v. Sir JOHN SCOTT LILLIE. *May 7.*

Defendant and an infant who had granted an annuity, covenanted jointly and severally for the due payment of the same: Held, that the infancy of the grantor did not avoid and exonerate the defendant from his separate contract.

THE declaration stated that, on the 14th of August, 1817, by a certain indenture, Thomas Lillie and the defendant, and each of them, did grant unto George Gillow, his executors, administrators, and assigns, for, and during the term of the natural lives of M. M. G., S. G., and R. G., in the said indenture mentioned, and the life and lives of the survivors and survivor of them, one annuity or clear yearly sum of 120*l*. And the defendant did thereby for himself, his heirs, executors, and administrators, covenant, promise, and declare, with and to the said G. Gillow, his executors, administrators, and assigns, that they the said T. Lillie and the defendant, or one of them, their or one of their heirs, executors, or administrators, should and would well and truly pay or cause to be paid unto the said G. Gillow, his executors, administrators, and assigns, for and during the natural lives of the said M. M. G., S. G., and R. G., and the lives and life of the survivors or survivor of them, the said annuity. And although the said M. M. G., S. G., and R. G., were then respectively living, the said Thomas Lillie and the defendant, had not, nor had either of them, well and truly paid or caused to be paid unto the said G. Gillow in his lifetime, or to the said plaintiffs as executrix, and executors as aforesaid, since the decease of the said G. Gillow, for and during the natural lives of the said M. M. G., S. G., and R. G., the said annuity.

Plea. That the said Thomas Lillie in the said indenture named, at the time of the making of the indenture was an infant within the age of twenty-one years, to wit, at the age of twenty years, whereby and according to the [*696] *statute in such case made and provided, the said indenture was and is void in law; and that, the defendant was ready to verify, &c.

Demurrer and joinder.

Talfourd, Serjt., in support of the demurrer, relied on *Han v. Ogle*, 4 Taunt. 10, where it was held that the several covenant of one grantor of an annuity was not avoided by the infancy of another who granted in the same deed.

Mereuether, Serjt., contra. In that case the attention of the Court was not directed to the language of the covenant, that they, or one of them should pay. And here, the defendant never intended that he alone and absolutely should be liable to pay the annuity; but only that he should be liable in case of default by the infant. But the engagement by the infant being void, the whole falls to the ground. To induce an infant to join in such an engagement is a misdemeanor; and the plaintiff, who is particeps criminis, cannot come into court to take advantage of his own wrong.

TINDAL, C. J. I am not prepared to say that if this were merely a grant of a joint annuity by the defendant and the infant, the consequence pointed out by my brother *Mereuether* might not have followed, and that the statutory avoidance of the contract, as to the infant, under 53 G. 3, c. 141, s. 8,—although I do not decide the point,—might not have avoided it as to both. But this action proceeds on the separate grant of the defendant; and there is no reason for holding a separate grant by a person of full age void, because the party to another separate grant in the same deed is an infant.

The rest of the Court concurred in giving Judgment for the plaintiffs.

[*697] *LESLIE and Others, Assignees of CUMBERLEGE, the Younger, a Bankrupt, v. GUTHRIE. *May 8.*

To an action by the assignees of a bankrupt ship-owner for the freight of a voyage to

India, accruing to him before his bankruptcy, the defendant pleaded, that the ship-owner before his bankruptcy assigned by deed the freight in question to I., in trust to discharge a debt due from the ship-owner to I., and to pay the surplus, if any, to the ship-owner; that the defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the debt, had been demanded of him by I.: Held, a good bar to the action.

THE declaration stated that the defendant, on the 1st of December, 1833, was indebted to John Cumberlege the younger before he became bankrupt, in 2000*l.* for freight payable by the defendant to the said J. Cumberlege the younger for the carriage and conveyance of goods and chattels in and on board of a certain ship or vessel whereof the said J. Cumberlege the younger then was owner. That the defendant afterwards, to wit, on, &c., in consideration of the premises respectively, then promised the said J. Cumberlege the younger, before he became bankrupt, to pay him the said sum of money on request; yet the defendant had not paid the said sum of money, or any part thereof, to the said J. Cumberlege the younger before he became bankrupt, or to the plaintiffs, assignees as aforesaid, or either of them, since the said J. Cumberlege the younger became bankrupt: to the plaintiffs' damage of 2000*l.*

Plea. That the said sum of 2000*l.* in which the defendant was in the declaration alleged to have been indebted to the said J. Cumberlege the younger, for freight, was a certain sum of money which became due for freight payable by the defendant for the carriage and conveyance of goods and chattels in and on board of a certain ship or vessel called the Neptune, of which the said J. Cumberlege the younger then was the owner, in and upon a certain voyage from the East Indies to England, being part of a certain voyage taken by the said ship or vessel from the port of London to the East Indies and back to [*698] *England, upon which the said ship or vessel at the time of making the indenture hereinafter mentioned was bound, and which voyage in the said indenture was recited and mentioned. That before the said J. Cumberlege the younger became bankrupt as in the declaration mentioned, to wit, on the 15th of October, 1831, by a certain indenture then made between the said J. Cumberlege the younger, before he became bankrupt as aforesaid, of the first part, Inglis and others of the other part, and which said indenture was duly sealed and delivered by the said J. Cumberlege the younger before he became bankrupt as aforesaid,—after reciting that the said Inglis and others had lent and advanced to the said J. Cumberlege the younger the sum of 1600*l.*, which the said J. Cumberlege the younger did thereby admit, and which in truth and in fact was the case, and that the said Inglis and others had applied to the said J. Cumberlege the younger, to assign over to them the freight and earnings of the said ship Neptune on her then present intended voyage from the port of London to the East Indies and back, and all charter-parties, contracts, agreements, and policies of insurance relating thereto, as collateral security for the due payment of the said sum of 1600*l.* so lent and advanced to him as aforesaid, and also of all such further sum or sums of money as should or might be due and owing by the said J. Cumberlege the younger to the said Inglis and others for costs of insurance, and upon the balance of all accounts between them, not exceeding in the whole the sum of 3000*l.*, and which the said J. Cumberlege the younger had consented and agreed to do,—the said J. Cumberlege the younger, before he became bankrupt as aforesaid, in pursuance of the said agreement, and for the considerations aforesaid, and in consideration of the sum of 10*s.* to the said J. Cumberlege *the younger paid by the said Inglis and others at or before [*699] the sealing of the said indenture, did bargain, sell, assign, transfer, and set over unto the said Inglis and others, their executors, administrators, and assigns, all and every the said sum and sums of money that then was or were due, or which should or might at any time or times thereafter arise and become due to him, the said J. Cumberlege the younger, his executors, administrators, or assigns, by any person or persons whomsoever, for or on account of the

freight, earnings, and profits of the said ship or vessel the Neptune, under or by virtue of any then existing or future charter-party or charter-parties, or other contract or contracts for or in respect of her said then intended voyage to India and back to England; and all and every policy or policies of assurance which then was or were, or thereafter might be effected on the said freight or freights; and all moneys which should or might become due and recoverable under or by virtue thereof, together with all charter-parties, contracts, agreements, and policies of insurance relating thereto; and all the right, title, interest, &c., whatsoever, at law or in equity, of him the said J. Cumberlege the younger, of, in, and to the same premises, and every part thereof; to hold, recover, and enjoy the said sum of money so due or to become due for the freight, earnings, and profits of the said ship or vessel the Neptune, as aforesaid, and all and singular other the premises thereby assigned or intended so to be, unto the said Inglis and others, their executors, administrators, and assigns; in trust nevertheless that they, their executors, or administrators, did and should in the first place thereout deduct, retain to, and reimburse themselves, the said sum of 1600*l.* with interest for the same at and after the rate of 5 per cent.

[*700] per annum, together with all *such further sum and sums of money as should or might be due to them upon the balance of accounts between them and the said J. Cumberlege the younger, and also all such sum and sums of money, as might be paid by them for insurance of the said freight or freights, with interest and commission thereon, not exceeding in the whole the sum of 8000*l.*; and in the next place, to pay over the surplus, if any, unto the said J. Cumberlege the younger, his executors, administrators, or assigns, or to such person or persons as he, or they, might appoint to receive the same; and to, for, and upon no other use, trust, intention, or purpose whatsoever; whereof the defendant before the said J. Cumberlege the younger became bankrupt as aforesaid, to wit, on the 1st of June, 1833, had notice. That from the time of the making of the said indenture, until and at the time when the said freight in the declaration mentioned became due, the said sum of 1600*l.*, so lent by the said Inglis and others to the said J. Cumberlege the younger as aforesaid, together with interest thereon, amounting together to a large sum of money, to wit, 1800*l.*, and certain sums of money paid by the said Inglis and others for insurance of the said freight, with interest and commission thereon, and also certain moneys due from the said J. Cumberlege the younger to the said Inglis and others, upon the balance of accounts between them and the said J. Cumberlege the younger, were due and owing from the said J. Cumberlege the younger to the said Inglis and others; all which said moneys amounted together to a large sum of money, to wit, 2384*l.* 4*s.* 11*d.*, and exceeded the amount due for freight as in the declaration mentioned; and which said sums of money before and at the time of the commencement of this suit remained, and still were due and payable and unpaid to the said Inglis and others, who at the time of the said bankruptcy of said J. Cumberlege *the younger, and at the [*701] time when the plaintiffs became and were such assignees as aforesaid, and from thence until and at the time when the said freight became due, and until and at the time of the commencement of this suit, claimed to be and were entitled to receive from the defendant the said sum of money due for freight as in the declaration mentioned, under and by virtue of the said indenture:— and that, the defendant was ready to verify, &c.

Replication. That at the time of making the said indenture in the said plea mentioned, no charter-party, contract, or agreement whatsoever, for, or in respect of the said freight of the said ship or vessel during the voyage of the said ship or vessel from the East Indies to England,—and for and on account of which voyage the said sum of 2000*l.* in the declaration was mentioned to have become due and payable,—had been or was made, entered into, or agreed upon, by or on behalf of the said J. Cumberlege the younger, then being the owner of the said ship or vessel as aforesaid; and that no freight or money in

respect thereof was then due or owing to the said J. Cumberlege the younger, in respect of the said voyage in the indenture mentioned ; and that the plaintiffs were ready to verify.

Demurrer and joinder.

Sir. *W. Follett* in support of the demurrer. The replication is ill as tendering an immaterial issue.

It will be contended, however, that the plea is no answer to the action because the assignment of freight by Cumberlege before his bankruptcy, on which the defendant relies, was void ; and *Robinson v. Macdonnell*, 5 M. & S. 228, will be cited as establishing that proposition. In that case, **Robinson and Co.* being indebted to the firm of Sharp, by deed of December 15th, 1810, [*702] assigned to the Sharps, as a security for their debt, all the freight, earnings, profits, and sum and sums of money then due, or which thereafter might become due on account of a certain ship, and the benefit of all agreements for the hire of the said ship, and all the right, title, and interest of *Robinson and Co.*, any or either of them, to the said several premises. The Sharps became bankrupt in October, 1812, and *Robinson and Co.* in January, 1813. The ship had sailed on a whaling voyage in May, 1812, and returned in December, 1813. And the defendants, assignees of the Sharps, having under the deed of December 15, 1810, taken possession of some oil, part of the profit of the voyage, the plaintiffs, assignees of *Robinson and Co.*, sought to recover the value in trover ; and Lord ELLENBOROUGH said, " if that deed is to extend to all freight, earnings, and profits, in subsequent voyages, it is open to the objection made by the Lord Chancellor in *Speldt v. Lechmere*, that it will for ever separate the ship and earnings." That, however, was not the only ground of the judgment, for he goes on to say, " there is still another objection, however, to the claim of the oil under the deed of 15th of December, 1810, which is this, that the oil had no existence, actual or potential, at the time this deed was made ; and to make a grant or assignment valid, the thing which is the subject of it must have existence, actual or potential, at the time of such grant or assignment ; and upon this principle, an assignment of sheep which the lessee was to deliver to the assignor at the end of the lessee's term, or of the wool which should grow upon such sheep as the assignor should thereafter buy, have been held inoperative, because the assignor had not, at the time of the assignment, that which he was professing to assign, either actually or *potentially, but in possibility only. *Wood and Foster's Case*, 1 Leon. 42, [*703] *Grantham v. Hawley*, Hob. 132. Now here, at the time of this assignment, the assignors had no property, actual or potential, in this oil : it was altogether matter of chance whether any of it would have been obtained ; and even the voyage in which it was obtained does not appear to have been in contemplation. For these reasons we think the defendants, have no claim under a deed of 15th of December, 1810." And what Lord ELDON said in *Speldt v. Lechmere*, 13 Ves. 588,—“ as to the earnings of the ship, this is not like the case of *Mestaer v. Gillispie*, 11 Ves. 621, upon the benefit of a certain charter-party, but if the defendants are to take the earnings of this ship, and not the ship itself, they would be separated for ever,”—he afterwards explained in *Re Ship Warre*, 8 Price, 269, note, where the position to which Lord ELLENBOROUGH had referred is considerably limited. “ I should find it extremely difficult in considering the question, to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first-intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings for ever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid.” The present case, however, is materially distinguishable from *Robinson v. Macdonell*, for there the assignment was general, and might occasion the inconvenience of separating the ship and freight for ever : and it did not appear whether the profits accrued before or after the bankruptcy of the assignor. Here the assignment is only of the freight of a single

[*704] and specified voyage ; it became due before Cumberlege was a *bankrupt ; and *Douglas v. Russell*, 4 Simon 524, conclusively establishes the validity of such an assignment. There, A., a ship-owner, assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. : the outward freight was paid to A. before the ship sailed : the charter-party afterwards was delivered to B. by A.'s direction, and B. gave notice of the assignment to C. : afterwards, but before the ship returned, A. became bankrupt : it was held, that the homeward freight was not in A.'s order and disposition at his bankruptcy, and that B. was entitled to it.

Then, if the assignment in this case were valid, even in equity, the plaintiffs are precluded from suing ; for with respect to the bankrupt's rights and liabilities they cannot stand in a better position than the bankrupt : they cannot recover, in a court of law, money which a court of equity would compel them to pay over to the parties entitled under the deed. Thus, in *Gladstone v. Hadwen*, 1 M. & S. 526, Lord ELLENBOROUGH cites with approbation what fell from WILLES, C. J., in *Scott v. Surman*, Willes, 402, " My notion is (and that opinion is confirmed by many authorities cited by Mr. Durnford in a note), that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are, of the estate of their ancestors and testators ; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts. And I found this opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point.

[*705] *As to the reason of the case, I rely upon the rule concerning circuitry of action ; for I think it would be absurd to say, that anything shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them, by which they will be obliged to refund and account, and, according to the case of *Burdett v. Willet*, will likewise have costs decreed against them, and so the effects of the bankrupt, which ought to be applied to the discharge of his debts, will be wasted to no purpose whatever." And in *Crowfoot v. Gurney*, 9 Bingh. 372, where S. being indebted to J., and G. being indebted to S., S. requested G. to pay J. whatever might be due from G. to S., and G. promised J. to do so as soon as the amount was ascertained ; but after the amount had been ascertained, and before it was paid, S. became bankrupt ; it was held, that the assignees of S. could not sue G. for the amount of his debt to S.

It may be contended that the legal interest in the freight in question, passes to the plaintiffs as trustees for *Inglis & Co.*, and *Carvalho v. Burn*, 4 B. & Adol. 382, may be cited as an authority, that if, upon a transfer like that by Cumberlege any residuary interest be reserved, the assignees of the transferor, should he become bankrupt, take the legal estate in the property transferred, in order to secure the residuary interest for the creditors. But here there could be no residuary interest, for it is averred and not controverted that *Inglis's* claim greatly exceeded the amount of the freight assigned as a security for it.

Bompas, Serjt., contra. In *Robinson v. Macdonnell*, it is laid down without qualification that the property in *the earnings of a ship cannot be separated from the property in the ship, and that decision cannot be considered as overruled by Lord ELDON's subsequent dicta. For freight has always been held an inseparable incident of the ship ; as in the case of abandonment ; which transfers freight subsequently earned : *Case v. Davidson*, 5 M. & S. 79 ; or of assignment of the ship ; the assignee taking care to sue for the freight in the name of the assignor : *Morrison v. Parsons*, 2 Taunt. 407. Though if a ship be sold pending a voyage, should the ship-owner become bankrupt, the freight passes to his assignees under the bankruptcy : *Chinnery v. Blackburne*, 1 H. Bl. 17, n. ; *Splidt v. Bowles*, 10 East, 279. At all events, the transfer of a claim

to a debt will be no bar to the suit of the transferor's assignees under a bankruptcy, unless the debtor consented to the arrangement; it is his consent which alone can give it validity in a court of law: *Crowfoot v. Gurney*, 9 Bingh. 372; *Ex parte Monro*, Buck. 300. In the latter case, a bond debt was assigned by the obligee, and the bond delivered to the assignee, but notice of the assignment was not given to the obligor previous to the bankruptcy of the obligee, and it was held that the debt remained in the order and disposition of the bankrupt, within the statute 21 Jac. 1, c. 19. In *Cuxon v. Chadley*, 3 B. & C. 591, where J. C. being indebted to S., and R. C. being indebted to S. and also to J. C., it was orally agreed between the three that S. should transfer the debt due to him from J. C. to the account of R. C., and S., in pursuance of such agreement, delivered to R. C. an account, in which R. C. was charged with the debt due from J. C. to S., it was held that J. C. was not thereby discharged: and that case *was confirmed by *Wharton v. Walker*, 4 B. & C. 163, and *Best v. Argles*, 2 Cr. & Mee. 394. At all events, according to the doctrine established by *Carvalho v. Burn*, the plaintiffs, as assignees under *Cumberlege's* bankruptcy, have the legal interest in the freight in question; for by the contract itself, a residuary interest is reserved to *Cumberlege*, and the plaintiffs take under the contract and according to the terms of the contract, and not according to the uncertain event of facts arising subsequently. At the time of the contract it was at least uncertain whether the freight to be earned would amount to more or less than *Cumberlege's* debt to *Inglis*, and if there were only a contingent eventual benefit, the assignees ought to take the legal interest to secure any surplus that might be forthcoming. [*707]

Sir *W. Follett* in reply. The principle of *Carvalho v. Burn* applies only to a tangible and not a mere speculative residuary benefit. *Ex parte Monro*, and the cases of that class, turned upon the doctrine of reputed ownership, which can apply only to the case of a secret transfer of the property in visible objects, and not to the transfer of a debt. Besides, here the party liable to pay the freight had notice of the transfer of his debt, and could no longer have considered *Cumberlege* as entitled to receive it; and though, upon the transfer of a debt, the assent of the debtor may be necessary to entitle the transferee to sue in his own name, yet payment to the transferee would be a sufficient discharge to the debtor as against the transferor, and consequently against his assignees, who cannot stand in a better situation than himself. *Best v. Argles* only decided that a mere authority to receive a debt did not with such *certainty amount to a transfer as to induce a court of equity to enforce it. [*708]

TINDAL, C. J. The question argued in this case was, whether the right to the freight of the ship *Neptune* for a voyage to the East Indies and back passed to the assignees of *Cumberlege* the owner, on his becoming bankrupt, or had passed previously to certain creditors as a security for money advanced by them to *Cumberlege*; because, if before the bankruptcy it passed to any third person, the assignees are not in a condition to claim it.

The two grounds on which it has been argued that the freight might have passed to the assignees, are, first, that according to the decision in *Robinson v. Macdonnell*, unearned freight cannot be the subject of assignment; and undoubtedly if that doctrine is to be taken as widely as it is laid down in some parts of that case, the plaintiffs might be entitled to sue.

Secondly, that the assignees are at least the legal owners of this freight, according to the decision in *Carvalho v. Burn*, by which it has been established that if upon a transfer by a trader before bankruptcy there be a reservation of any reversionary interest which may accrue to the transferor or his assignees, they shall take the legal interest in the property transferred, and, with a view to assure themselves the benefit of the reversion, be trustees for the parties who claim an interest under the transfer.

Now *Robinson v. Macdonnell* does appear in one part of the judgment to lay it down that future earnings are not assignable. But that is not the only ground

on which the decision of the Court proceeded ; there are others perfectly distinct, and sufficient of themselves to warrant the judgment ; and even if that were the only *ground on which the Court decided, is there no distinction between that case and the present ? The deed there assigned all freight, earnings, profits, and sums of money then due, or which might thereafter become due on account of the ship, and the benefit of all agreements for the hire of the said ship. Upon which Lord ELLENBOROUGH said, " If that deed is to extend to all freight, earnings, and profits, in subsequent voyages, it is open to the objection made by the Lord Chancellor in *Speldt v. Lechmere*, that it will for ever separate the ship and earnings." In the present case, there is no such general assignment of the earnings of future voyages, but merely of the earnings by virtue of any charter-party or other contract for and in respect of the ship's then intended voyage to India and back to England. If, therefore, the inconvenience of separating for ever the ship and earnings operated on the Court in *Robinson v. Macdonnell*, that inconvenience has no application to the present case. Again, in *Robinson v. Macdonnell*, it did not appear distinctly whether the earnings claimed under the deed became due before or after the bankruptcy of the party who assigned them. Here they were clearly due before the bankruptcy ; and the assignment has been, in effect, the assignment of a specific sum due before the bankruptcy. However, giving the fullest effect to the decision in *Robinson v. Macdonnell*, has that case never been impeached ? First, we find in the note to the case in Price, *Re Ship Warre*, 8 Price, 269, Lord ELDON says, " I should find it extremely difficult, in considering the question, to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first-intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings for ever from the ship [710] *itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon the separation of title till that debt should be paid ;" and then in *Douglas v. Russell*, 4 Simons, 524, it is expressly ruled that an assignment by the owners of a ship of freight to be earned is good. That case, therefore, furnishes an answer to the objection, unless any difficulty arise from *Cumberlege* being apparent owner of the freight ; but as it is expressly averred that the party liable to pay the freight had notice of the transfer, the consequences of apparent ownership are out of the question.

That brings me to the second point of inquiry, whether the decision in *Carvalho v. Burn* applies to the circumstances of the present case. According to the principles of courts of equity, where, upon a transfer by a trader before his bankruptcy any reversionary interest accrues to his assignees, the immediate legal interest in the property transferred vests in them as trustees for the parties entitled in the first instance, and then for the creditors under the bankruptcy ; and all suits in respect of the immediate interest must be brought in the name of the trustees.

But there is an averment in this declaration which puts an end to any objection arising out of that principle ; for it is alleged, that from the time of the making of the indenture, until and at the time when the said freight in the declaration mentioned became due and payable, the said sum of 1600*l.* so lent by the said Inglis and others to the said J. *Cumberlege* the younger, as aforesaid, together with interest thereon, amounting together to a large sum of money, to wit, 1800*l.*, and certain sums of money paid by the said Inglis, and others for insurance of the said freight, with interest and commission thereon, [711] and also certain moneys payable by the *said J. *Cumberlege* the younger to the said Inglis and others upon the balance of accounts between them and the said J. *Cumberlege* the younger, were due and owing from the said J. *Cumberlege* the younger to the said Inglis, and others, all which said moneys amounted together to a large sum of money, to wit, 2384*l.* 4*s.* 11*d.*, and exceeded the amount due for freight as in the declaration mentioned. It is impossible, therefore, that there should be any residuary benefit accruing to the

assignees; and as there was nothing for them to take, our judgment must be for the defendant.

PARK, J. The great pressure made by my brother *Bompas*, has been on the case of *Ex parte* *Monro*; but that case turned on the statute of James touching reputed ownership. There could be no reputed ownership here; for the defendant had express notice of the transfer by *Cumberlege*; and though it is contended that, with a view to obviate the objection arising on the score of reputed ownership is not sufficient to show that the party liable to pay had notice of the transfer, but that it ought also to be shown that he assented to it, no authority has been cited for that position. In *Ex parte* *Monro* it was contended that the delivery of the bond not only took the ordering and disposition of the debt out of the bankrupt, but at the same time put it completely in the power and possession of the assignee of the bond. But it was held that the debt remained in the ordering and disposition of the bankrupt within the statute 21 Jac. 1, c. 19.

GASELEE, J. I am of the same opinion. It appears on this record, that there was no surplus beneficial interest arising out of the transfer in question, consequently, the principle of *Carvalho v. Burn* does not *apply, and [*712] the legal estate in the property did not pass to the assignees.

BOSANQUET, J. I am of the same opinion. In this case the assignment was before the bankruptcy, and the freight assigned became due before the bankruptcy; and the assignment is not of the earnings of all future voyages, but merely the earnings by virtue of any charter-party or other contract for or in respect of the ship's then intended voyage to India and back to England. The case, therefore, materially differs from those in which there has been an assignment to separate the freight from the vessel in all time to come: here the assignment was only for an intended voyage on which the ship was actually bound; and we have the opinion of Lord ELLENBOROUGH, and Lord ELDON, that such an assignment will in equity avail against the assignees of a bankrupt, where there is no objection on the score of the reputed ownership continuing in the assignor. It is contended, however, that at least the legal interest in the freight in question passes to the assignees, unless the assignment were such as to exclude any residuary benefit to the assignor; and great reliance is placed on the decision in *Carvalho v. Burn*. But there, a merchant who resided at Liverpool, was in the habit of making consignments of goods to his agent in South America, for sale, on the faith of and against which consignments the consignor drew bills in proportion to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the endorsement of the consignor's correspondent in London. Some of the bills so endorsed were refused acceptance by the agent; the endorser on receiving information that they had been so dishonored, requested that the consignor would order his agent, in case he did not pay the consignor's drafts, immediately to hand over to the endorser's agent such property *as he had of the consignor's of an equivalent value to the bills that should not be paid by him; the consignor [*713] agreed to do so, but became bankrupt before his order to transfer the goods reached South America; and it was held that the bargain between the consignor and his correspondent did not operate as a legal or equitable assignment of the property in the consignor's goods held by his agent, but that they remained the property of the consignor at the time of his bankruptcy, and passed to his assignees.

In the present case the freight has been assigned for a debt due from the assignor before his bankruptcy,—a debt, exceeding the whole amount of the freight; there was no residuary benefit therefore, and the freight did not pass to the bankrupt's assignees.

With respect to the objection raised on the score of reputed ownership on the authority of *Ex parte* *Monro*, the notice of the transfer given to the defendant excludes any idea of reputed ownership in the bankrupt.

Judgment for defendant.

WILKINSON and STENNETT v. HALL and Another. *May 8.*

Tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise.

THE declaration stated, that defendants, before and at the time of the giving the notice to quit and making the demand thereafter mentioned, and from thence until a certain day, to wit, the 14th of June, 1834, held and enjoyed one undivided moiety or half part, the whole into two equal parts to be divided, of and in certain tenements, to wit, a certain quay or wharf, and certain ware-
[*714] houses, vaults, and buildings, with the appurtenances, *as tenants thereof, to the plaintiff Thomas Wilkinson, and one other undivided moiety thereof, as tenants thereof to the plaintiff William Stennett; that is to say, as such tenants thereof respectively from year to year, for so long a time as the plaintiffs and defendants should respectively please: the reversion of the one undivided moiety of the said premises with the appurtenances during all that time belonging to the plaintiff Thomas Wilkinson, and the reversion of the other undivided moiety thereof during all that time belonging to the said William Stennett: and thereupon, whilst the defendants so held and enjoyed the said undivided moieties of the said tenements, with the appurtenances, as tenants thereof to the plaintiffs respectively as aforesaid, and whilst the said reversions thereof respectively so belonged to the plaintiffs respectively as aforesaid, to wit, on the 11th of December, 1833, the plaintiffs gave notice in writing to the defendants, and thereby demanded of and required the defendants to quit, and to deliver up the possession of the said tenements with the appurtenances to the plaintiffs, or either of them, on the said 14th of June, 1834, provided the defendants' tenancy of the said premises originally commenced at that period of the year, or otherwise to quit and deliver up the possession of the said premises at the end of the current year of their tenancy thereof which should expire next after the end of half a year from the time of their being served with the said notice. And the plaintiffs averred, that the tenancies aforesaid ended and were duly determined by the said notice. That after the determination of the said tenancies of the defendants as aforesaid, and whilst the defendants continued in possession of the said tenements with the appurtenances as aforesaid, and the said plaintiffs were so entitled to the possession thereof as tenants in
[*715] common thereof, to wit, on, &c., the plaintiffs, *by a certain notice in writing then made and signed by them, and delivered to the defendants, demanded and required the defendants to deliver the possession of the said tenements with the appurtenances to the plaintiffs; nevertheless the defendants not regarding the statute in such case made and provided, did not nor would, at the determination of the said term and tenancies as aforesaid, deliver the possession of the said tenements with the appurtenances, or any part thereof, to the plaintiffs, or either of them, according to the said notice so given, and the demand so made as aforesaid, but wholly neglected and refused so to do; and on the contrary thereof, wilfully held over the said tenements with the appurtenances, after the determination of the said term, and tenancies, and after the said notice so given as aforesaid, and the said demand so made as aforesaid, for a long space of time, to wit, from thence hitherto, during all which time the defendants did keep the plaintiffs, and each of them, out of the possession of the said tenements with the appurtenances, and every part thereof; they, the plaintiffs, during all that time being entitled to the possession thereof as tenants in common thereof; contrary to the form of the statute in such case made and provided. And the plaintiffs averred that the whole of the said tenements with the appurtenances, during the said time of holding over the same, and keeping the plaintiffs out of the possession thereof as aforesaid, were of great yearly value, to wit, of the yearly value of 200*l.*; and by reason of the premises, and by force of the statute in such case made and provided, the defendants became liable to pay the

plaintiffs a large sum of money, to wit, the sum of 2666*l.* 13*s.* 4*d.*, being at the rate of double the yearly value of the said tenements with the appurtenances, for so long as the same were so detained as aforesaid; and thereby, and by force of the said statute, an action *had accrued to the plaintiffs to demand and have, and they thereby demanded of and from the defendants the said sum of 2666*l.* 13*s.* 4*d.*: yet the defendants had not paid the said sum of money above demanded, or any part thereof; to the damage of the plaintiffs of 200*l.*

Plea. That the defendants did not before, or at any time of the said times in the declaration mentioned, or at any other time whatsoever, hold or enjoy the said undivided moieties of and in the said tenements in the declaration respectively mentioned, or either of them, or any part thereof, as tenants to the plaintiffs jointly, upon any joint demise or letting whatsoever by them of the same, or any part thereof, to the defendants; and that, the defendants were ready to verify, &c.

Demurrer and joinder.

Merewether, Serjt., in support of the demurrer. This action being for double value, and not for double rent, is founded not on contract, but on the defendants' wrong in holding over the premises after the expiration of the lease. And the plaintiffs ought to join in the action, as they would be entitled to do in an action of trespass for mesne profits: *Goodtitle v. Tombs*, 3 Wils. 118. It is clear they ought to join in trespass for damage to the property they hold in common: *Com. Dig. Abatement*, B. 10, F. 6; and to avow jointly in replevin: *Sir W. Jon.* 258; it has been held also, that they may join in account, *Martin v. Crompe*, 1 *Ld. Raym.* 340; and in covenant, *Midgley v. Lovelace*, *Carth.* 289. It is true, that in *Powis v. Smith*, 5 B. & Ald. 850, it was held that tenants in common could not join in assumpsit for use and occupation. But according to the report of that case in 1 *Dowling and Ryland*, 492, *BAYLEY, J.*, said, "Where one action was sufficient, it would be a manifest injury *to the tenant that he should be put to the expense and trouble of appearing to two." However, the present action is founded on a tort, for which it is clear tenants in common may jointly sue.

Comyn, contra. This is an action of debt; taking it, however, to be founded on a tort, it is in effect an equivalent for an action for use and occupation in which the amount of damages is settled by statute. If so, the case of *Powis v. Smith* is in point for the defendants. It is clear that, in respect of estate, tenants in common must sever; in respect of contract, they can only join where they are parties to the contract: *Lit. s.* 302, 315, 316. If the defendants had been tenants under a demise from the plaintiffs, they might have taken issue on the plea instead of demurring; but if there was no joint demise, the plaintiffs have several interests, and can only recover severally, whether in ejectment or in suits for rent.

Merewether. The argument for the defendants would be just, if this were an action for double rent, because the fixed rent could only be claimed jointly by virtue of a joint demise. But this is an action for double value; when that value is ascertained, it belongs to tenants in common in moieties, and it is in case of the occupier that he should be subject to one action only.

TINDAL, C. J. This case may be determined by considering what is the situation of an occupier who holds under two tenants in common without any joint demise; for this action under the statute comes in place of the action which would have lain for the rent if the tenancy had not been at an end. Now *Littleton* says, *s.* 316, "If two tenants in common make a lease of their tenements to another for a term of years, rendering *to them a certain rent yearly during the term, if the rent be behind, &c., the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personality." And in *s.* 317, "But in an avowry for the said rent they ought to sever, for this is in the realty, as the assize is above." So if

there be no joint demise, there must be several actions of debt for rent, for a joint action is not maintainable except upon a joint demise. Here, upon the face of the declaration, it appears that the defendants held a moiety of the premises under one of the tenants in common, and another moiety under the other. In case of a distress and replevin, therefore, there must have been separate avowries. The damages which the statute gives, being a compensation for rent, ought to stand on the same footing as rent itself; and if the plaintiffs could neither avow jointly nor sue jointly in debt for rent, so neither can they sue jointly for that which stands in the place of rent. Further than this, parties cannot join in an action for damages, unless the damages when recovered would accrue to them jointly. But how can two tenants in common have a joint interest in the proceeds of several demises? Suppose, after the double value had accrued, one of the two were to die: his share in the damages would go one way, and his share in the land another: the damages to his executor, the land to his heir. *Cutting v. Derby* 2 W. Blk. 1077, affords an illustration of the principle, where, in action for double value by one tenant in common, the court said, "Where one certain injury is done to both tenants in common they shall have one certain remedy; but when the injury is separate they may have several actions."

It is true that that case does not go the length of saying that the tenants in common *must* sever, only that *they may: but it shows clearly that they [*719] have several interests in their share of the damages.

PARK, J., and GASELEE, J., concurred.

BOSANQUET, J. I am of the same opinion: and we are borne out by the language of the statute 4 G. 2, c. 28, s. 1, which enacts, "that in case any tenant shall wilfully hold over any lands, tenements, or hereditaments after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agents thereunto lawfully authorized, then and in such case such person or persons so holding over shall, for and during the time he, she, and they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements, and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the value of the lands."

According to the declaration, the two undivided moieties of this property were so demised that the defendants held one undivided moiety under one of the plaintiffs, and the other undivided moiety under his co-tenant. There were in fact two separate reversions. Now it is clear the statute only contemplated the case of one entire reversion.

Judgment for defendants.

[*720]

*GRIFFITH'S Fine. May 8, 12.

Passing of fine after death of conusee.

Two of the conusors in this fine lived in India; the third in Wiltshire, where his conusance was taken April 4, 1835.

The conusee, however, had died, the 29th of March, though his death was unknown to the third conusor on the 4th April, 1835; and the statute for the abolition of fines, 3 & 4 W. 4, c. 74, came into operation after sending out the *dedimus* to India, and before its return.

The fine was levied to enable the conusee to sell some property in execution of the trusts in a will.

Under these circumstances, the Court, on the application of *Merewether*, Serjt., allowed the fine to pass as to the two conusors in India.

ARAYNE v. LLOYD. *May 9.*

No rule for interpleading will be granted after suit has been stayed by injunction.

A RULE had been obtained in this cause, calling on certain persons to interplead, but it appearing that the Court of Chancery had stayed the suit by an injunction on the 16th of April, the rule for interpleading was

Discharged.¹

Wightman and *Colquhoun* in support of the rule.

Atcherley, Serjt., contra.

¹ See *Sturgess v. Claude* 1. Dowl. Pr. C. 505.

*BOURDEAUX v. ROWE. *May 9.*

[*721]

A commission to examine witnesses may be granted for the trial of an issue directed by the Court of Chancery.

Spankie, Serjt., having obtained a rule nisi, for a commission to examine witnesses in this cause,

W. H. Watson opposed it, on the ground that this was not in the language of the statute which authorizes such commissions, "an action pending" in this Court, but an issue out of Chancery which was ordered to be tried here; and that therefore the application for a commission should have been made to the Court of Chancery.

Sed per Curiam. Anything which affects the circumstances of the trial is the proper subject of application here. Rule absolute.

KELCEY, Assignee of FORDRED, an Insolvent, v. MINTER and Another. *May 9.*

A sale of the goods of an insolvent under a *fi. fa.*, issued upon a warrant of attorney given by the insolvent, is invalid if it take place after the commencement of the insolvent's imprisonment, notwithstanding the goods may have been seized under the writ before the imprisonment.

To trover by the assignee of William Fordred, an insolvent, the defendants pleaded, that before the said William Fordred subscribed his petition, to wit, in or as of Michaelmas term, in the third year of the reign of our lord the now king, in the Court of our said lord the king before the king himself, the defendants by the consideration and judgment of the same Court, recovered *against the said W. Fordred a certain debt of 600*l.*, and also 65*s.* [*722] costs, which in and by the same Court were adjudged to them, with their assent, for the damages which they had sustained, as well by occasion of the detaining of the said debt, as for their costs and charges by them about their suit in that behalf expended, whereof the said W. Fordred was convicted; as by the record, &c., more fully appeared; that the said judgment being in full force, and the said debt and damage being wholly unpaid, the defendants for the obtaining satisfaction thereof, afterwards and before the said W. Fordred subscribed his said petition, to wit, on, &c., aforesaid, sued and prosecuted out of the said Court of our said lord the king before the king himself, a certain writ of our said lord the king, called a *fieri facias*, directed to the sheriff of Kent, by which writ our said lord the king commanded the said sheriff that of the goods and chattels of the said W. Fordred in the bailiwick of the said sheriff, he should cause to be levied the debt and damages aforesaid; and that he should have that money before our said lord the king at Westminster, on 28d of January, in the said year last aforesaid, to render to them for their debt and damages aforesaid, and that the said sheriff should then have there that

writ: which writ afterwards and before the delivery thereof to the said sheriff, as thereafter mentioned, and before the said W. Fordred subscribed his said petition, to wit, on, &c., was duly endorsed to levy 444*l.* 1*s.* 7*d.*, besides sheriff's poundage, officers' fees, and all other incidental expenses; and which writ afterwards and before the return thereof, and before the said W. Fordred subscribed his said petition, to wit, on, &c., was delivered to one D. G. James, Esq., then being sheriff of the said county, to be executed; by virtue of which writ the said D. G. James so being such sheriff as aforesaid, afterwards and before the [*723] said W. Fordred so subscribed his said *petition, to wit, on, &c., seized and took the goods and chattels in the declaration mentioned, for the purpose of levying the moneys by the endorsement directed to be levied; which seizure and taking under the said writ, were the same conversion and disposition as in the declaration mentioned; and that, the defendants were ready to verify.

Replication. That before the said judgment in the plea mentioned was recovered against the said W. Fordred by the defendants, to wit, on the 9th of January, 1833, the said W. Fordred executed a certain warrant of attorney, directed and addressed to one James Boxer and one Holden Walker, described as two of the attorneys of his Majesty's Court of K. B. at Westminster, jointly and severally, or to any other attorney of the same Court; and thereby, amongst other things, desired and authorized them, the attorneys therein named, or any one of them, or any other attorney of the same Court of K. B. aforesaid, to appear for him the said W. Fordred in the said Court as of Michaelmas term then last, Hilary term then next, or any other subsequent term, and then to receive a declaration for him in action of debt for 600*l.* for money borrowed, at the suit of John Minter and Richard Hobday the defendants in the present suit; and thereupon to confess the same action, or else to suffer a judgment by nil dicit, or otherwise, to pass against him in the same action, and to be thereupon forthwith entered up against him of record of the said Court for the said sum of 600*l.*, besides costs of suit; as by the said warrant of attorney remaining of record in the said Court of our said lord the king before the king himself, reference being thereunto had, would amongst other things more fully appear: that the said judgment in the plea mentioned was afterwards, to wit, on, &c., obtained upon the said warrant of attorney; and the said writ, in the [*724] said plea mentioned, was issued upon the said judgment *so obtained as aforesaid: that the imprisonment of the said W. Fordred, from which he was so discharged as in the declaration mentioned, commenced on the 8th of February, 1833; and that the said goods and chattels in the declaration mentioned, which had theretofore been so seized and taken, as in the plea mentioned, were sold under the said writ so issued and judgment so obtained as aforesaid, after the commencement of the imprisonment of the said W. Fordred as aforesaid, contrary to the true intent, meaning, and provisions of the statute, in that case made and provided; and that, the plaintiff was ready to verify, &c.

Rejoinder. That before and at the time of the executing of the said warrant of attorney, the said W. Fordred was indebted to the defendants in a large sum of money, exceeding the sum for which the said warrant of attorney was so given, and for which the said execution so issued as aforesaid, and exceeding the value of the said goods, chattels, and effects, to wit, the sum of 600*l.* That the said W. Fordred, being so indebted as aforesaid, the defendants required the said W. Fordred to pay them the said sum of money, or to give them security for the same by a warrant of attorney to confess judgment for the said sum of 600*l.*; and threatened the said W. Fordred to sue him for the same, unless he would make such payment, or give such security: Whereupon the said W. Fordred, for the purpose of avoiding such suit, and yielding to the request and importunities of the defendants in that behalf, involuntarily and by such compulsion as aforesaid, executed the said warrant of attorney as a security to the defendants, for the sum of money so due and owing to them as afore-

said, and which sum of money at the time of the alleged finding and conversion of the said goods, chattels, and effects was, and remained due and owing from the said W. Fordred to the defendants; and still was in *arrear and unpaid to the defendants; and that, they were ready to verify. [*725]

Demurrer and joinder.

Bayley, in support of the demurrer.

The rejoinder tenders an immaterial issue, and does not answer the material fact alleged in the replication—namely, that the sale did not take place until after the commencement of the insolvent's imprisonment. The 7 Geo. 4, c. 57, s. 34, enacts, "that in all cases where any prisoner who shall petition the Court for relief under this act, shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, shall and may be a creditor or creditors for the same under this act."

Manning, contra. If the defendants had been the party who sold the goods, the objection raised on the part of the plaintiff might have some weight; but the only conversion which the defendants admit on their plea, and for which they are responsible, is the seizure of the goods under the writ before the insolvent's imprisonment. It was the sheriff's duty to have sold the goods at once, and had he done so, no question could have arisen. He, perhaps, may be liable to an action at the suit of the *plaintiff, *Notley v. Buck*, 8 B. & C. 160, but the defendants discharged themselves from any claim, by [*726] showing a seizure under execution for a bona fide debt, prior to the insolvent's imprisonment. For aught that appears to the contrary, the money produced by the sale may be now in the sheriff's hand, awaiting the direction of the Court as to its distribution.

TINDAL, C. J. In *Notley v. Buck* it was expressly averred in the pleadings that the sheriff had notice of the bankruptcy: he, therefore, was plainly a wrong-doer; and though the Court did not say that an action would lie against the execution creditor, yet, on general principles, where a thing is done through the procurement of another, the procurer is as much liable as the agent. The sheriff and his employer sail in the same boat. In the language of the writ, the sheriff is to make the debt; it must be presumed that things proceed in their ordinary course, and that when the sheriff has sold the goods, he has paid over the money to the execution creditor. Besides, the replication here alleges that the sale took place by the authority of the defendants. The case, therefore, seems to me to be brought within the meaning of the statute; a sale of goods after the imprisonment of the insolvent, upon process which issued before.

The other Judges concurred.

Judgment for the plaintiff.

*WATSON v. MASKELL.

[*727]

Upon setting off one judgment against another, subject to the attorney's lien, that lien must be taxed as between attorney and client.

UPON a rule for setting off the amount of a judgment obtained by one of these parties, against the amount of a judgment obtained by the other, the Court having decided that the set off could only be allowed subject to the lien of Watson's attorney for his costs in the particular cause,—see *antè*, p. 366,—

A question now arose whether this lien was to be enforced to the amount of

the attorneys' costs as between attorney and client, or only to the amount of his costs, as they would be taxed between party and party.

By rule 93, Hil. 2 W. 4, "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

Humfrey contended that under this rule the lien must be calculated as between attorney and client. There are many expenses which an attorney would be authorized and bound to incur for his client, and which his client would be bound to repay, which, nevertheless, could not be allowed on taxing costs as between party and party; as payments for stamps; for the extra costs of an outlawry, *Jenkins v. Biddulph*, 4 Bingh. 160; special retainers, and the like; the set-off in this case, therefore, would be to the prejudice of the attorney, if he were not allowed to enforce his lien to the amount of his costs as between attorney and client.

[*728] **Goulbourn*, Serjt., and *Hayes*, contra. Under this rule the attorney can only retain his costs as between party and party. The law does not recognise extra costs: *Sinclair v. Eldred*, 4 Taunt. 7; *Hathaway v. Barrow*, 1 Campb. 151; *Webber v. Nicholas*, 1 Ry. & Moo. 419; *Hodges v. Earl of Litchfield*, Antè, 500; and it would be a great hardship to make the adverse party pay indirectly, through an attorney's lien, costs which he could not be called on to pay directly. No case has decided that an attorney can recover such extra costs against his client, much less that he can retain them against an adverse party.

TINDAL, C. J. The question is, whether, upon the proper interpretation of the rule of Hil. 2 W. 4, an attorney, upon a set-off of judgments between conflicting parties, is entitled to assert his lien on the judgment in favor of his own client, to the extent of his bill of costs, as between him and his client, or to the extent only which his client could call on the opposite party to pay it.

The question involves two propositions: first, what was the extent of the lien before the new rule; secondly, supposing the lien to have formerly included the costs in question, whether, if they were now to be refused, the set-off in the present case would not be allowed to the prejudice of that lien, within the meaning of the new rule.

Now, although there may be no express decision on the point, it has always been considered that an attorney's lien on his client's papers has been to the extent of his bill, subject to be taxed as between attorney and client: and that, not only for his bill of costs in a suit, but for any other demand, as charges for [*729] conveyancing and the like. So with respect to judgments; on *receiving the amount payable to his client, the attorney has always been allowed to retain all expenses incurred by him in the conduct of the suit, as well as his charges for professional attendance; and there is no decision by which he is limited to the amount that would be taxed as between party and party.

If that were the practice before Hil. 2 W. 4, surely it would be to the prejudice of the attorney now to limit his lien to the costs taxable as between party and party. I can put no other construction on the rule; and I think, therefore, before one of these payments can be set off against the other, *Watson's* attorney must be allowed so much as shall be found due to him upon taxation of costs, as between attorney and client.

PARK, J., and *GASELEE*, J., concurred.

BOSANQUET, J. The object of the rule was, that the attorney should be in the same situation as if the money due on the judgment were in his hands. And according to the language of Lord *MANSFIELD*, the attorney's lien is for his bill of costs.

Rule for allowing the lien accordingly.

DOE dem. SMITH v. GLENFIELD. May 12.

The copyhold property of an insolvent debtor vests in his assignee by virtue of the assignment, under 7 G. 4, c. 57, s. 11, without entry on the court rolls.

THIS ejectment was brought on the demise of the assignee of an insolvent debtor for some copyhold property, and a verdict was found for the plaintiff.

*The transfer to the assignee having been entered only on the minutes [730] of the steward, and not on the court-roll,

Talfourd, Serjt., pursuant to leave reserved at the trial, obtained a rule nisi to set aside the verdict and enter a nonsuit, on the ground that the lessor of the plaintiff had no legal title till his name was entered on the court-roll.

Scriven, Serjt., and *R. V. Richards* showed cause.

The title of the assignee of an insolvent to copyhold property, is complete by the assignment pursuant to sect. 11 of 7 G. 4, c. 57. It is not necessary that he should incur the expense of a fine for admission; and it is only when he seeks to sell the property that he is required by sect. 20 to enter his name on the rolls of the manor.

However, if an entry were necessary to give him a legal title, the entry on the steward's minutes is the original, and of more authority than the entry on the court-roll. *Doe v. Calloway*, 6 B. & C. 484.

The Court Baron is an inferior court; and in an inferior court the minutes are of more authority than the rolls themselves. *Rex v. Hains*, Comb. 337; *Fisher v. Lane*, 2 W. Bl. 834.

Talfourd. The lord of the manor cannot be deprived of his fine on a transfer unless by express enactment; and when the statute says, sec. 11, the property shall vest in the assignee, the legislature must have meant that it should vest according to the usual forms of proceeding, that is, by procuring the proper entry on the court-roll. And that course was always pursued under the bankrupt law, till 6 G. 4, c. 16, rendered it unnecessary.

*TINDAL, C. J. As a general rule it is clear that the legal estate in a copyhold cannot be passed without surrender. The question is, whether [731] a statutory title may not be conferred without that formality. Looking to the 11th section of 7 G. 4, c. 57, I think that such is the effect and operation of that statute; it enacts that the prisoner shall, at the time of subscribing his petition, duly execute a conveyance and assignment to the provisional assignee of the court, in such form as is to that act annexed, of the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner; "which conveyance and assignment so executed as aforesaid, in form as aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee."

These are words which must of necessity vest every kind of property in the assignee; and that is rendered more clear by sec. 20, which enacts, "that in case such prisoner shall be entitled to any copyhold, or customary estate, the conveyance and assignment by such provisional assignee to such assignee or assignees as aforesaid shall be entered on the court rolls of the manor of which such copyhold or customary estate shall be holden, and thereupon it shall be lawful for such assignee or assignees to surrender, or convey such copyhold or customary estate to any purchaser or purchasers of the same, from such assignee or assignees as the said Court shall direct."

Unless it were assumed that the assignment carries the copyhold estate, why should a surrender be necessary when the assignee proposes to proceed to a sale? It seems to me that the statute has effected a new mode of transfer, and has rendered a surrender necessary only *in the case in which the assignee [732] proposes to effect a sale. The object of that is, that the title of the purchaser may appear.

PARK, J. I am of the same opinion. The language of sect. 11 is very general. The provisional assignee is ordered to convey to the permanent assignee, and yet, if the argument for the defendant were well founded, the legal estate would still remain in the insolvent.

GASELEE, J. Looking to the period at which the assignment to the provisional assignee is to be made, it is clear that nothing more than the assignment is necessary to pass the estate; for it is provided, that "in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes." And if the assignment of itself did not pass the property, but an entry on the rolls were also necessary, the legislature must have gone on to direct that in case of dismissal of the petition, every surrender entered on the rolls should be set aside. On the contrary, it is only in sect. 20 provided for the first time, that an entry shall be made on the roll for the purpose of sale.

BOSANQUET, J. Nothing can be more general than the language of sec. 11, which enacts, "That such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said court, in such form as is to this act annexed, of the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner; which conveyance and assignment so executed as aforesaid, in form as aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future *real and personal estate and [*733] effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the provisional assignee." No entry on the roll therefore is necessary to vest the estate in the provisional assignee. Then by sec. 19, the same language is used, with regard to the transfer from him to the permanent assignee—"And when such assignee or assignees shall have signified to the said court his or their acceptance of the said appointment, the estate, effects, rights and powers of such prisoner, vested in such provisional assignee as aforesaid, shall immediately be conveyed and assigned by such provisional assignee to the said assignee or assignees, in trust for the benefit of such assignee or assignees, and the rest of the creditors of such prisoner, in respect of, or in proportion to their respective debts, according to the provisions of this act; and after such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be, to all intents and purposes, as effectually and legally vested by relation in such assignee or assignees, as if the said conveyance and assignment had been made by such prisoner to him or them." So that the same property which passed to the provisional assignee, passes from him to the permanent assignee. Then comes sect. 20, which provides for the case of sale, and enacts, "That the assignee or assignees of the estate and effects of any such prisoner, shall, with all convenient speed, after his or their accepting such conveyance and assignment as aforesaid, use his or their best endeavors to receive and get in the estate and effects of such prisoner, and shall with all convenient speed make sale of all such estate and effects."

It is only necessary to establish the derivative title of the purchaser that the entry should be made, but not for the title of the assignee.

Rule discharged.

[*734]

*Ex parte SWIFT. May 12.

An attorney having through inadvertence omitted to inscribe his name on the roll of attorneys, although he had observed every other formality necessary for his admittance, the court refused to enter it *nunc pro tunc* to defeat an action for penalties incurred by the omission.

An action having been brought against Swift for penalties incurred under 2 G. 2, c. 28, for practising as an attorney in this court, without having had his

name duly entered on the roll of attorneys (see ante, p. 62, *Humphreys v. Harvey*),

Robinson, on the part of Swift, moved that the entry might be made *nunc pro tunc*, as of Trinity term, 1833.

The applicant had complied with all the forms necessary to entitle him to practice, except the mere entry on the roll; that entry had been omitted by inadvertence, at most, in the applicant, if not by an oversight of the officers of the court; the applicant had suffered by the loss of his costs in *Humphreys v. Harvey*; and he was now sued for penalties in the name of the clerk of the attorney who had deprived him of his costs upon this technical objection. It was true that compliance with this application might deprive the suing party for penalties of an advantage he expected to obtain; but that objection applied to every case of amendment which, in furtherance of justice, was always permitted, as to matters of form, even at the latest stage of proceeding. *Mellish v. Richardson*, 7 B. & C. 819. The enrolment of admission was no more than the record of admission: and as the applicant was admitted in Trinity term, 1833, the record might be made up now. In *Ex parte Fry*, 3 Dowl. Pr. C. 338, where no penal action was pending, the Court made the entry on the roll some time after admission.

*TINDAL, C. J. I fear we have no authority to accede to the present application. If the interests of another party had not been involved, [*735] we might have lent our aid to the applicant, to release him from future embarrassment; but here we are required by our own act to arrest an action already commenced. That is going further than we feel authorized to do. The power of entering judgments *nunc pro tunc* is always exercised subject to the rights of third persons: as, in the case of executors, it is so exercised as not to interfere with intervening payments.

The rest of the Court concurred.

Rule refused.

MATTHEWS v. SWIFT. May 13.

(See the preceding case.) But in such action they also refused to allow plaintiff to amend after special demurrer.

THE defendant having demurred specially to the plaintiff's declaration, in a penal action commenced against the defendant in Hilary term, on the statute 5 G. 2, c. 23, for practising as an attorney without being duly enrolled,—(see the preceding case),—

Bompas, Serjt., on the part of the plaintiff, obtained a rule nisi for leave to amend.

Robinson, who showed cause, contended that the Court being aware of the merits of this case, from the defendant having been the party who was deprived of his costs, in *Humphreys v. Harvey*, ante, p. 62, would not assist the plaintiff by permitting, in the exercise of their discretion, an amendment which would further no ends of justice. In the conduct of a penal action the Courts require great exactness, and will not grant a new trial except for misdirection: *Brook v. Middleton*, 10 East, 268; *Rex v. Mann*, 4 M. & S. 338; and the plaintiff was the less entitled to indulgence, as he had delayed his action from May, 1834, when the omission of the defendant's name on the roll was pointed out, to January, 1835. *Ranking v. Marsh*, 8 T. R. 30.

Bompas. In the exercise of their discretion as to amendments, the Courts are guided by the rules of law, and look upon all kinds of action with equal favor. When the legislature has determined that certain actions shall be brought, it would not advance the ends of justice, but rather tend to defeat vested interests, if the Court were to view such actions with disfavor, or to look to the merits of the cause upon a question of form. Accordingly, amendments have been allowed in penal actions even after the time prescribed for suing has expired: *Maddock v. Hammet*, 7 T. R. 55; and the similiter has been added,

even after a trial: *Rex v. Mayor of Grampound*, 7 T. R. 699. It is true the rigor with which amendments have been refused in writs of right may seem at variance with the position now contended for; but that is the only exception: it has never been extended to penal actions.

TINDAL, C. J. All the cases have laid it down that amendments are to be made in the discretion of the Court, and only in furtherance of justice. I admit that such discretion must be exercised according to law, and that the Courts cannot take up and act upon an individual discretion; but we have a right on such occasions to consider the nature of the action, though not to weigh *the merits of the cause. Here the whole matter has been before us upon [*737] a former occasion; and we now find a penal action brought upon that which was an omission by mere inadvertence, and not with any intention to elude the provisions of the statute on which this plaintiff seeks to recover a penalty. In such an action we are warranted in withholding leave to amend.

GASELLE, J., concurred.

VAUGHAN, J. I cannot consider this an amendment in favor of justice. In some sort we have judicial notice of all the circumstances of the cause, for they were before us in *Humphreys v. Harvey*, and that through the instrumentality of the party whose clerk now sues the defendant: it would be a measure of great severity to assist in visiting the defendant with a heavy penalty for a mere inadvertence. If there is to be no difference as to the exercise of the discretion to allow amendments, in different forms of action, how is it that they have always been refused in writs of right? If the court is to have any discretion at all, I would never consent to permit the amendment on this occasion.

BOSANQUET, J. It would not further the ends of justice if the Court were to allow the amendment now required. I agree, the Courts are not to refuse an amendment because they may disapprove of the law which authorizes the action in which it is required; but that is not the ground of our refusal to comply with this application. The circumstances of the case were not such as to bring the defendant within the spirit of the law on which the plaintiff sues; and the action is not one in which the plaintiff has any claim to be assisted.

Rule discharged.

[*738]

*BRADLEY v. MILNES. *May 13.*

Defendant having been arrested for 65*l.*, when there was not probable cause for arresting him for more than 44*l.*, the Court allowed him his costs under 48 G. 8, c. 46.

THE plaintiff had contracted, at certain fixed prices, to do the iron-work of four houses about to be built by the defendant.

He afterwards agreed to do two more at the same price; and subsequently did a seventh and eighth without coming to any express agreement.

It was not clear whether the last four were to be paid for by the defendant or by one Ponsford.

The defendant paid for the first four according to the contract; and the plaintiff sent in a bill to Ponsford charging him for all the four last according to the amount fixed by the contract with the defendant for the four first.

Ponsford hesitating to pay, the plaintiff threatened to arrest the defendant for the expense of the last four houses, estimated according to measure and value, and not according to the contract for all the first four, if Ponsford failed to pay the bill sent in.

Ponsford refusing to pay, the defendant was arrested for 65*l.* 16*s.* 6*d.*, being the charge for doing the four last houses, according to measure and value. Upon the trial of the cause the jury gave a verdict for 44*l.* 4*s.* 10*d.*, which was the amount of doing the four according to the terms of the contract. Upon which,

Atcherley, Serjt., obtained a rule nisi to tax the defendant his costs under 43

G. 3, c. 46, as having been arrested without reasonable or probable cause for a larger sum than the plaintiff knew to be due to him.

**Talfourd, Serjt., and S. B. Harrison, showed cause.*

The excess for which the defendant was arrested was not sufficiently large to occasion any inconvenience in procuring bail, or to indicate any malice on the part of the plaintiff. As there was no express contract with respect to two of the houses, the plaintiff might easily have fallen into a mistake. [739]

Atcherley and R. V. Richards, contra. The plaintiff proceeded for the larger amount without probable cause, for after he had delivered a bill to Ponsford, according to the terms of the contract, it could not have been by mistake that he claimed a larger amount of the defendant; and if there were no probable cause for the excessive demand, the defendant is entitled to his costs whether the plaintiff were actuated by malice or not: *Gompertz v. Denton*, 1 Cr. & Mee. 207; *Donlan v. Brett*, 10 B. & C. 117.

TINDAL, C. J. The only question is, has it been made clear to us that the plaintiff had no reasonable or probable cause for arresting the defendant for 65l. 16s. 6d.?

The verdict is for 44l. 14s. 10d. Whether the larger or the smaller sum were due, depends on the question whether the four houses in question were to be done according to the terms of a contract for four others, or according to measure and value. Now it is quite clear that two of the four in question were to be done according to the first contract; and even if the remaining two were to be charged according to measure and value, that would not bring the plaintiff's demand to 65l. or near it; the difference between the contract and the measure and value charge upon the whole four being more than 21l. I think, therefore, that there was no reasonable or probable cause for an arrest to the amount in question, and consequently that this rule should be made absolute. [740]

GASELEE, J. I have some doubts whether the plaintiff considered he was bound by the terms of the contract as to all the eight houses, and should prefer his entering a verdict with costs; but as the rest of the Court entertain a different view of the matter, the rule must be absolute.

VAUGHAN, J. It is clear that the plaintiff arrested the defendant for the larger amount because he was irritated at Ponsford's refusal to pay the smaller.

BOSANQUET, J. I think it clear there was no reasonable or probable cause for an arrest to this amount.

Rule absolute.

It was ordered that under this rule the defendant should not have his costs of an unsuccessful application for a new trial, and that the plaintiff should not have his costs of resisting that application.

ATKINSON v. BAYNTUN. May 13.

The Court allowed defendant to amend his plea, after judgment on demurrer, upon an affidavit that material facts had come to his knowledge after such judgment.

THE defendant in consequence of information acquired since the decision of this cause, ante, p. 444, having procured an order from a Judge at chambers, to amend his fourth plea, by inserting an averment that the sum for which the second execution issued against the **Manleys* had included the sum [741] endorsed on the first writ of execution,

Sir W. Follett obtained a rule nisi, to discharge the Judge's order, on the ground that the application to amend was too late, and too extensive; substituting a new plea rather than an amendment of the old one.

Talfourd, Serjt., and Manning now showed cause upon an affidavit stating that after the argument of the demurrer, the plaintiff had on the 29th of January delivered to the defendant an account of the several sums received by him on account of the mortgage, and that the defendant, until he received such account

was ignorant what sums had been received by the plaintiff. They referred to the *King v. Archbishop of York*, 1 Adol. & Ell. 394, where under a Judge's order, two counts were added in quare impedit, a year after the declaration had been filed; and to *Wood v. Plant*, 1 Taunt. 44, where MANSFIELD, C. J., speaking of Judge's orders, said, "The effect of these orders was much considered in the case of the *King v. Wilkes*, 4 Burr. 2570. They are as binding as any act of the Court, though they are not entered and made rules of court, unless it be necessary to enforce them by attachment."

If the present rule were made absolute, the defendant would have been precluded by the new rules of pleading from showing that the plaintiff had no cause of action, which he might formerly have done under the general issue.

Sir *W. Follett*. The application to amend should have been made to the Court at the time of the argument.

[*742] The effect of the present order is to give the *defendant a rehearing and enable him to supply the defects of his case after judgment: and the amendment proposed does no more than raise the same point which has been already discussed and decided.

TINDAL, C. J. The proper course has not been taken in this case; for the application to amend should have been made at the time of the argument. But the circumstance of the fact now relied on having come to the knowledge of the defendant since judgment was given, seems to make a difference in the case.

If the application had been made at the time of the argument, we should have allowed the amendment; and though there is no express decision on the point, we think it ought to be allowed now.

GASELEE, J., and VAUGHAN, J., concurred.

BOSANQUET, J. The Court does in some cases allow amendment after argument, and probably would have done so here. I do not approve of the course which has been taken, but think that under all the circumstances, the defendant should be allowed to amend.

Rule to set aside the Judge's order discharged.

But the defendant to pay the costs of the rule, as well as of the amendment, because the application to amend ought to have been made to the Court.

[*743] *GIBSON and Another, Assignees of DAVID RANKINE,
a Bankrupt, v. BELL. May 13.

Held, that a defendant might set off a debt due to him from a bankrupt for money lent &c., against a claim by the bankrupt's assignees on defendant for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to the defendant.

THE declaration stated that David Rankine, before he became bankrupt, and before the making of the promise of the defendant thereafter next mentioned, had sold to the defendant, and the defendant had then purchased of the said D. Rankine, divers, to wit, 5 butts, 7 hogsheads and 2 quarter casks of wine, and 166 dozen bottles of wine of great value, at and for certain prices or sums of money, amounting in the whole to a large sum of money, to wit, 535*l.* 10*s.*, that the defendant had in part payment, and on account thereof, accepted three several bills of exchange, respectively bearing date the 31st of October, 1833, drawn by the said D. Rankine upon the defendant; to wit, a certain bill of exchange for the payment of the sum of 165*l.* 3*s.* six months after the date thereof; a certain other bill of exchange for the payment of the sum of 165*l.* 3*s.* nine months after the date thereof; and a certain other bill of exchange for the payment of the sum of 165*l.* 4*s.* twelve months after the date thereof: that it was agreed by and between the defendant and the said D. Rankine, that the defendant

should deliver to the said D. Rankine in further payment and on account of the said sum of 535*l.* 10*s.*, a pipe of port wine valued at 50*l.* more or less, and that any difference there might then be between the sum to which the said three several bills of exchange so drawn upon and accepted by the defendant and the price of the said pipe of port wine so to be delivered by him to the said D. Rankine as aforesaid should amount, and the said sum of 535*l.* 10*s.* *so to be paid by the defendant to the said D. Rankine for the said first-mentioned wines, as aforesaid, should become and be the subject of [*744] future arrangement between the defendant and the said D. Rankine: of all which premises the defendant had notice; and thereupon, before the said D. Rankine became bankrupt, and also before the said bill of exchange thereinbefore firstly mentioned became due and payable according to the tenor and effect thereof, to wit, on the 25th of November in the year aforesaid, in consideration that the said D. Rankine, at the request of the defendant, would cancel and destroy the said last-mentioned bill of exchange for 165*l.* 4*s.*, and would not require the defendant to deliver the said pipe of port wine according to the said agreement in that behalf, the defendant promised the said D. Rankine before he became bankrupt, to accept divers, to wit, three other bills of exchange to be respectively drawn by the said D. Rankine upon the defendant, to wit, a bill of exchange to bear date the 15th of November in the year aforesaid, for the payment of the sum of 45*l.* three months after the date thereof; another bill of exchange to bear date the 25th of November in the year aforesaid, for the payment of the sum of 50*l.* three months after the date thereof; and a third bill of exchange for the payment of the sum of 110*l.* 3*s.*, to be drawn at such time and to bear such date as to allow the defendant ten months for the payment of the said sum of 110*l.* 3*s.*, being the balance then due and owing from the defendant to the said D. Rankine upon the account aforesaid; and to deliver the said last-mentioned three bills of exchange to the said D. Rankine so accepted as aforesaid, when the defendant should be thereunto afterwards requested. The plaintiffs then averred that the said D. Rankine, confiding in the said promise of the defendant, did afterwards, and before he became bankrupt, *and also before the said bill of exchange thereinbefore firstly mentioned became due and payable according to the tenor and effect thereof, to wit, [*745] on, &c., cancel and destroy the last-mentioned bill of exchange for 165*l.* 4*s.*; of which the defendant then had notice: and although the defendant, in part performance of his said promise, did afterwards and before the said D. Rankine became bankrupt, to wit, on, &c., accept the said several bills of exchange for the payment of the said several sums of 45*l.* and 50*l.*, and deliver the same so accepted to the said D. Rankine; and although the said D. Rankine did afterwards, to wit, on, &c., draw upon and deliver to the defendant a certain other bill of exchange at such time and bearing such date as would allow the defendant ten months for the payment of the said balance, to wit, bearing date the 2d of January, 1834, for the payment of the said sum of 110*l.* 3*s.*, eight months after the date thereof, and did then request the defendant to accept the said last-mentioned bill of exchange, and to deliver the same so accepted to him the said D. Rankine; and although the plaintiffs, as assignees as aforesaid, afterwards and after the said D. Rankine became a bankrupt, to wit, on the 31st of January in the year aforesaid, and afterwards, did also request the defendant to accept the said last-mentioned bill of exchange, and to deliver the same so accepted to them the plaintiffs as assignees as aforesaid; and although the said D. Rankine before he became bankrupt, and the plaintiffs, as assignees as aforesaid, since the said D. Rankine became bankrupt, had not nor had any or either of them at any time required the defendant to deliver the said pipe of port wine to the said D. Rankine, or to the plaintiffs as assignees as aforesaid, or to any or either of them; yet the defendant, not regarding his said promise, but contriving and wrongfully intending to deceive and defraud the said D. Rankine before he became bankrupt, and the plaintiffs as assignees *as aforesaid, since the bankruptcy of the said D. Rankine in that behalf, [*746]

did not nor would when he was so requested as aforesaid, or at any time before or afterwards, accept the said last-mentioned bill of exchange, or deliver the same so accepted to the said D. Rankine before he became bankrupt, or to the plaintiffs, as assignees as aforesaid, or either of them, since the bankruptcy of the said D. Rankine.

There was also a count for goods sold and delivered; for money lent; for money paid to the use of defendant; for money had and received; and for money found to be due on an account stated.

The defendant pleaded, first, that he did not promise in manner and form as the plaintiffs had above complained against him, &c.; and for a further plea as to the first count of the declaration, that before and at the time of the date and issuing forth of the fiat in bankruptcy under and by virtue of which the said David Rankine was found and adjudged to be such bankrupt as aforesaid, to wit, on the 13th of January, 1834, the said David was indebted to the defendant in 800*l.* for money by the defendant before then lent and advanced to and paid, laid out, and expended for the said David at his request, and for money by the said David before then had and received to and for the use of the defendant; that the said sum of money still remained unpaid and unsatisfied to the defendant; and that the defendant had not, when he gave credit to the said David in respect of the said sum of money or any part thereof, notice of any act of bankruptcy by the said David committed; which said sum of money so due, unpaid, and unsatisfied to the defendant as aforesaid, exceeded any demand of the said David before his said bankruptcy, and of the plaintiffs as assignees as aforesaid, since the said bankruptcy in respect of the matters in the first count alleged; [*747] of all which premises the plaintiffs *had notice before and at the time of

the commencement of this action; and out of and against which said sum so due, unpaid, and unsatisfied to the defendant as aforesaid, the defendant was ready and willing, and thereby offered to allow and set off the full amount of such demand; and that, the defendant was ready to verify, &c. And for a further plea to the said declaration, except so far as related to the said first count, the defendant said that before and at the time of the date and issuing forth of the fiat in bankruptcy under and by virtue of which the said David Rankine was found and adjudged to be such bankrupt as aforesaid, to wit, on, &c., the said David was indebted to the defendant in 800*l.* for money by the defendant before then lent and advanced to, and paid, laid out, and expended for the said David at his request, and for money by the said David before then had and received for the use of the defendant; that the said sum of money still remained wholly unpaid and unsatisfied to the defendant; and that the defendant had not, when he gave credit to the said David in respect of the said sum or money, or any part thereof, notice of any act of bankruptcy by the said David committed; which said sum of money so due, unpaid, and unsatisfied to the defendant as in this plea aforesaid, exceeded the amount of the moneys wherein the defendant was indebted to the said David as in the declaration in that behalf mentioned, or any demand of the said David before his bankruptcy, and of the plaintiffs as assignees since the bankruptcy in respect of those moneys; of all which premises the plaintiffs had notice before and at the time of the commencement of this action, and out of and against which said sums of money so due, unpaid, and unsatisfied to the defendant as aforesaid, the defendant was ready and willing, and thereby offered to allow and set off the full amount of, [*748] the said moneys wherein the defendant was *indebted to the said David, and of any such demand as aforesaid in respect thereof; and that, the defendant was ready to verify, &c.

In the replication, the plaintiffs joined issue on the first plea, and demurred to the second for the following causes:—That the debt in that plea mentioned as due to the defendant, and the cause of action in the first count of the declaration mentioned, were not mutual debts or mutual credits capable of being set off against each other; that the cause of action in that count was not one

to which a set-off could be pleaded; and also that the second plea was pleaded to the first count only of the declaration, whereas if the cause of action in that count was one to which a set-off could be pleaded, then as the causes of action in the residue of the declaration were also of a kind to which a set-off might be pleaded, a plea of set-off to the first count severally, accompanied by another plea of set off to the residue of the declaration severally, was manifestly insufficient, because it amounted to no more than that D. Rankine was indebted to the defendant to an amount equal or greater than a part of the amount which the plaintiffs as assignees were entitled to claim of the defendant: That the said second plea tended to an immaterial and frivolous issue, and was in that respect informal and insufficient. As to the third plea, the plaintiffs replied that the said David was not before or at the time of the date or issuing forth of the said fiat in bankruptcy, indebted to the defendant in manner and form as the defendant had above in that behalf alleged; and that, the plaintiffs prayed might be inquired of by the country, &c.

Stephen, Serjt., in support of the demurrer.

First, the defendant cannot plead two set-offs to different parts of the action; the statute G. 2, gives the set-off as an answer to the whole action, and if it were not *pleaded to the whole the plaintiff might be tricked. Suppose [749] 100*l.* to be due to the plaintiff on one count, and another 100*l.* on a second, and suppose the plaintiff to owe the defendant 150*l.*; if the defendant might plead a set-off of 150*l.* to the first count, and the same to the second count, he would answer a demand for 200*l.*, with a claim of no more than 150*l.*

Secondly, that which the plaintiffs claim is neither a mutual debt nor a mutual credit and therefore cannot be open to a set-off. It is not a debt, since the bill, for refusing to accept which the defendant is now sued, would not have been due till September, 1834; this action was commenced in July, 1834, and there could be no debt till the bill was due: *Mason v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Brook v. White*, 1 New Rep. 330; *Hutchinson v. Reid*, 3 Campb. 329; *Hoskins v. Duperoy*, 9 East, 498. It is, therefore, only a claim for damages incurred by the refusal to accept the bill. And such a claim is not a mutual credit; for though in *Smith v. Hodson*, 4 T. R. 211, it was held that the payment by a defendant of an acceptance lent by the bankrupt was a mutual credit, yet *Rose v. Hart*, 8 Taunt. 499, puts the limit to the rule, and shows that nothing is a mutual credit which will not terminate in a debt. In *Glennie v. Edmunds*, 4 Taunt. 775, it was held that a loss on a policy could not be set off against the premium, on the ground that the action sounded in damages. In *Sampson v. Burton*, 2 B. & B. 89, it was held that a guaranty against contingent damages could not form the subject of a mutual credit under the 5 G. 3, c. 30, s. 28; and in *Rose v. Sims*, 1 B. & Adol. 527, damages arising from a refusal to endorse a bill were held not to constitute a mutual credit.

**Henderson*, *contra*. To raise the first objection, the plaintiff ought to have demurred to both the pleas of set-off; but having taken issue [750] on the second of them, he is precluded from saying that the second set-off exists. As to the first, this demand is at all events a mutual credit under the bankrupt act, because it arises out of a sale, and would certainly terminate in a debt. That distinguishes it from *Rose v. Sims*, where the claim arose, not from an act of buying and selling, but from a collateral liability the extent of which remained to be found by a jury.

But it may even be called a debt within the statutes of set-off, for the bill which the defendant declined to accept was to be given for a sum due on a balance of account. The question must be determined by the substance of the transaction, and not by the accident that the plaintiff sues in the form prescribed for unliquidated damages. In substance this is a debt. *Sampson v. Burton* was a case of damages arising out of a guaranty; in *Glennie v. Edmunds* the amount due was not ascertained at the time of the bankruptcy; in *Hoskins v. Duperoy* the question was as to the sufficiency of a petitioning creditor's

debt; and a demand which would not constitute a good petitioning creditor's debt, may nevertheless be enforced in the way of set-off. But in *Utterson v. Vernon*, 8 T. R. 539, it was held that when a creditor has a demand on his debtor which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved as a debt under the commission. If so, there can be no objection to allowing a set-off in respect of a similar demand.

Stephen, in reply, relied chiefly on *Rose v. Sims*.

Cur. adv. vult.

[*751] *TINDAL*, C. J. In this case, the plaintiffs have taken two objections to the special plea of the defendant, pleaded by him to the first count of the declaration: one, a formal objection assigned for cause of special demurrer, the other an objection in point of law.

As to the formal objection, we think the plaintiffs cannot avail themselves thereof in the present state of the record. The plaintiffs have demurred specially to the first plea of set-off, pleaded to the first count, and have traversed the second plea of set-off, pleaded to the second count. As against the plaintiffs, therefore, who have denied the facts stated in the second plea to be true, it may be taken that the facts alleged in it are not in existence; that is, as if there were no set-off in point of fact against the second count of the declaration. The plea of set-off to the first count may therefore be considered as if it stood alone; and in that case, there could be no objection to a defendant pleading a set-off to one count only of a declaration. Even if the plaintiff had traversed each plea separately, and gone to trial upon separate issues on those pleas, we cannot see that the difficulty urged by the plaintiffs could ever have taken place. For after the defendant had given evidence of the items of his set-off against the first count, he would not be allowed to give evidence of the same items a second time, as an answer to the demand in the second count. Unless therefore the whole set-off was large enough to cover the demands in both counts, the plaintiffs must have recovered either on the one count or the other. And we think further, that if the objection intended to be taken was the joining on the record two separate pleas of set-off, one to each of the counts of the declaration, the demurrer should have extended to both pleas, and the misjoinder have been then alleged as the ground of demurrer; for the putting of the one plea [*752] *upon the record is as much to be objected to as the placing of the other there.

With respect to the objection in matter of substance to the first plea of set-off, the question is, whether the cause of action stated in the first count of the declaration, and the debts alleged in the plea to have been due from the bankrupt to the defendant, before and at the time of his bankruptcy, can be considered "as mutual credits between those parties," so that "the one debt or demand" may be set off against the other, within the meaning of the statute 6 G. 4, c. 16, s. 50.

Looking to the form of the first count of the declaration, it is a claim for unliquidated damages against the defendant, for not accepting a bill of exchange according to a special agreement entered into between the defendant and the bankrupt. But that agreement appears on the face of the first count to have been in substance a contract to accept a bill in payment of the remainder of the price of certain goods, sold and delivered by the bankrupt to the defendant: and the bill of exchange is expressly alleged in that count to have been drawn "for the balance then due and owing from the defendant to the said bankrupt upon the account aforesaid." In substance therefore, the bill, if accepted, would have been a security for the payment at a future day of a settled and ascertained balance due upon an account, in which the price of goods sold to the defendant formed one side, and partial payment made by the defendant the other side. It is to be observed further, that the plaintiffs, although they have brought a special action of assumpsit, have stated no special damage in their declaration; so that the measure of damage to which the jury would be confined

in their verdict, is necessarily a mere matter of calculation, viz., the amount for which the bill was drawn, together with the interest *due upon it, if the time of the payment was passed; or the amount of the bill, minus [*753] the discount, if the bill was not then due. And the question is, whether this is such credit given by the bankrupt to the defendant as comes within the meaning of the clause above referred to.

The principle which the bankrupt laws seem to have had in view from the earliest time to the last provision made therein, is this, that were two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That this was the practice of the commissioners of bankrupt long before any statutory provision on the subject, appears clear from the two earliest decided cases; *Anonymous*, 1 Mod. 215, before Lord Chief Justice NORTH and *Chapman v. Derby*, 2 Vern. 117. (1689.)

The first statute which made any express provision on the subject, was the expired statute 4 & 5 Anne, c. 17. By that statute it was enacted in the eleventh section, that where there hath been mutual credit given between the bankrupt and any debtor, and the accounts are open and unbalanced, it shall be lawful for the commissioners or assignees to adjust the account, and the debtor shall not be compelled to pay more than shall appear to be due on such balance. This provision of the expired statute of Anne, is re-enacted in the twenty-eighth section of the 5 G. 2, c. 30, with some variation in the expression, that section enacting that "the commissioners or assignees shall state the account between them, and one debt may be set against another, and what shall happen to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." This statute continued in force *until the 46 G. 3, c. [*754] 135, s. 3, which provides, that where there hath been mutual credit given, or mutual debts between the bankrupt and any other person, "one debt or demand may be set against the other, notwithstanding any secret act of bankruptcy before committed." The same language is continued in the last statute 6 G. 4; so that from the earliest practice to the latest provision by statute, the object seems to have been, that the account should be stated as between merchant and merchant, and that whatever would be in ordinary practice a pecuniary item in such account, should be the subject of set-off; and we think the demand of the bankrupt against the defendant under the circumstances stated upon this record, falls clearly within this description.

The cases upon which the plaintiffs have principally relied in argument, are two; the case of *Rose v. Hart*, 8 Taunt. 499, and *Rose v. Sims*, 1 B. & Adol. 526. In the former, Lord Chief Justice GIBBS, in giving the judgment of the Court, has laid down the rule of interpretation, that by credit, the legislature meant "such credits only as must in their nature terminate in debts; a distinction that is adopted by the Court of King's Bench in the latter case of *Rose v. Sims*."

Now it is observable that in giving judgment in the former case, the Chief Justice states the law of set-off to depend upon the enactment in the 5 G. 2, c. 30, s. 28, and lays great stress upon the circumstance, that it is enacted merely in the final words of the clause "that one debt shall be set against another." But, in point of fact, the law of set-off at that time was governed, not by the 5 G. 2, only, but also by the 46 G. 3, c. 135, s. 3, by which latter statute it was enacted, as before observed, "that one debt or demand" may be set off *against another; and it is difficult to see for what purpose such latter [*755] word can have been introduced, and have been since continued in the fiftieth section of the last bankrupt act, except for the purpose of giving a greater latitude than the strict meaning of the word debt would of itself import. Without, however, relying on the inference from the introduction of the word "demand," and taking the explanation of the word credit with the restriction

adopted by the Courts of C. P. and B. R., we think the claim of the bankrupt in this case is one which would in its nature terminate in debt and nothing else. If the demand had not been enforced until after the time for which the bill was to run, the demand became actually a debt for which the bankrupt might have brought his action for goods sold, or on an account stated. If enforced before the time had expired, his demand was one which must become a debt in a short time, and of which the present value was determinable by deducting the discount for the time the bill had still to run; and as to the case of *Rose v. Sims*, we think the present case may well be distinguished from it. In that case a special action was brought for not endorsing a bill of exchange according to an agreement; if the endorsement had been made, it would not in its nature necessarily have terminated in a debt from the defendants, for the acceptor would have been the debtor, the endorser a guarantee only.

Upon the whole, the demand appears to us to be a mere pecuniary demand, which the commissioners or assignees might have stated in account between the defendant and the bankrupt; a demand which, although unliquidated at the moment, was capable of being reduced to certainty by a simple calculation, where no special damage had been incurred. This determination agrees with [756] the principle adopted by the *Judges of this Court in the case of *Sampson v. Burton*, 2 Brod. & Bing. 94, and is not in conflict with the two cases on which the plaintiffs have principally relied; and certainly is more consistent with the principle and spirit of the bankrupt laws.

For these reasons, we think there ought to be

Judgment for the defendant.

CURTIS v. SPITTY. May 13.

In debt for rent against an assignee, the defendant traversed an averment in the declaration, that all the estate in the premises had vested in him. Issue having been joined, and the defendant having proved that he was assignee of part only of the premises, Held, that the verdict on such issue must be entered for the defendant.

THIS case was brought before the Court on a motion on the part of the defendant by leave of the learned Judge who tried the cause, to enter a verdict for him upon the issue raised by the second plea to the first count of the declaration.

The first count of the declaration stated a demise by the plaintiff's testator to one William Copping, for ninety-nine years, if certain persons should so long live (some of whom were still in life), at the yearly rent of 18s.; that "on the 1st of January, 1816, all the estate, right, title and interest of the lessee of and in and to the said demised land and premises with the appurtenances, by assignment thereof, then and there made, came to and vested in the defendant:." And that a certain sum became due to the lessor for rent of the premises after the assignment.

The second plea to this first count traversed the averment, that all the estate, &c., came to and vested in the defendant, in the very words of the declaration; and issue was joined upon that traverse.

[757] *At the trial, it appeared in evidence that in 1813, the premises comprised in the lease were divided into three separate parcels and put up to sale in three lots, by the executors of Copping, the lessee; that the father of the defendant purchased one of the parcels which was duly assigned to him for all the residue of the lessee's interest in the term; and that the interest in such parcel was now vested in the defendant as his father's personal representative.

Wilde, Serjt., and *Petersdorff*, on behalf of the plaintiff, showed cause against the rule, which had been obtained chiefly on the authority of *Hare v. Cator*, Cowp. 766, where in a declaration against the defendant as assignee of all the

estate, &c., in certain premises, evidence that he was assignee of part only was held a fatal variance.

They contended that there must be some mistake in the report of that case: the lease there had never been assigned; the defendant had purchased a fee; and therefore the Court could not have decided on the ground that part only of the premises had been assigned to the defendant. But in *Merceron v. Dowson*, 5 B. & C. 479, where in covenant against an assignee of a lease, the plaintiff declared that all the right, &c., of the lessee vested in the defendant by assignment, and that afterwards the premises were out of repair; and defendant pleaded in bar, that for one period he was possessed of one-sixth of the premises, as tenant in common with A., B., and C., and for another period of one-third, as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment; it was held, that the plea was bad in substance, as it could not be a bar to the whole action; and that it was bad in form also, as it merely confessed that defendant had *possession of part of the premises, and not that he was assignee. In *Stevenson v. Lambard*, 2 East, 575, the assignee had been evicted from a moiety of the premises; but it was held, that that circumstance was no bar to an action of covenant for rent, though, if the defendant pleaded the eviction, the rent might be apportioned.

It thence followed that as, in the present case, the lessor had no means of ascertaining the precise share of the property assigned to the defendant, the defendant should have pleaded in abatement the non-joinder of the other assignees. 2 Wms. Saund. 142, Com. Dig. Abatement, F. 12. *Duppa v. Mayo*, 1 Wms. Saund. 282, has established that debt for arrears of a rent-charge ought regularly to be brought against all the pormors of the profits of the lands liable; but if it be not, defendant can only take advantage of it by plea; and in *Mitchell v. Tarbutt*, 5 T. R. 650, Lord KENYON said, "Where there is any dispute about the title to land, all the parties must be brought before the Court." It is true that covenant will lie against the assignee of part of an estate for not repairing his part: *Congham v. King*, Cro. Car. 221; but the verdict in this action would not be conclusive evidence in an action of covenant to charge the defendant with the repairs of the whole of the premises, for in answer to the action of covenant he might show the special circumstances.

Thesiger and *Steer*, contra. If there be any mistake in the statement of the facts in *Hare v. Cator*, at least the judgment of the Court is exempt from ambiguity. The lessor has always his remedy for the whole rent by distress; and if he elects to charge an assignee in debt, he ought to ascertain beforehand the extent of the *assignee's interest. *Congham v. King*, Cro. Car. 221; *Gamon v. Vernon*, 2 Lev. 231; *Twynam v. Pickard*, 2 B. & Ald. 105. [*759]

In *Stevenson v. Lambard*, the defendant had been assignee of the whole, but pleaded eviction of a moiety, and the case only decides that there may be an apportionment of rent. In *Merceron v. Dowson*, the defendant was assignee of the whole, with others, and the plea only went to a part of the declaration, though it professed to be an answer to the whole. In *Duppa v. Mayo*, there was a rent-charge, which is not apportionable.

Cur. adv. vult.

TINDAL, C. J. (after stating the pleadings and evidences as *antè*, p. 756), proceeded:—

Whether upon this evidence, the defendant is entitled to have the verdict entered for him upon the issue raised by the second plea, is the only question before us.

That the issue has been found for the defendant in the precise terms in which it is raised, there can be no doubt; and if so, we feel difficulty in seeing upon what principle we can look further into the question intended to be raised between the parties in this stage of the proceedings; more particularly as the case of *Hare v. Cator*, Cowp. 766, is a direct authority upon the very point, that if the plaintiff alleges in his declaration that the whole interest of the lessee came to him by assignment, and the defendant traverses the allegation, it is a fatal

variance, if it appears in the evidence that the defendant was assignee of parcel only of the land originally demised. It must be admitted, that the observations made in the course of the argument upon that case, have excited some doubt as [*760] to the accuracy of the *report; but the argument of the counsel, and the judgment of the Court, precludes the possibility of doubt that the proposition with which the Court meant to deal, was this, that even if the defendant was assignee, he could be assignee of parcel of the land only, and that the plaintiff, having alleged in his declaration that he was assignee of the whole, was out of Court; and as that case has been regarded as law in Westminster Hall from the time of its decision down to the present day, we do not think ourselves authorized to overrule it, where the party who is to be affected by our determination has no opportunity of reviewing our decision.

The proposition contended for by the plaintiff, is this,—that the lessor may charge the assignee of part of the land in an action of debt with the rent of the whole of the land comprised in the original demise. He may, undoubtedly, after an assignment of part, distrain upon that part for the rent which accrues due for the whole; because the rent for the whole becomes due out of each and every part of the land; but in that case it must be remembered, that the avowry would be for rent due from the original tenant, and nothing would appear upon the record as to the assignment. The remedy by distress, does not, therefore, afford any authority for the remedy by a direct action of debt against the assignee; which action, depending as it does upon the privity of contract being transferred to the assignee by reason of the privity of estate, that is, by reason of the plaintiff being the landlord, and the defendant the tenant of the same land, opens a very nice and difficult question, not settled by any decision in the books, so far as we can ascertain, namely, whether there exists a privity of estate in respect of the whole land by an assignment of part only.

If the proposition of the plaintiff be the law, then the lessor would have had [*761] a good cause of action if he had *stated his title in the declaration according to the fact, and had rested his demand for the whole rent, upon the assignment of the defendant of part only of the demised premises, and the question might then be raised upon the record by demurrer; or the plaintiff might, by a special demurrer to the plea, have raised the same question; but he has thought proper to go to trial upon the issue tendered to him by the defendant.

Under these circumstances, we think we are not justified in saying more on the present occasion than that we think the issue has been found against the plaintiff; and, therefore, the verdict is to be found for the defendant.

If another action is brought, either party may put the question on the record.
Rule absolute.

HAWES and Others v. ARMSTRONG. May 13.

"Inclosed I forward you the bills drawn per J. A. upon, and accepted by L. D., which I doubt not will meet due honor, but in default thereof I will see the same paid. B. J. A.:"

Held, that the consideration of B. J. A.'s promise did not appear sufficiently to render him liable on this undertaking.

ASSUMPSIT. The declaration stated, that before and at the time of the making of the promise and undertaking of the defendant thereafter mentioned, John Thomas Armstrong and Leonard Dell were indebted to the plaintiffs in a certain sum of money, to wit., the sum of 260*l.*, and being so indebted, the plaintiffs were desirous and urgent to be paid the same; and thereupon, on the 13th of May, 1829, in consideration that the plaintiffs, at the instance and [*762] request of defendant, would give time for the payment *of the said debt or sum of 260*l.*, and would take, accept, and receive, by way of security for the payment of the same, three several bills of exchange (amounting in the whole to 260*l.*), respectively drawn by the said J. T. Armstrong upon and ac-

cepted by the said L. Dell, and respectively bearing date the 8th of May, 1829; and would forbear and give to the said J. T. Armstrong and L. Dell time for payment of the said debt or sum of 260*l.* until the said bills should respectively become due and payable, the defendant undertook and then promised the plaintiffs, that in default of the said bills not meeting due honor, he would see the same paid. And the plaintiffs averred, that they, confiding in the said promise and undertaking of the defendant so made as aforesaid, did then, to wit, on, &c., take, accept, and receive, by way of security for the payment of the said debt or sum of 260*l.*, the said three bills so drawn and accepted as aforesaid, and did forbear and give time to the said J. T. Armstrong and L. Dell for payment of the said debt or sum of 260*l.* until the said bills respectively became due and payable according to the tenor and effect thereof: That although the said three bills had long since respectively become due and payable, and although the same were respectively duly presented to the said L. Dell for payment thereof when the same respectively became due and payable according to the tenor and effect thereof, and although the said L. Dell did not nor would, nor did nor would the said J. T. Armstrong duly honor the said several bills, or any of them, or pay the moneys therein respectively mentioned, or any part thereof, when they were so presented for payment as aforesaid, or at any other time, of all which premises the defendant had due notice; and although the defendant was afterwards, to wit, on the 11th of May, 1830, and often afterwards, requested by the [*763] *plaintiffs to see the said several bills paid according to the form and effect of his promise and undertaking aforesaid; yet the defendant, not regarding his said promise and undertaking in that behalf, did not, nor would, see the said several bills, or any of them, paid; nor had he paid the moneys mentioned in the said three several bills of exchange, or either of them, or any part thereof, but had hitherto wholly neglected and refused so to do; and the said debt or sum of 260*l.* was still wholly due, unpaid and unsatisfied: to the plaintiffs' damage of 300*l.*

Plea, that there was not any memorandum or note in writing signed by defendant, or by any person by him thereunto lawfully authorized, of the said supposed promise and undertaking in the declaration mentioned; or of any promise or undertaking of or by the defendant to answer for the said debt or default in the declaration mentioned, or any debt or default of the said J. T. Armstrong and L. Dell, or either of them, or otherwise, as required by the statute in such case made and provided, to charge the defendant for such debt or default.

Replication, that there was, and still is, a certain memorandum or note in writing, made and signed by the defendant, of the said promise and undertaking in the declaration mentioned, thereby charging himself with the said debt and default of the said J. T. Armstrong and L. Dell, and which said note or memorandum was addressed to the plaintiffs, in the words following; that is to say,—“Messrs. Hawes,—Gentlemen, inclosed I forward you the bills drawn per J. T. Armstrong upon and accepted by Leonard Dell, which I doubt not will meet due honor; but in default thereof, I will see the same paid. I remain, &c. B. J. Armstrong, Hatton Wall, 13th May, 1829;” as by the said writing will more fully appear.

Demurrer and joinder.

**R. V. Richards*, in support of the demurrer, contended that the [*764] memorandum set out on the replication disclosed no consideration for the defendant's promise; and therefore could not support the plaintiff's demand. *Wain v. Walters*, 5 East, 10; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Jenkins v. Reynolds*, 3 B. & B. 14; *Morley v. Boothby*, 3 Bingh. 107; *Lees v. Whitcomb*, 5 Bingh. 84; *Cole v. Dyer*, 1 Cr. & Jer. 460; *James v. Williams*, 2 Dowl. Pr. C. 481. At all events, it did not disclose the consideration alleged in the declaration, and, therefore, was either nugatory or a departure. *Lysaght v. Walker*, 5 Bligh, 2.

Comyn, contra. The memorandum is sufficient, if it shows by reasonable inference the consideration alleged in the declaration: precise expression is not essential to its validity: *Morris v. Stacy*, Holt, N. P. C. 153; *Boehm v. Campbell*, 8 Taunt. 678; *Newbury v. Armstrong*, 6 Bingh. 201; *Shortrede v. Cheek*, 1 Adol. & Ell. 57. The cases cited for the defendant were cases of naked promise: here the memorandum expressly refers to bills in respect of which the plaintiffs had a claim, and it must be presumed they were given on good consideration.

R. V. Richards. The memorandum does not disclose, as the declaration alleges, that the plaintiffs had given time to the parties liable on the bills; that he had incurred any inconvenience at the request of the defendant; or that the defendant had obtained any advantage at the hands of the plaintiffs.

Curr. adv. vult.

TINDAL, C. J. The question which has been argued before us on these pleadings is this,—Whether the *consideration which is stated in the declaration as the ground of the defendant's promise, appears upon the memorandum or note in writing, signed by the defendant, which is set forth in the replication. That, in order to satisfy the provisions of the statute of frauds, the consideration upon which the promise is made must appear on the written memorandum on which the action is brought, as well as the promise itself, has been settled by the authority of numerous decisions, of which the first is that of *Wain v. Warlters*, 5 East, 10: the ground of such decision being simply this,—that the term *agreement* used in the statute, includes both the consideration for the promise, and the promise itself. The consideration is thus stated in the declaration in the present case: "that the plaintiffs, at the request of the defendant, would give time for the payment of the debt of 260*l.* then due from John Thomas Armstrong and Dell, and would take, accept, and receive, by way of security for the payment of the same, the several bills of exchange set out in the declaration, and would forbear and give time to the said John Thomas Armstrong and Dell for payment of the said debt or sum of 260*l.* until the said bills should respectively become due and payable." And whether this consideration sufficiently appears in the written memorandum, is the point in dispute.

That such consideration does not appear expressly, and in terms, in such memorandum, is apparent on the bare inspection of the writing itself. It is not, however, necessary that such consideration should appear in express terms: it would undoubtedly be sufficient in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that such and no other, was the consideration upon which the undertaking was given.

[*766] Not that a mere *conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute; but there must be a well-grounded inference, to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise.

Now, looking at the memorandum in this case, and reading it as persons of ordinary understanding would read it, we cannot come to the conclusion, that giving time, and forbearance to sue, was necessarily the consideration for the promise of the defendant. It may have been so, undoubtedly, and most probably it was. But the consideration may also have been, for anything to the contrary to be collected from the written agreement, an engagement on the part of the plaintiffs to extend their credit to Armstrong and Dell; or an engagement by the plaintiffs to discount these bills for Armstrong and Dell. For there is nothing whatever in the letter itself that necessarily connects the undertaking of the defendant with the consideration of forbearance: no expression to denote that the bills are delivered in satisfaction of or as security for the debt then due from Armstrong and Dell to the plaintiffs; not even any mention

that any debt was due to them. Undoubtedly, it is extremely probable, from the amount of the debt due from Armstrong and Dell agreeing exactly with the amount of the bills inclosed in the letter, that such bills were sent as a security for the debt then due, and if so, that the forbearance for the time the bills had to run must have formed the ground for the promise of the defendant; but there is no written evidence to show that such was the case: and after proof of the existence of such debt by parol evidence (which might be admitted) the great link in the chain of the evidence would *still be wanting, and there [767] would be nothing but parol evidence to supply it, namely, that the forbearance of suing for that debt was the consideration for the particular promise.

Thinking, therefore, in this case, that the consideration for the defendant's promise is left in complete uncertainty upon the defendant's letter, we cannot bring ourselves to the conclusion that the memorandum is sufficient to take the case out of the statute of frauds; and consequently we hold that there must be Judgment for the defendant.¹

¹ In *Ellis v. Levi* (decided June 9th in the ensuing Trinity term), the Court pronounced a like judgment on the following agreement:—

“Mr. T. Ellis, 60 Whitechapel,—Mr. Richard H. Chase, of the office of Ordnance, Barbadoes, about to proceed thither in the Mary, having incurred an account with you, amounting to 49*l.* 5*s.*, with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we hereby guarantee his performance of the said engagement; and in failure thereof we will be responsible to you. Isaac Levi & Co., 36 Old Broad Street, 20th Nov., 1833.”

RAND v. VAUGHAN and Another. May 13.

A landlord cannot distrain under 11 G. 2, c. 19, s. 1, goods fraudulently and clandestinely removed from the tenant's premises *before* the rent becomes due.

THIS was an action of trespass against the defendants, in bar of which, they both pleaded a joint plea of not guilty; and the defendant Duffield then pleaded specially, as bailiff of Vaughan the landlord, a justification for a distress under the 11 G. 2, c. 19, s. 1: the plea stating that the rent for which the distress was *made, became due on the 25th of March, 1834; that the goods of [768] the plaintiff were fraudulently and clandestinely conveyed away to prevent the distress; and that the distress was taken within thirty days next ensuing such carrying away of the goods.

The plaintiff, in his replication, alleged that the goods were conveyed away on the 24th of March, 1834, before the time when the rent became due and payable; and the defendant Duffield, in his rejoinder, took issue on that allegation.

The jury found a verdict for the defendant Vaughan, on the plea of not guilty; and for the plaintiff, upon both the pleas of the defendant Duffield, with 10*l.* damages.

Platt moved to enter judgment for the defendant Duffield, *non obstante veredicto*, on the ground that, admitting the fact alleged in the replication, enough remained unconverted on the plea, to bar the plaintiff's recovery. If tenants could elude a distress by removing their goods the day before rent became due, the statutes of 8 Ann. c. 13, s. 2, and 11 G. 2, which enabled landlords to seize, for rent in arrear, goods clandestinely removed, would have been passed in vain: and though EYRE, C. J., in *Watson v. Main*, 3 Esp. 15, thought those statutes did not apply to the case of a removal before the rent became due, Lord ELLENBOROUGH, in *Furneaux v. Fotherby*, 4 Campb. 136, doubted the correctness of that opinion. A rule nisi having been granted,

Henderson showed cause. Although judgment is sometimes entered for a plaintiff *non obstante veredicto*, where a verdict has passed in favor of a defendant, there is no instance of an application like the present, where the verdict

[*769] has been found for the plaintiff upon an issue *taken by the defendant. But the statutes of 8 Ann. and 11 G. 2, apply only to the case of a removal of goods after rent is in arrear; and the decision of EYRE, C. J., has never been overruled.

Platt was heard in support of the rule.

Cur. adv. vult.

TINDAL, C. J. (after stating the pleadings and finding of the jury, as *anté*, page 767), said, This case comes before us on a motion to enter a verdict for the defendant Duffield, *non obstante veredicto*. The motion would perhaps have been more correct in point of form, if it had been a motion to arrest the judgment for the plaintiff, on the ground that enough still remains upon the defendant's special plea confessed by the plaintiff's replication, to bar the plaintiff's demand: for we are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favor, *non obstante*. But we think there is no ground whatever for the motion in the one form or the other. The short question raised by the pleadings is, whether the statute applies to cases where the tenant removes his goods fraudulently and clandestinely before the rent becomes due; and we are of opinion that such case is not provided for by the statute. By the common law, the distress for rent was necessarily made upon some part of the demised premises, otherwise the tenant might rescue the distress, or bring an action of trespass. And it was only in case the landlord coming to distrain saw the cattle on the premises, and the tenant to prevent the distress drove them off the premises, that the landlord could justify freshly following and distraining them. And the statutes 8 Ann., c. 14, s. 2, and 11 G. 2, appear to have been passed with the view of [*770] *removing such difficulty in the way of the landlord's remedy in the case of a fraudulent or clandestine removal of the tenant's goods off the premises. For it expressly empowers the landlord "to take and seize such goods, wherever the same shall be found, as a distress for the said arrear of rent; and the same to sell or otherwise dispose of in such manner as if the said goods had been actually distrained by such landlord in and upon such premises for such arrears of rent." It is the *place*, therefore, not the *time* of the distress, to which the statute intends to apply the remedy: and, indeed, it is obvious, that if the construction contended for by the defendant is adopted, as the landlord may, after five days next after the distress, sell the goods and pay himself the rent, he might do so in many cases before the rent became due, which could never have been intended. Looking to the intention of the act therefore, and the great uncertainty which would arise if a removal of the goods at any time before the rent became due would be sufficient to let in the provisions of the act; for if at any time, how long before, would be the question; we think the present distress was illegal. We therefore think the law to have been correctly laid down by EYRE, C. J., in *Watson v. Main*, 3 Esp. N. P. 15, upon which Lord ELLENBOROUGH appeared to have doubted only, but to have expressed no opinion, in 3 Campb. 136.

Rule discharged.

*M E M O R A N D A.

[*771]

On the 23d of April, the Great Seal was put in Commission. The Commissioners appointed were the Right Honorable Sir C. C. PEPYS, Master of the Rolls; the Right Honorable Sir L. SHADWELL, Vice-Chancellor; and the Right Honorable Sir J. B. BOSANQUET, one of the Judges of the Court of Common Pleas.

Robert Alexander and *Thomas Starkie*, of Lincoln's Inn, Esquires, having, in the vacation preceding this Term, been appointed His Majesty's Counsel learned in the law, were, on the first day of Term, called within the bar, and took their seats accordingly.

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1. The declaration stated, that in consideration plaintiff, at the request of defendant, had given defendant a letter written by O., since deceased, by means of which letter defendant was enabled to, and did determine controversies, and obtain a large portion of O.'s effects, defendant promised to give plaintiff 1000l.: Held, that a sufficient consideration

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3. A bill of exchange for a portion of his debt, given by a bankrupt after commission and before certificate to his assignees, who was also petitioning creditor, and had proved for the residue of his debt, Held void in the hands of the assignee. *Rose v. Main.* 357
4. Defendant, after he had become bankrupt, was discharged out of custody on a *ca. sa.* upon executing a warrant of attorney with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should prove his debt under the commission. The plaintiff having proved his debt, but no dividend having been paid, the Court refused on a summary application to exonerate the sureties. *Duncan v. Sutton and Others.* 431
5. Defendants, B.'s bankers, had discounted for B. a bill payable January 10th, drawn by B., and guaranteed by L. On the 3d of January, B., being in embar-

assed circumstances, gave L. a cheque on defendants for the amount of the bill: the defendants on receiving the cheque handed the bill over to L.—B. became bankrupt January 9th:

Held, that his assignees could not sue defendants as having received the amount of the cheque by way of fraudulent preference. *Abbott and others, assignees of Baker, a bankrupt, v. Pomfret and others.* 463

6. In trespass, defendants, after alleging that M. had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: plaintiff replied that the goods belonged to him, and not to defendants: Held, that upon this issue it was not incumbent on defendants to give formal proof of M.'s bankruptcy and their appointment as assignees. *Jones v. Brown and others.* 484
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2. Plaintiff declared that he executed a separation deed between himself and his wife, and agreed to pay certain debts due to G. and R., and certain household expenses at H. in full, confiding in an agreement by the defendant to pay him a certain sum towards the discharge of the said debts and expenses, and to enlarge the time mentioned in the deed of separation, for plaintiff's quitting the house at H., but that the defendant did not pay the sum agreed on. Plea, that plaintiff was solely liable to pay the debts due to G. and R., and the household expenses in full, the agreement to pay part of which was stated to be the consideration for the defendant's promise. Held, that the plea was ill, and the declaration sufficient. *Waite v. Jones.* 656

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1. By the law of France, an endorsement in blank does not transfer any property in a bill of exchange: Held, that the holder of a bill

drawn in France, and endorsed there in blank cannot recover against the acceptor in the courts of this country. *Trimby v. Vignier.* 151

2. A letter from the holder to the endorser of a bill, threatening legal measures unless the bill be paid, does not amount to notice of dishonor of the bill by the acceptor. *Solarie and Others v. Palmer and Another.* 194
3. A party who, being employed by plaintiff to procure a bill of exchange to be discounted, lodged it instead with defendant as a security for a debt due to defendant, was held a competent witness for plaintiff in an action of trover brought by plaintiff for the recovery of the bill.
4. To trover for a bill of exchange, defendant pleaded that the drawer being lawfully possessed of the bill, endorsed it to P., and that P., for good consideration, endorsed it to defendant: plaintiff replied, that there was no good consideration for P.'s endorsing the bill. The jury having found for the plaintiff on this replication, the Court refused to arrest judgment or award a repleader. *Fancourt v. Bull.* 681

BREWER.

See *Covenant*, 2. *Pleading*, 5.

CAPIAS.

See *Practice*, 8.

CHARTER-PARTY, CONSTRUCTION OF.

1. Defendant by charter-party of October 20th, 1832, agreed to go in ballast from Portsmouth to St. Michael's, and bring back a cargo of fruit direct to London. The charterer was to be allowed thirty-six running days for loading and unloading, to commence on the 1st December, then next; and if the vessel did not arrive at St. Michael's by the 31st of January, 1833, the charterer was to be at liberty to rescind the charter-party.

Held, that the defendant was bound to proceed at once to St. Michael's, and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. Michael's before the 31st of January, 1833. *M'Andrew v. Adam.* 29

2. Agreement to proceed to the East Indies, and there load a full and complete cargo; the fore-cabin to be filled with light goods: freight 4l. 15s. per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton; 100 tons of rice or sugar to be shipped previous to any other part of the loading, to ballast the vessel; Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of sugar, was at liberty to complete the cargo with light goods. *Irving v. Clegg and Another.* 53
3. Plaintiffs agreed with defendants to convey a cargo to Oporto, and if the river was in possession of an enemy, to unload at F., outside the harbor. The freight was to be 475l.; or, if the vessel could enter Oporto, discharge and reload there, 300l. only; twenty-five days were allowed for unloading. Plaintiffs arrived at F. June the 2d, and an enemy being

in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of defendants, and partly by bad weather, till August 25th, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered Oporto, where she discharged the remaining eighth of her cargo. In July, the defendants' agent at Oporto gave plaintiffs a bill for the larger freight. In September the vessel obtained, at Oporto, a full cargo for England. Held, that plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June. *Gibbins and Others v. Buisson and Another.* 283

COMMON.

By a local act all rights of common whatever in B. were extinguished; the wastes were divided; the owners of allotments were directed to inclose, and authorized to distrain the cattle of strangers trespassing:

No fence having been made, held, that the owner of an allotment in B., could not distrain cattle which had strayed into his allotment from a common in W., in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of W. *Wells v. Percy.* 556

COMPOSITION DEED.

A composition with a clergyman, in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under 13 Eliz. c. 20. *Alchin v. Hopkins, Clerk.* 99

CONDITION.

See *Estate*, 1. *Royal Sign-manual.*

CONSIDERATION.

See *Assumpsit*, 1. *Execution*, 1. *Pleading*, 16.

CONTRACT.

See *Executor*, 1.

CONVEYANCE.

See *Estate*, 2.

COPYHOLD.

The copyhold property of an insolvent debtor vests in his assignee by virtue of the assignment under 7 G. 4, c. 57, s. 11, without entry on the court rolls. *Doe dem. Smith v. Glenfield.* 729

COPYRIGHT.

See *Pleading*, 17.

CORPORATION.

Where the crown granted a borough in fee-farm to a corporation, and acquitted them of part of the rent, willing that they should repair the banks, mounds, sea-shores, and pier within the borough: Held, that an action lay against the corporation at the suit of an individual, whose house had been injured by

the sea in consequence of the neglect of the corporation to repair the sea-shore and mounds. *The Mayor and Burgesses of Lyme Regis v. Henley.* 222

COSTS.

See *Attorney*, 2. *Practice*, 14.

1. The tenant in a real action is not entitled to costs upon a nolle prosequi. *Williams v. Harris.* 13
2. The book of the clerk of the warrants is the proper place of enrolment for the name of an attorney of the Common Pleas. It is the duty of an attorney to cause his name to be enrolled; and if he omits to do so, he is incompetent to obtain costs, though otherwise duly qualified as an attorney. *Humphreys v. Harvey.* 62
3. If a rule is drawn up in the alternative, the party who fails on the substantial question is not entitled to the costs of the rule, although he succeeds upon the alternative. *M. Andrew v. Adam.* 270
4. Where an executrix commenced an action with temerity, and prosecuted it recklessly, laying the venue in Middlesex, notwithstanding all the parties lived in Monmouthshire, and twice violating a peremptory undertaking to try, the Court refused to exonerate her from costs. *Wilkinson, Executrix of Bevan, v. Edwards.* 301
5. When one judgment is set off against another, the lien of an attorney does not extend beyond his costs in the particular cause. *Watson v. Maskell.* 366
6. Where, upon a matter decided at chambers, a judge has entertained the question of costs, an appeal to the Court on the subject of such costs ought not to be made. *Davy v. Brown.* 460
7. Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages, expenses incurred previously to entering into the contract; nor the expense of a survey of the estate; nor the expense of a conveyance drawn in anticipation of a completion of the purchase; nor the extra costs of a chancery suit touching the purchase, in which the vendor is defeated; nor losses sustained by the purchaser, in the resale of stock prepared for the estate. But he is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose; and interest on his deposit money. *Hodges v. Earl of Litchfield.* 492
8. A policeman defendant who obtains a verdict is entitled to his costs under 10 G. 4, c. 4, notwithstanding the power given to the Judge to certify under 3 & 4 W. 4, c. 42. *Humphrey v. Woodhouse and Others.* 506
9. Costs of commission to examine witnesses abroad, not allowed to the party who obtains the commission, although successful in the action,—where the examination is more particularly for his benefit. *Bridges v. Fisher.* 510
10. Where a verdict was found against one of three defendants, and in favor of the two, the Court deducted the costs of the two out of plaintiff's costs and damages against the one, without regard to plaintiff's attorney's lien. *George v. Elston and Others.* 513
11. The circumstance that an executor has

commenced and conducted an action properly, is not sufficient to exempt him from costs, if he fails. *Southgate and Others, Executors of T. Clark, v. Crowley and Another.* 518

12. Where costs were ordered to be paid to the defendants or their attorney, a demand by their attorney in the country was held sufficient to authorize an application for an attachment to enforce payment, notwithstanding the agent of the attorney in the country was the attorney on record. *Dennett v. Pass and Another.* 638
13. Upon a declaration of two counts, the defendant paid into Court enough to cover the demand in the first, and obtained a verdict on the second; but having omitted to plead the payment, as required by the new rules, Held, that he was not entitled to costs. *Adlard v. Booth.* 693
14. Upon setting off one judgment against another, subject to the attorney's lien, that lien must be taxed as between attorney and client. *Watson v. Maskell.* 727
15. Defendant having been arrested for 65l., when there was not probable cause for arresting him for more than 44l., the Court allowed him his costs under 43 G. 3, c. 46. *Bradley v. Milnes.* 738

COVENANT.

See *Executor*.

1. Lessee for a term of years underleased for a term longer than his own, the under-lessee covenanting to pay rent to lessee: Held, that the executor of lessee might sue the under-lessee for rent accruing during the continuance of lessee's term. *Baker and Wife, Executrix of Hutchins, v. Gostling.* 19
2. Carrying on the business of a retail brewer, Held, to be no breach of a covenant not to carry on the business of a common brewer, or retailer of beer. *Simons and Battley v. Farren.* 126
3. Plaintiff and defendants were members of a Joint Stock Company; plaintiff agreed to demise land to defendants as trustees for the Company; defendants covenanted to pay him rent; and by a separate deed, plaintiff and the other members of the Company covenanted to indemnify the defendants for acts done by them as trustees: Held, that plaintiff, notwithstanding he was a member of the Company, might sue defendants on their covenant. *Bedford and Others, Assignees of Austin, a Bankrupt, v. Brutton and Others.* 399

DEVISE.

See *Rent Charge*. *Estate*, 2.

1. Testator being seised in tail of lands at C., with remainder to his son in tail, and reversion to himself in fee, and being seised in fee of other lands at D., devised "all his real estates whatsoever, over which he had any disposing power," to R. and his heirs, in trust for testator's son for life, with several remainders over in tail, subject to terms for the payment of debts, annuities, and marriage portions: Held, that by this devise testator's reversionary interest in the lands at C. passed to the devisee. *Mostyn and Others v. Champneys and Others.* 341

2. T. J. Selby, who had no relations of his own name, devised his property to his right and lawful heir-at-law (for whom he directed advertisements to be published), charged with legacies to be paid in twelve months after testator's death; and if no heir was found, to W. L., on condition he changed his name to Selby. On the side of his mother and grandmother, the testator had several relations, to whom he left large legacies: Held, that by his lawful heir he meant an heir of the blood of the Selbys; and that none such being found, the property belonged to *W. L. Davies and Wife, Demandants; Lowndes, Tenant.* 597

DISTRESS.

See *Landlord and Tenant*, 2.

DOWER.

See *Evidence*, 2.

DURANTE VIDUITATE.

See *Estate*, 1.

ECCLESIASTICAL BENEFICE.

See *Composition Deed*.

ERROR.

See *Practice*, 7.

ESTATE.

1. Rents devised to a female durante viduitate, do not pass over to the remainder-man upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband. And the party who thus holds himself out is not, by so doing, estopped to show the invalidity of the marriage. *Allen and Wife v. Wood, Administrator of Grimmett.* 8
2. Devise of land to trustees, in trust to permit testator's wife and daughters to receive the clear rents of three parts to their sole and separate use, and the testator's son the clear rent of the fourth part; the trustees to pay all outgoings, to repair and to let the premises: Held, that the legal estate, as to all the four parts, vested in the trustees.
- Upon the death of one of two trustees, the survivor was to appoint another in place of the deceased, and to convey the premises to him, to hold them jointly with the survivor. One of the trustees being dead, the survivor by a deed to which the cestui que trusts were parties, appointed P. sole trustee, in place of himself and the deceased, and conveyed the premises to P. to hold to him and his heirs, and not jointly with the surviving trustee: Held, that the whole legal estate passed by that conveyance to P. *White v. Parker.* 573

ESTOPPEL.

See *Landlord and Tenant*, 1. *Estate*, 1.

EVICITION.

See *Pleading*, 5.

EVIDENCE.

See *Bankrupt*, 6. *Pleading*, 15, 18, 19. *Bill of Exchange*, 3. *Practice*, 18.

1. Plaintiff, a leaseholder, in consideration of 100l., and a yearly sum of 75l. payable quarterly, by indenture under-demised and leased to defendant certain premises for a longer term than plaintiff had in them himself: Held, that a counterpart of this indenture, executed by defendant only, and bearing only a 30s. stamp, was not admissible in evidence to support an allegation of assignment, on which defendant had taken issue. *Baker and Wife, Executrix of Hutchins, v. Gosling.* 246
2. In dower, the tenant pleaded in May, 1833, that demandant had elected to receive an annuity in satisfaction of dower: Held, that the plea was not supported by showing the demandant's receipt of dividend in September, 1833.
- Held also, that an order made in a suit in Chancery between the demandant, tenant, and others, was admissible in evidence for the demandant in dower, to show the circumstances under which the dividends were received. *M. Slatter, widow, demandant; G. Slatter, tenant.* 259
3. A memorandum signed by the lessee on the margin of a lease, and stating that the lessee was to be tenant and pay rent for a period of six weeks antecedent to the term granted by the lease, Held admissible in evidence on the part of the lessor, to show the amount of rent due. *Cowne v. Garment.* 318
4. Plaintiff put up to sale by auction a lease of premises which he occupied as assignee of the lease, stipulating not to produce any title prior to the lease: In an action against a purchaser for not completing his purchase, in which action plaintiff declared he was possessed of the lease, held, that he was bound to prove the execution of it, by calling the attesting witness, and that it was not sufficient to prove the assignment to plaintiff. *Laythorp v. Bryant.* 421
5. Statements of a deceased occupier touching his title are admissible in evidence generally, without reference to the particular effect they may produce in the cause. *Carme, demandant; Nicol, tenant.* 430
6. A conversation at the time of a purchase is admissible in evidence for the defendant, in an action for the price of the goods, although it may let in a set-off otherwise barred by the statute of limitations. *Moore v. Strong.* 441
7. A trader, in embarrassed circumstances, absented himself from his house from the 16th of February till the 9th of March. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of March, two letters written by him on the 16th of January preceding, asking for time on two bills of exchange payable by him in February, were received in evidence to show the motive of his absence. *Smith and Another, Assignees of Whalley, a Bankrupt, v. Cramer.* 585
8. A defence, on the ground of want of consideration for an agreement, cannot be proved under the plea of *non-assumpsit*. *Passenger v. Brookes.* 587
9. On a trial touching the right to lands, de-

crees in chancery between other parties. concerning the same lands, were held admissible in evidence, to show the character in which the possessor enjoyed the lands. *Davies and Wife, Demandants; Lewndes, Tenant.* 607

10. An entry of the dishonor of a bill of exchange, made in the usual course of business, at the time of the dishonor, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill upon proof of the death of the clerk who made the entry. *Poole v. Dices.* 649

EXECUTION.

1. M. being in custody on execution, pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, defendant in consideration that plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution:

Held, that defendant's was a valid contract. *Atkinson v. Bayntun.* 444

2. A sale of the goods of an insolvent under a fi. fa., issued upon a warrant of attorney given by the insolvent, is invalid if it take place after the commencement of the insolvent's imprisonment, notwithstanding the goods may have been seized under the writ before the imprisonment. *Kelcey, Assignee of Fordred, an Insolvent, v. Minter and Another.* 721

EXECUTION DEED.

See *Baron and Feme*, 2.

EXECUTOR AND ADMINISTRATOR.

See *Covenant*, 1. *Costs*, 4, 11.

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non-repair, to say, that the premises yield no profit. *Tremeere v. Morison.* 89

FEME COVERT.

1. Under 3 & 4 W. 4, c. 74, ss. 77, 91, a feme covert, when her husband has absconded, and has not been heard of for some time, may pass a reversionary life interest in freehold property. *Ex parte Mary Gill.* 168
2. To a declaration on a bill of exchange alleged to have been drawn and endorsed by Sarah Elwood, defendant pleaded that she was the wife of Thomas Elwood, who was still alive; replication that she drew and endorsed the bill by the authority of her husband: Held, no departure. *Prince v. Brunatite.* 435

FINE.

1. The court refused to amend a fine in a case of misdescription cured by 3 & 4 W. 4, c. 74, s. 7. *Lockington, Demandant; Shipley and Wife, Conusors.* 355
2. Passing of fine after death of conusee. *Griffith's fine.* 720

FORGERY.

See *Money had and received*.

GUARANTY.

1. Plaintiffs, owners of a ship hired on charter-party by H. S., refused to let her sail until certain disputes about the freight between them and H. S. were settled, by H. S. giving security; whereupon defendant, in consideration that plaintiffs would let H. S. sail without giving security, undertook to get T. M. to sign the guaranty hereunder set forth, and deliver it to plaintiffs in a week: Held, that this was not an undertaking for the debt, default, or miscarriage of another, within the statute of frauds.

The guaranty to be signed by T. M. was as follows:—

Whereas, H. S. has hired your ship for six months from the 12th of July, 1830, and such longer time as his intended voyage may require, and has paid or secured the freight for six months, from the 20th of August, 1830, and is about to leave England, I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months:— Held, an undertaking within the statute of frauds, and insufficient for want of a consideration apparent on the face of it; and consequently that only nominal damages could be recovered against defendant for failing to procure T. M.'s signature, according to his promise. *Bushell and Others v. Bearan.* 103

2. "Inclosed I forward you the bills drawn per J. A. upon, and accepted by L. D., which I doubt not will meet due honor, but in default thereof I will see the same paid. B. J. A."

Held, that the consideration for B. J. A.'s promise did not appear sufficiently to render him liable on this undertaking. *Hawes and Others v. Armstrong.* 761

GOODS BARGAINED AND SOLD.

See *Assumpsit*, 2.

HOUSE OF LORDS.

See *Practice*, 7.

INFANT.

1. The Court has no jurisdiction to discharge from custody an infant in execution for damages, in an action of slander. *Defries v. Davis.* 692
2. Defendant and an infant who had granted an annuity, covenanted jointly and severally for the due payment of the same: Held, that the infancy of the grantor did not avoid and exonerate the defendant from his separate contract. *Gillow and Others, Executrix and Executors of Gillow v. Sir John Scott Lillie.* 695

INSOLVENT DEBTOR.

See *Copyhold. Execution*, 2.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee under 7 G. 4, c. 57, passes only such property as the insolvent has at the time of the assignment. *Sims and Another, Assignees of Barnard, an Insolvent, v. Simpson.* 306

INSURANCE.

Hides insured from Valparaiso to Bordeaux free of particular average, unless the ship were stranded, arriving at Rio de Janeiro on their way to Bordeaux, in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at Rio. The ship was stranded on her passage from Rio to Bordeaux. The assured received the news of the damage of the hides and of their sale at the same time:

Held, that the stranding was not such as to make the underwriter liable for an average loss; and that the assured could not recover as for a total loss, without abandonment. *Roux v. Salvador.* 526

INTERPLEADER.

See *Sheriff*, 1. *Practice*, 20.

JOINER OF PARTIES.

See *Pleading*, 20.

JOINT STOCK COMPANY.

See *Covenant*, 3.

JUDGES.

The Judges declined to answer a question proposed to them by the House of Lords, in terms which rendered it doubtful whether it did not extend to the construction of a bill before the House. *In the matter of the London and Westminster Bank.* 197

JUDGMENT.

See *Practice*, 1, 11, 12.

LANDLORD AND TENANT.

See *New Trial*. *Pleading*, 1, 2. *Stamp*.

1. The plaintiff came into occupation under one who had paid rent upon distress by the defendant: Held, that after proof of this fact, the plaintiff was estopped to dispute the defendant's title to the rent, notwithstanding the defendant inadvertently put in evidence a document which showed that the plaintiff's predecessor occupied under a lease, to which the defendant was in law a stranger. *Cooper v. Blandy and Another.* 45
2. A landlord cannot distrain under 11 G. 2, c. 19, s. 1, goods fraudulently and clandestinely removed from the tenant's premises before the rent becomes due. *Rand v. Vaughan and Another.* 767

LEASE.

See *Stamp*.

LIEN.

See *Costs*, 5, 10, 14.

MEMORANDA, 243, 571, 771.

MONEY HAD AND RECEIVED.

A stockholder whose stock has been sold without his knowledge, under a forged power of attorney, may sustain an action for money had and received against the party who holds the proceeds of the sale. *Marsh and Others, Plaintiffs in Error v. Keating, Defendant in Error.* 198

NEW TRIAL.

Plaintiff having recovered a verdict under 20l. as damages for his inability to let a house for six weeks in consequence of defendant having omitted to do certain repairs to which he was liable as tenant, the Court refused to disturb the verdict, notwithstanding the substantial repairs were to be done by plaintiff. *Woods v. Pope.* 467

NIL HABUIT IN TENEMENTIS.

See *Pleading*, 1.

OUTLAWRY.

Outlawry, when an abuse of process. *Pigue v. Drummond.* 354

PATENT RIGHT.

In case for invading plaintiff's patent right to certain machinery for drying calicoes, &c., where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery; a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the Court refused to set aside the verdict for the plaintiff and enter a nonsuit. *Haworth v. Hardcastle and Others.* 182

PARTNERS.

See *Covenant*, 3.

PENAL ACTION.

See *Pleading*, 21.

POLICE.

See *Costs*, 8.

POST-HORSE DUTY.

By 4 G. 4, c. 62, postmasters are to pay for horses let out for a distance not exceeding eight miles, a duty of 1s. 9d. a horse, or one-fifth of the sum charged to the hirer, and are to make a return to the stamp office of the number of horses let, the number of miles, the amount charged to the hirer, the fifth part of that amount, or 1s. 9d. for each horse. For a false return the postmaster is liable to a penalty; and the farmer of the duty may compel him to verify his return on oath. Defendant returned, as the amount of duty for two horses let out for five miles, 2s. 6d., and omitted to state the sum charged to the hirer:

Held, that notwithstanding such omission, he had sufficiently indicated his election to pay the duty of one-fifth, and that the farmer could not claim 1s. 9d. for each horse. *Hammond v. Hooley.* 131

PLEADING.

See *Practice*, 9. *Sheriff*, 2. *Evidence*, 8. *Baron, and Feme. Bill of Exchange*, 4. *Costs*, 13. *Bankrupt*, 6, 7. *Feme Covert*, 2. *Assumpsit*, 2. *Money had and received*.

1. *Nil habuit in tenementis* is no plea in an ac-

- tion of debt for use and occupation. *Curtis and Others, Executors of Curtis v. Spitty*. 15
2. In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due; and a variance in this respect is fatal. *Ireland v. Johnson, Vaughan, and Others*. 162
3. A defendant may plead to the same demand, first, the general issue; and, secondly, that the demand accrued for carrying into effect illegal wagers. *Trichnerr v. Duerr*. 266
4. To a declaration by endorsees against acceptor, defendant pleaded that the bill was accepted without consideration from the drawer: Held ill, and that under the rule of Hil. 4 W. 4, plaintiff might demur. *Low v. Chifney*. 267
5. To covenant for rent, plea that defendant, with the consent of lessor, carried on the business of a retail brewer and retailer of beer, whereupon a forfeiture was incurred, and he was evicted by B. C. having good right and title to the premises as heir of C., with whom defendant's lessor had covenanted not to carry on the business of a retailer of beer without the consent of C.: Held ill. *Simons and Another v. Farren*. 272
6. A plea of privilege, as attorney of another court, is a plea in abatement; and if it be not verified by affidavit, plaintiff may sign judgment. *Davidson v. Chilman*. 297
7. The rule of Hil. 4 W. 4, which requires the party who pleads a plea of judgment recovered to set out its date, &c., in the margin of the plea, does not apply to a plea of judgment recovered against an executor.
Barriers under the degree of the Coif are, as well as Serjeants, competent to sign pleas in the Court of Common Pleas. *Power v. Izod, Administrator of Izod*. 304
8. To action on an attorney's bill, defendant pleaded that the bill was for work at law and in equity, and was not delivered to her a month before action. Replication, that the bill was not for work at law and in equity: Held, ill. *Moore v. Boscott*. 323
9. The Court allowed the assignees of a bankrupt to plead, in covenant on a lease, 1st, that the lessee's interest did not pass to them; 2dly, that they renounced the term in time to be discharged from the performance of covenants. *Thompson v. Bradbury and Another, Assignees of Venables, a Bankrupt*. 326
10. To a declaration of two counts, one on a bill of exchange, the other on an account stated, defendant, without a rule to plead several matters pleaded, "that he did not accept the bill;" and for a further plea, that he did not account: Held, that the informality of omitting to confine each plea to the count to which it applied, did not authorize plaintiff to sign judgment. *Vere v. Goldborough*. 353
11. To a plea by the acceptor of a bill of exchange, that it was, to the knowledge of the holder, negotiated by fraud, and that no consideration was given for the endorsement to the holder, it is sufficient for the holder to reply generally, that he had no notice of the fraud, and that the bill was endorsed to him for a good consideration. 469
12. And where upon demurrer judgment was given for plaintiff on such a replication, the Court refused to allow defendant to withdraw the demurrer on payment of costs. *Bramah and Another v. Roberts and Others*. 481
13. To a plea of payment of 3l. 8s. 2d. in satisfaction and discharge of defendant's promise; replication that defendant did not pay it in satisfaction and discharge, nor did plaintiff receive it in satisfaction and discharge: Held, on demurrer, unobjectionable. *Wabb, Assignee of Walter, an Insolvent v. Wetherby*. 502
14. Pleas in trover. *Leuckert v. Cooper and Another*. 509
15. Plaintiff declared, that he was possessed of a close and pond: that defendant at the time of the grievance complained of was possessed of a close used as a private road, adjoining plaintiff's close and pond; and that defendant wrongfully made in his said close used as a private road a sewer near to the plaintiff's pond, and continued the sewer for a long time, and thereby during all that time diverted the water of the pond: Held, that the allegation that the defendant's close was used as a private road at the time of making the sewer was surplusage, which it was not incumbent on the plaintiff to establish in proof. *Dukes v. Gostling*. 588
16. Illegality of consideration must be pleaded specially as a defence, not only where the express contract on which a plaintiff sues is illegal, but also where illegal services having been performed, no contract to pay for them can be implied. *Potts v. Sparrow*. 594
17. In assumpsit for the price of a copyhold bargained and sold, a defence on the ground that the copyright was not assigned in writing, must be specially pleaded. *Barnett v. Glossop*. 633
18. The defendant pleaded, that a promissory note on which the plaintiff declared, was made by defendant in December, 1833, in pursuance of an agreement thereby to secure to J. A., money lost to him at play in July 1833:
Held, that this plea was not supported by evidence, that in July, 1833, defendant gave J. A., a bill of exchange, payable six months after date, for 87l. lost at play, which bill J. A. endorsed to V. K.; and that in December, 1833, defendant substituted for this bill of exchange a promissory note of 100l. bearing date September, 1833, and payable to the order of V. K. six months after date, being the note on which the plaintiff sued. *Boulton v. Coghlan*. 640
19. To a plea, that work in respect of which plaintiff sued, was not, according to agreement, done to the satisfaction of defendant or his surveyor; plaintiff replied, that it was done to the satisfaction of defendant and his surveyor; without this, that it was not done to the satisfaction of defendant or his surveyor:
Held, that upon this issue it was sufficient to show that the work was done to the satisfaction of the defendant. *Bradley v. Milnes*. 644
20. Tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. *Wilkinson and Stennett v. Hall and Another*. 713
21. In a penal action against an attorney the Court refused to allow plaintiff to amend after special demurrer. *Matthews v. Swift*. 735
22. The Court allowed defendant to amend his plea after judgment on demurrer, upon an affidavit that material facts had come to his

- knowledge after such judgment. *Atkinson v. Bayntun*. 740
23. In debt for rent against an assignee, the defendant traversed an averment in the declaration that all the estate in the premises had vested in him. Issue having been joined, and defendant having proved that he was assignee of part only of the premises: Held, that the verdict on such issue must be entered for the defendant. *Curtis v. Spitty*. 756

PRACTICE.

See Attorney, 1. *Bankrupt*, 1. *Infant*, 1. *Pleading*, 10. *Judges*. *Bail*, 1, 2.

1. The affidavit in support of a motion to enter up judgment on a warrant of attorney need not now state, as formerly, that the defendant was alive on a day in term. *Cockman v. Hellyer*. 3
2. The writ of *capias*, and writs which purport to be a continuance of it, must state the place where the defendant resides, and if that be unknown, the place where he is supposed to reside. *Roberts v. Wedderburne*. 4
3. The actual or supposed place of the defendant's residence must be stated in that part of the body of the writ prescribed by Schedule, No. 4, 2 W. 4, c. 39.
It is not sufficient to endorse it on the writ. *Lindridge v. Richard Roe*. 6
4. The names of two defendants having been inserted in the writ of summons, separate proceedings were taken against each: Held, irregular. *Pepper v. Whalley*. 71
5. In C. P. judgment against the casual ejector must be moved for within the first four days of Hilary and Trinity Term, and within one week of the first day of Michaelmas and Easter Term. *Doe and Lawford v. Roe*. 161
6. Where plaintiff had been misled by defendant as to the nature of a charter-party, the Court permitted plaintiff to amend by striking out a count in covenant on a charter-party, and declaring for freight not upon the charter-party:

And this, after many years had elapsed since the commencement of the action, the defendant having been the cause of the delay. *Aylwin, Administrator of Dismorr, v. Todd*. 170

7. The House of Lords will not receive from the agent of the plaintiff in error a petition to refer to the Judges the legal points in the case. *Ricketts v. Lewis*. 196
8. Omission of the words "the" and "by" in the copy of the writ of *capias* prescribed by the schedule 2 W. 4, c. 39. Held, not to invalidate an arrest. *Pocock v. Mason*. 245
9. A declaration in ejectment need not be entitled of a term, or of a particular day as of a term. It is sufficient if it be entitled of a particular day. *Doe d. Ashman v. Roe*. 253
10. Certificate of cognizance of infant feme trustee. *In the Matter of S. Luke, an Infant, wife of G. Luke*. 265
11. After a rule to plead in Easter Term, in an action on a bill of exchange, defendant paid a portion of the bill, with costs to that time, and agreed to pay the residue with the costs of the action, the 1st of October following, if it were not previously paid by another party: no payment having been made according to the agreement, Held, that plaintiff

- might sign judgment in Michaelmas Term without a fresh rule to plead. *Usborne and Another v. Pennell*. 320
12. Where a prisoner has been served with a rule to plead, the omission of an endorsement of notice to plead, on the declaration, will not render irregular a judgment signed for want of a plea. *Clementson v. Williamson*. 366
13. Quære, whether a writ of *capias* ought to disclose the county of the defendant's residence. *Bosler v. Levy*. 352
14. Sheriff's costs upon interpleader. *Dobbs v. Humphries*. 412
15. The assignment of a bail bond must be executed in the presence of two witnesses, but it is not necessary that they should both subscribe their names in the presence of the officer assigning. *Phillips v. Barlow*. 433
16. Money paid into Court, in lieu of bail, but under a protest against the sufficiency of the affidavit to hold to bail, will not be paid out of Court to defendant on the ground of insufficiency of the affidavit. *Green v. Glassbrook*. 516
17. In quære impedit the writ was returnable January 8th, 1834. Defendants appeared January 11th, 1834. Plaintiff declared January 10th, 1835. The Court set aside the declaration as too late. *Barnes v. Jackson and two Others*. 545
18. A commission to examine witnesses may be granted for the trial of an issue directed by the Court of Chancery. *Bordeaux v. Rowe*. 721
19. The Court set aside a Judge's order for better particulars of set-off, on the ground that plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained. *Finnerty v. Smith*. 649
20. No rule for interpleading will be granted after a suit has been stayed by injunction. *Arayne v. Lloyd*. 720

QUARE IMPEDIT.

See Practice, 17.

REGULA GENERALIS, 242, 411.

RENT CHARGE.

1. A rent charge is extinguished by a devise to the grantee of part of the land out of which the rent charge issues, notwithstanding the devise is expressly made over and above the rent charge.
2. Where a charge on the land is clear, and upon the construction of a will, it is doubtful whether or not the testator meant to transfer the charge from the realty to the personality, it will be held to continue a charge on the land. *Dennett v. Pass and Another*. 388

REPUTED OWNERSHIP.

See Bankrupt, 2.

ROYAL SIGN MANUAL.

Where an estate is devised on condition of the devisee's changing his name, it is sufficient if he changes it within a reasonable time, and it is not necessary that he should apply for the royal sign manual. *Davies and Wife, demandants; W. S. Lowndes, Tenant*. 619

SEA-WALLS.

See *Corporation*.

SEPARATION-DEED.

See *Baron and Feme*.

SET-OFF.

See *Costs*, 10.

Held, that a defendant might set-off a debt due to him from a bankrupt for money lent, &c., against a claim by the bankrupt's assignees on defendant for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to the defendant, *Gibson and Another, Assignees of David Rankine, a Bankrupt*, v. *Bell*. 743

SHERIFF.

See *Practices*, 14.

1. The Court refused to interfere in favor of the sheriff, under the interpleader act, where the under-sheriff's partner appeared to be concerned for some of the parties. *Dudden v. Long*. 299
2. In trespass against bailiff and sheriff for taking plaintiff on a charge of felony to a police station, and thence to a prison, the sheriff, after pleading the general issue, justified the taking from the police station to the prison under a ca. sa.

The plaintiff admitting the suit, and the delivery of the warrant to the bailiff, replied, *de injuria absque residuo cause*.

Held, that under this replication he could not involve the sheriff in misconduct of the bailiff committed before the plaintiff arrived at the police station. *Price v. Peck and Others*. 380

STAMP.

See *Evidence*, 1.

A lease contained a demise of two separate farms with two habendums differing from each other; a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other; the lessee entered on the whole at one time: Held, that one ad valorem stamp for the amount of both rents was sufficient. *Blount v. Pearman*. 408

STATUTE OF LIMITATIONS.

See *Evidence*, 6.

STAY OF PROCEEDINGS.

See *Bankrupt*, 1.

SURETY.

See *Bankrupt*, 4.

TENDER.

On a plea of tender of 11. 12s. 5d., the jury,

you 11. 12s. 5d. which defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; that plaintiff said, "I can't take it, the matter is now in the hands of my attorney:" Held, upon writ of false judgment, that such finding did not warrant a judgment for defendant. *Finch v. Brooke*. 253

TITHES.

Notwithstanding an endowment of 1374, conferring all small tithes on a vicar, the court refused to set aside a verdict finding the right to potatoes grown in fields to be in the rector, evidence having been adduced from which it might be presumed that, on good consideration, an alteration had been made in the endowment previously to the restraining statute of 13 *Eliz. Gilbert and Others v. Towns*. 173

TRESPASS.

See *Pleading*, 15.

The plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and there imprisoning him. Plea, justifying the assaulting, seizing, and laying hold of the plaintiff, and pulling and dragging him about:

Held, no sufficient answer to the entire charge in the declaration. *Bush v. Parker and Others*. 73

TROVER.

R. being employed to procure a bill of exchange to be discounted for plaintiff, instead of doing so, endorsed it, and placed it in the hands of defendant, who was clerk to a creditor of R. Defendant carried the bill to R.'s account with his creditor; and, though afterwards apprised of the circumstances under which R. held the bill, refused to restore it: Held, that defendant was liable to plaintiff in trover. *Cranch v. White*. 414

TURNPIKE ACT, CONSTRUCTION OF.

1. By a local act a toll was imposed on horses drawing carriages; for default of payment the collector was authorized to distrain any horse or carriage upon which toll was imposed by that act. No person was to pay more than once a day in respect of any carriage, or any horse; and no toll was to be taken in respect of any carriage, horse, or beast conveying materials for the road:

Held, that the toll was imposed on the horse only, and not on the combination of carriage and horse; and that the same horse passing a second time the same day, with a different carriage and different passengers, was exempt from toll. *Niblett and Others v. Pattow*. 81

2. Where a local turnpike act directs a higher or lower rate of toll to be collected in respect of the greater or lesser breadth of the wheels, and where, in addition to the tolls under such local act, the additional tolls in respect of breadth of wheels authorized to be taken

by 13 G. 3, c. 85, have been collected and imposed, although erroneously, parties are not relieved from such additional tolls by 4 G. 4, c. 95, s. 6. *Pickford and Others v. Davis.* 141

USE AND OCCUPATION.

See *Pleading*, 1.

VARIANCE.

See *Pleading*, 2, 18.

VENDOR AND PURCHASER.

See *Costs*, 7.

The particulars of sale of certain leasehold premises in Covent Garden stated, that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house-keeper, or working-hatter."

The original lease, when produced, appeared to prohibit the business of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-housekeeper, working-hatter, and many others, and the sale of coals, potatoes, or any provisions: Held, that there was such a material discrepancy between the particulars,

and the lease, as to entitle a purchaser to rescind his contract. *Flight v. Booth.* 370

VENUE.

Where, by consent of both parties, the venue was laid in L.: Held that no objection could afterwards be taken to the venue, notwithstanding it ought, under an act of parliament, to have been laid in S. *Furnival v. Stringer.* 68

WARRANT OF ATTORNEY.

See *Practice*, 1.

WAY.

Defendants having erected on their own premises a permanent obstruction to a navigable drain leading from a river through defendant's premises to plaintiff's close, Held that an action lay for the plaintiff notwithstanding the portion of the drain which passed through the plaintiff's close had for sixteen years been completely choked up with mud. *Bower v. Hill and Another.* 549

WRIT.

See *Practice*, 2, 3, 4. *Amendment.*







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